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FRED C. HAMANN ET AL., APPELLEES, V. NEBRASKA UNDERWRITERS INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 22 1908. No. 15,232.

1. **Insurance:** FORFEITURES. "Forfeitures are looked upon by the courts with ill-favor, and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance." *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338.

2. **Contracts:** CONSTRUCTION: FORFEITURES. Where a contract is susceptible of two constructions, one of which will work a forfeiture, and the other will not, that construction should be adopted which will prevent the forfeiture and preserve the rights of the parties.

3. **Insurance Policy:** CONSTRUCTION. Where it is conditioned in a policy of insurance "that the assured shall take an inventory of the stock hereby covered at least once a year during the life of this policy, and shall keep books of account, correctly detailing all purchases and sales of said stock, and shall keep said inventory and books securely locked in a fireproof safe, or in some place secure against fire in another building during the hours said store is not open for business; and in case of loss the assured agrees and covenants to produce such books and inventory, and in the event of failure to produce the same or any of them on demand, or failure to comply with any one of the above conditions, this policy shall be null and void, and no suit or action at law shall be maintained thereon for such loss"—*held*, that the provisions for taking an inventory and keeping it with the books of account of purchases and sales should be construed conjointly; that the purpose of the requirement to keep the inventory and books of account in a fireproof safe was to enable the parties to estimate the damage in case of loss, and the books of account would furnish no aid unaccompanied by the inventory, and therefore there was no default on the part of the assured in not keeping his books of account in a fireproof safe until the expiration of the time within which to take the inventory.

APPEAL from the district court for Saunders county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

*Halleck F. Rose* and *Wilmer B. Comstock*, for appellant.

*John H. Barry*, *contra*.

REESE, J.

This is an action on an insurance policy issued by the defendant to the plaintiffs upon a stock of merchandise consisting of hardware, paints and oils; said policy being dated March 30, 1906. The insured property had, lately before the issuance of the policy, been removed from the village of Yutan, in Saunders county, to the proposed village of La Shara, in the same county, some eight miles away, but which at that time was no more than a station on a newly constructed railroad. At the time of the removal of the goods, which was about the 1st of February of the same year, an inventory was taken, and the value found to be $4,670. The policy was delivered to the assured some two weeks after its date, and about two weeks thereafter the building in which the goods were kept, and which was newly constructed, together with all its contents, was totally destroyed by fire. The inventory and all books of account were also destroyed, no fire-proof safe being kept in the store building. Upon notice of the fire being given to defendant it denied all liability upon the policy, basing such denial upon the failure of the assured to comply with the conditions and requirements of what is usually termed "the fire-proof safe clause" contained in the policy. The amount insured by the policy was $500. The petition was in the usual form. The answer, in addition to its denials, contained two specific defenses, numbered second and third therein. The third defense set up the requirements of the policy as to giving formal notice and proofs of the loss, and alleged that the plaintiffs had failed and refused to furnish such proofs, as by the policy required. As we have said, all liability under the policy was denied; and, as it is conceded that such denial constituted a waiver of this defense, no further attention need be given to it. The second defense set out the "fire-proof safe clause" of the policy, and alleged that plaintiffs had failed and refused to comply with any of its provisions, and that by the terms of the policy such

failure absolved defendant from all liability for the loss. The clause referred to, with a description of the insured property, is contained in a "sticker" or "rider" pasted in the policy, and is as follows: "It is expressly warranted by the assured that the assured shall take an inventory of the stock hereby covered at least once a year during the life of this policy, and shall keep books of account, correctly detailing all purchases and sales of said stock, and shall keep said inventory and books securely locked in a fireproof safe, or in some place secure against fire in another building during the hours said store is not open for business; and in case of loss the assured agrees and covenants to produce such books and inventory, and in the event of failure to produce the same or any of them on demand, or failure to comply with any one of the above conditions, this policy shall be null and void, and no suit or action at law shall be maintained thereon for such loss."

It is claimed by defendant that this clause is a promissory warranty, and that it is binding in all its terms; while plaintiffs insist that the clause has no binding force, for the reason that they had no notice or knowledge of its existence, and that the requirement to keep the inventory and books of account in a fireproof safe must be construed together; that the requirement of the policy that "the assured shall take an inventory of the stock hereby covered at least once a year during the life of the policy" gave to plaintiffs one year in which to take the inventory, and the policy being of only one year's duration, no inventory was required, and until such inventory was taken the obligation of the clause as to both the inventory and the books of account was suspended. It is also claimed that the local agent who issued the policy knew that plaintiffs had no safe at the time of the delivery of the policy; that his knowledge was the knowledge of defendant, and therefore the clause requiring a safe to be kept was not binding on plaintiffs; and that a compliance with its provisions was waived. As there is

no averment of such waiver presented in the pleadings, it will not be further noticed. A jury trial was had in the district court, and after the evidence was closed the court instructed the jury that neither the second nor third defense pleaded in the answer would furnish any defense to the action, and that no attention need be given them. The jury returned a verdict in favor of plaintiffs for the full amount of insurance named in the policy. Proper exceptions were taken to the action of the court. A motion for a new trial was filed and overruled, and judgment was rendered upon the verdict. The defendant appeals, and assigns the ruling and instruction of the court, together with the ruling on the motion for a new trial, as error.

We think the whole defense must stand or fall upon the construction to be given the above copied clause. We are reminded at the outset that the law does not favor forfeitures, and that if a writing providing for a forfeiture is susceptible of different constructions, one of which will enforce the forfeiture, and the other will prevent it, that construction should be adopted which will preserve rights and avoid the forfeiture. The law also requires a strict construction of agreements of forfeiture as against the party seeking their enforcement. We therefore conclude that, in so far as this inquiry is concerned, the contention of defendant that the clause referred to is a warranty is not material. In *Continental Ins. Co. v. Waugh & Son*, 60 Neb. 348, it was held that, where it was provided that the assured should take an itemized inventory of stock on hand within 30 days of the issuance of the policy, and that he should keep a set of books of account from date of inventory, the assured was not required to keep books of account until the inventory was taken; that the assured had the 30 days in which to take the inventory, and the loss having occurred within that time there was no requirement that books should be kept during that time, and therefore none that a safe should be kept. In *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, in which there was a provision in the policy quite similar to the one now

under consideration, it was held that the provisions should be construed conjointly, and that to work a forfeiture of the policy there must be a failure to perform all the conditions named, and not any particular one of them. In *Jensen v. Palatine Ins. Co.,* 81 Neb. 523, under a similar clause it was held that the assured had one year in which to take the inventory, and he could not be said to be in default before the end of that period, and the fact that that time would reach the termination of the policy would make no difference. The policy would not be forfeited by a failure to take the inventory before the expiration of the year. In *Hanover Fire Ins. Co. v. Dole,* 20 Ind. App. 333, where there was a similar provision in the policy of insurance, it is said: "The true meaning of the clause in question is that when, by the terms of the application and policy, an inventory was made of the stock, books of accounts of purchases and sales should be kept, so that, by a reference to the inventory and such purchases and sales at any time, the amount of stock on hand could be ascertained. This was the only purpose of this provision in the policy. The requirement that an inventory should be taken, and an account of purchases and sales should be kept, are not provisions independent of each other, but are to be construed together. The policy was for a single year, and appellee had until the expiration of that year to make the inventory. He was not required to make an inventory immediately upon receipt of the policy, and was required to keep books of accounts of purchases and sales only from the time of making the inventory"—citing *Forehand v. Niagara Ins. Co.,* 58 Ill. App. 161, and *Citizens Ins. Co. v. Sprague,* 8 Ind. App. 275. See, also, *Parker v. Insurance Co.,* 143 N. Car. 339.

But it is contended by defendant that the holdings in the cases above cited cannot be applied to this case, for the reason that it is stipulated in the clause that a failure to comply with "any one of the above conditions" shall render the policy void and work a forfeiture. It is

claimed, and we think with reason, that the language of the clause should be held to embrace the taking of the inventory and its preservation with the books of accounts of purchases and sales as one provision. The purpose of the inventory and books of account is to furnish proof of the value of the stock in the case of loss. The books of account of purchases and sales could give little, if any, information as to such value, unless the value of the stock as shown by the inventory be used as a basis. Plaintiff was not in default of taking an inventory at the time of the loss; and, since books of account could be used for the purpose named only in connection with the inventory and based thereon, the lack of them was not material, and could not, in the absence of an inventory, be of any aid after loss in fixing the value of the stock. The clause must be construed as a whole, and, since no obligation to perform existed before the loss, no forfeiture occurred.

We therefore conclude that the ruling and instruction of the district court were correct, and that the judgment was right.

The judgment of the district court is

AFFIRMED.

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CHAS. E. AULT, APPELLEE, V. NEBRASKA TELEPHONE COMPANY, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,287.

1. **Master and Servant:** INJURY: FELLOW SERVANTS. Two gangs of workmen were engaged in the construction of a telephone line, each under a different foreman; the first gang digging the holes and setting the poles therein, the second gang stringing the wires on the poles. *Held*, That the parties employed in such separate employment were not fellow servants.

2. ———: ———: NOTICE: LIABILITY OF MASTER. A telephone company gave each of its linemen a printed notice setting forth their duties, and stating, among other things, that "all linemen and other employees of the company whose duties require them

to work upon or about poles are especially charged with the duty of inspecting the implements with which they work, all poles, cross-arms and wires, and must know that they are safe to work with or upon, before climbing or going upon such poles and cross-arms." *Held*, That, notwithstanding this notice, the company in the construction of new lines in which it employed two gangs of workmen, one known as "groundmen," who set the poles, and one known as "linemen," who strung the wires, could not escape liability for setting a defective pole, from the breaking of which a lineman was precipitated to the ground and injured.

3. **Trial:** INSTRUCTIONS. A judgment will not be reversed because of an instruction which, taken by itself, is ambiguous, and which in one view seems to impose on the master a greater burden than the law imposes in respect to the character of the tools and appliances furnished his servant, if such instruction is qualified by others, so as to make it apparent that the jury were not misled, and the charge as a whole correctly defines the law.

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

*Greene, Breckenridge & Matters,* for appellant.

*Gilkeson & Slama* and *J. M. Galloway, contra.*

DUFFIE, C.

The defendant company was constructing a line of telephone near the town of Yutan, Saunders county, Nebraska, in the months of December, 1905, and January, 1906. Two sets of men, known as groundmen and linemen, were engaged in the construction. The groundmen set the poles, and the linemen strung the wires. Each gang was in charge of a foreman who directed the work. The plaintiff was a lineman, and was severely injured by the breaking of a defective pole, upon which he, together with his foreman, was engaged in tightening the wires at the end of the line. They were both near the top of the pole, and fell a distance of some 14 feet. The defective pole was set by the groundmen something like a week prior to the accident. The plaintiff recovered judgment, and the defendant has appealed.

A short time after entering defendant's employment, the plaintiff signed and acknowledged receipt of a printed direction and notice to employees of the defendant company, a copy of which reads as follows: "To all linemen, trouble inspectors, and all other employees whose duties require them to work upon or about poles: The duties of a lineman are, among other things, to test and inspect poles; reset old poles; set new poles; rebuild old pole lines; climb poles; paint poles; gain poles; cross-arm poles; take down old wires; string new wires; pull slack; knock out crosses; trim trees; straighten up cross-arms on poles that have been pulled out of shape; replace defective cross-arms with new ones; string and hang cables; put up guy wires; set and reset guy stubs; and in fact do everything necessary to keep pole lines, cross-arms, wires, exchange cables and subscribers' wires in perfectly safe condition and working order. All linemen and other employees of the company whose duties require them to work upon or about poles are especially charged with the duty of inspecting the implements with which they work, all poles, cross-arms, and wires, and must know that they are safe to work with or upon, before climbing or going upon such poles and cross-arms. The company does not employ other persons to make such inspection, but relies upon its linemen and such other employees to make such inspection themselves at the time, and to know that the poles, cross-arms and wires are safe for them to work upon. They must be constantly on the lookout for trouble, and at once, upon discovery, report to the manager or foreman (in writing) any trouble or defect on lines or poles that they cannot at once repair. As the occupation is a more or less hazardous one, those engaged in that line of work must at all times be on their guard and careful for their own safety, as well as the safety of those engaged in working with them, and of the general public. In exchanges where only one lineman is employed, the lineman is the foreman, and must report to the exchange manager in writing any weak or defective wires or poles which he does

not immediately repair. Each manager is required to keep a copy of this rule and notice posted in a conspicuous place in his office. Omaha, Nebraska, September 1st, A. D. 1903. C. E. Yost, President. I acknowledge that I have received and read a copy of the foregoing this 6th day of December, A. D. 1905. C. E. Ault." Defendant introduced the above copied paper in evidence, and insists that one of the duties of the plaintiff was to inspect all poles on which he was required to work, and that this, if it did not relieve the company of all liability for damages suffered by the plaintiff from the breaking of a defective pole, should be considered in determining whether he was negligent in failing to discover its defective condition. The defendant's contention may be best understood by a quotation from its brief: "In this case the contract between the parties with respect to the duties of the service in which the plaintiff was engaged for the defendant was wholly disregarded. It was treated even as unworthy of consideration as evidence. The injury to plaintiff was received while he was engaged in the work that he was hired to do, and resulted from a risk which he had assumed as a matter of express contract, for when he made the written application, and received a notice of the company's rules on the 6th day of December, it was optional with him to remain or not upon the terms which were thus imposed upon him, and by continuing in the service thereafter the rules of the company, which he acknowledged he received and with which he was familiar, became the very essence of his contract of employment. If this is not so, then it is wholly impossible for an employer to fix the terms upon which he will employ his servants." Whether the master may impose upon his servant duties and obligations not in line of his employment, and relieve himself from liability for negligence in furnishing reasonably safe appliances for use by the servant, is not a question of grave doubt. That he cannot by a direct contract to that effect escape liability for negligence is well settled; such contracts being against public policy. The state has an interest in the

lives and healthy vigor of its citizens, which it will not allow the master to endanger by contracting against liability for his negligently endangering them.

In *Consolidated Coal Co. v. Lundak,* 196 Ill. 594, the company posted notices to the effect that persons accepting employment did so with full notice that the danger from falling roofs was one of the usual risks; that the manager does not assume that the place where the employee is ordered is not dangerous, but every place is dangerous, and the duty of ascertaining and avoiding the danger is on the employee; that no employee is authorized to run any risks or in relying on the timbermen; that the company by employing timbermen does not agree to secure the roof. It was held that such notices were not rules which should govern all persons working in the mine, but were attempts to make laws under the guise of rules, and, in so far as operating as a contract against the operator's negligence, was void, as against public policy. So in *O'Neil v. Lake Superior Iron Co.,* 63 Mich. 690, it was held that posted notices reciting that the business is hazardous and that "all employees *assume* their own risks of accidents or illness, from *whatever* cause" would not exempt the employer from liability to his employees. In *Missouri, K. & T. R. Co. v. Wood,* 35 S. W. (Tex. Civ. App.) 879, a contract between a railroad company and a brakeman requiring the latter "not to attempt to couple or uncouple a car unless he knows the coupling is in a proper condition," is an attempt to impose upon the servant a duty which the law imposes on the master; that he is to see that the implements furnished are in a reasonably safe state of repair, and such contract was held no defense to an action to recover for injury caused by a defective coupling.

In the case we are considering, the evidence is clear that the defective pole which caused the accident was set a week or two prior to the plaintiff's injury. It is also established that the foreman in charge of the linemen had ascended the pole and was engaged in tightening the

wires, and that he called upon the plaintiff to come up and assist him. Under these circumstances, the plaintiff had a right to assume that the master, or those engaged by him in setting the poles, had used reasonable care and diligence in the selection of such poles as would not endanger those who were afterwards required to work on or about them in the construction of the line. It is probable that after a line is once constructed that the linemen employed by the company have the best opportunity of inspecting and discovering any defects caused by decay, storms or accidents, and it may not be unreasonable to impose upon them the duty of inspection to discover such defects or want of repair as time and weather conditions may work on the line; but we know of no rule of law which will allow the master by contract or otherwise to relieve himself from liability for negligently allowing a dangerous condition to be created by one set of employees engaged in one employment, and this dangerous condition imposed upon another set of employees engaged in a different employment. The court did not err in refusing the first instruction asked by the defendant to the effect that the defendant would not be liable, if the evidence disclosed that the nature of the work *or the contract of employment* made it the duty of the plaintiff to make inspection and discover defects, if a reasonable inspection would have discovered that the pole in question was unfit for use.

The fifth instruction of the court, relating to the duty of the master in furnishing his servant with tools and appliances and a place to perform his work, is in the following language: "It is the duty of the master to provide his servant with a reasonably safe working place, and with reasonably safe tools and appliances with which to work, and if he fails in this regard and the servant is injured in consequence of the negligence of his master to so provide for his servant, and the servant, without fault on his part, sustains injuries in consequence of such failure, then the master is liable for such injury." We cannot approve the

language of this instruction; at best, it is ambiguous and, if standing alone, liable to mislead. If the jurors understood the court by the use of the word "negligence" found between the words "the" and "of" in said instruction to mean the neglect or failure of the master to furnish safe tools and appliances, then they were given a wrong impression of the liability imposed upon the master by the law; but, if they understood that the court by the use of the word "negligence" meant a negligent failure on the master's part to cause proper inspection of the tools and appliances furnished and to use reasonable care in that respect, then the instruction contains a correct exposition of the law and they were not misled. In view of what the court told the jury in other instructions, it is wholly improbable that the jury were misled or could understand that liability would be cast upon the defendant, unless it was established that it failed to use ordinary care in providing a reasonably safe working place and reasonably safe appliances for its employees. In stating the case to the jury, the court told them that the charge against the defendant was that it "negligently and carelessly caused to be set in the ground a pole which was defective and unfit for use." And in its third instruction the jury were told: "In order to recover in this action, the plaintiff must prove by a preponderance of the evidence the following material facts: First, that the defendant negligently set a telephone pole which it knew or ought to have known to be defective and unfit for use; * * * third, that such injuries were sustained by the plaintiff in consequence of the defendant's negligence in setting said defective telephone pole and commanding the plaintiff to work thereon." The fourth instruction defines negligence in the following language: "The jury are instructed that negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done or in doing what a reasonable and prudent man would not have done." A part of the eighth instruction is in the following lan-

guage: "In going about and performing his work the plaintiff had the right to assume that the defendant had exercised reasonable care to furnish him a reasonably safe working place, and he was not required to suspect that the defendant had been guilty of negligence, or to make such investigation or inspection as would be prompted only by the suspicion that the defendant had omitted to perform its duty." In the eleventh instruction it is said: "If the jury believe from the evidence that the defendant company negligently set a defective pole, which it knew or, by the exercise of reasonable care, ought to have known to be defective and unfit for use, * * * and the plaintiff sustained injuries in consequence of the negligence of the defendant company, as by plaintiff alleged, and without negligence or fault of plaintiff, then plaintiff should recover." The instructions taken all together plainly inform the jury that the charge against the defendant was that it negligently set a defective pole, and that this charge could not be sustained unless the evidence established a failure on the part of the defendant to use ordinary care in selecting such poles as were reasonably safe for use.

A careful consideration of the whole record, not only by the commission, but by the court, convinces us that no reversible error was committed by the trial court, and that its judgment ought to be affirmed. We so recommend.

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

AFFIRMED.

GEORGE E. BONE, APPELLEE, V. CHARLES B. JAMES, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,317.

**Easements:** LICENSE: PRESCRIPTION. The defendant and a former owner of a farm used a private road over and across land owned by the plaintiff, in order to reach said farm. Such use commenced in 1884, and continued without interruption up to about the time this action was commenced, in December, 1906. Defendant claimed a right of way over the plaintiff's land acquired by prescription, and refused to shut the gates maintained at the north and south boundaries of the plaintiff's land where the roadway entered the plaintiff's premises; whereupon the plaintiff replaced the gates with a permanent fence, which the defendant tore down and destroyed. The action is injunction to prevent the trespass. The evidence discloses that the use of this roadway was commenced by permission or license of the plaintiff, and so continued up to a short time prior to the commencement of this action, when the defendant first asserted a right to the roadway by prescription. *Held*, That use of the roadway under a naked license from the plaintiff could not ripen into a prescriptive right, however long continued.

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

*I. L. Albert* and *John C. Watson*, for appellant.

*D. W. Livingston, contra.*

DUFFIE, C.

The plaintiff and appellee is the owner of the west half of the northeast quarter of section 4, and the east half of the northeast quarter of section 5, in township 8, of range 14, Otoe county, Nebraska. The defendant and appellant is the owner of adjoining land on the north. Plaintiff's land had been inclosed with a fence for 20 years or more prior to the commencement of this action. Defendant purchased his land from one Meredith some three or four years ago. Prior to the purchase Meredith occupied the

land, and, as we understand the record, obtained access thereto by traveling north on the section line, or practically on that line, from the south boundary of plaintiff's land to its northern boundary. At a later date the plaintiff planted an orchard on the east side of the east half of the northeast quarter of section 5, the south line of the orchard being located some distance south of the half way point between the north and south boundaries of his land, and Meredith then traveled from the south boundary of plaintiff's land along the section line until the orchard was reached, when the road or lane was deflected to the west along the south line of the orchard, and then almost due north to the north line of plaintiff's land. When Meredith first commenced to use this way to his land, bars were maintained at the north and south entrance, and these bars were afterwards replaced by gates which were kept closed whenever plaintiff's cattle were allowed to run in his fields. It is not claimed that the road in question is a public highway, but it is insisted that defendant has acquired an easement therein by prescription. Some time in the fall or winter of 1906 the defendant refused to close the gates at the north and south end of this traveled way, and, upon such refusal, the plaintiff erected a fence across the gateway at the north line of his land, which on one or more occasions was taken down by the defendant, who insisted that he had a right of way over the plaintiff's land which should be open to him at all times, and thereupon the plaintiff brought this action to enjoin the defendant from trespassing upon his premises. The district court upon the final hearing of the case entered a decree making the injunction perpetual, from which decree the defendant has appealed.

The law is well settled that the burden is upon the party claiming an easement on the land of another "to prove the facts essential to the acquisition of a prescriptive title; but proof of an uninterrupted use for the necessary period without evidence to explain how it began raises a presumption that it was adverse and under a

claim of right, and the burden is upon the owner of the land, if he relies on such a defense, to show that it was by virtue of some license, indulgence, or agreement inconsistent with the right claimed." 14 Cyc. 1196, and authorities there cited. Meredith testified that he moved onto the land now owned by the defendant in 1884, and that the road or way has been in use since that date. If this way was used by the plaintiff and his grantor under a claim of right, it is clear that such use has continued for a time sufficient to establish an easement by prescription; but, if the use of this way was commenced and continued by license or permission had from the plaintiff, then no right by prescription could be acquired, however long such use was continued. It is important, therefore, to determine whether the use of this way over the plaintiff's land was under a claim of right and adverse to Bone's ownership of the land, or whether it was by license or permission obtained from him.

The only evidence upon that question was given by the plaintiff and by Meredith. Being asked to explain how Meredith came to go across the land, the plaintiff said: "Mr. Meredith had some land right north of me and he had some timber on it, and he had to go out and around Mrs. Hibbard's, and he asked me if I would mind his going through the place to get his timber, and I said 'No,' and I let him go through. I let him go either way he was a mind to. The fact of the business is that they was coming by the front of my house too much in the winter time. When it was a very bad snow, I would let him come up in front of the house, and then I got in my fence a little way in order to let him have more room. He said if I would take down a short piece of my fence and let him go through, it would be better, and I did it. They couldn't get around Mr. Rouse's place there. If it was blocked up down there, I let them go up in front of the house." Mr. Meredith testified that he first commenced using the road in 1884, and that, it being so long ago, he does not remember any conversation which he had with the plaintiff

about it. He further testified that, when a change was made in the road, he broached the matter of a change, and the plaintiff made no objection to it. On cross-examination he was asked the following question: "And you used it by permission of Mr. Bone? Answer. Yes, of course, it went through his land." He further testified that he did some work upon the road, and, being asked if the work which he did was not for the use of it, he replied: "Just for the benefit of it." Relating to the gates at the north and south end of the road, Meredith testified that he first used bars, and that the gates were put in as they were handier, that no one requested him to keep the gates closed, but that he always closed them when plaintiff had stock in his fields, as he knew they should be kept closed to confine the stock.

It is quite apparent from the whole testimony that the use of this road or way was commenced and continued by Meredith under license or permission from the plaintiff, and that no claim of right was ever asserted until made by the defendant a short time prior to commencement of this action. As stated in *Atchison, T. & S. F. R. Co. v. Conlon,* 62 Kan. 416, 53 L. R. A. 781: "Mere use under a naked license, however long continued, cannot ripen into a prescriptive right." In that case the railroad company constructed a crossing over its tracks and ties, and put gates in its fences for the benefit of the party owning land on both sides of the right of way, and this crossing was used by such owner for more than 15 years, during all of which time the railroad company maintained said crossing and gates. Under these circumstances, the supreme court of Kansas held that the landowner was a mere licensee, and could not, by the use of the crossing for the time stated, obtain a prescriptive right to the same.

The record as a whole makes it clear that the decree of the district court was right, 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.

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RUDOLPH CHRISTEN, APPELLEE, V. WILLIAM SCHREINER, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,318.

**Appeal:** VERDICT: EVIDENCE. When the verdict returned by the jury is the only one justified by the evidence, alleged error in the instructions of the court will not be considered.

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

*John C. Watson* and *A. P. Moran,* for appellant.

*Roddy & Bischof, contra.*

DUFFIE, C.

Christen, as the next friend of Richard Kussel, a minor, brought this action against the defendant to recover a balance due for work and labor performed. The defense alleged in the answer was payment of all sums due the plaintiff except $2.50, for which, together with the costs, defendant offered to confess judgment. The jury found for the plaintiff in the sum of $81.95, and, judgment being entered on the verdict, defendant has appealed.

It is claimed that the verdict of the jury is not sustained by the evidence, and is contrary to the evidence. It appears from the evidence of two witnesses that the account sued on was left in the hands of a firm of attorneys for collection, and, in response to a notice sent by the attorneys, the defendant called at their office, admitted the

correctness of the account after a small credit which he claimed had been allowed thereon, paid the attorneys $20 on the account, and promised to pay the remainder within a short time. This was ample evidence to support the finding of the jury.

Again, the defendant himself testified that Kussel worked for him seven months at the agreed price of $18 a month. The only payments to which he testifies amount to $74.75, leaving, according to his own statement, a sum exceeding $50 still due the plaintiff. The defendant, his wife, and another party testified to a settlement made with Kussel about the time his services ended, and that it was agreed between them that there was then due Kussel the sum of $22.50. At the time of the settlement Kussel was a minor, and the court instructed that Kussel was not bound by a settlement, in case the jury found that a larger sum than $22.50 was due him at the time of the alleged settlement. To this instruction the defendant excepted, and now assigns error thereon. It is a general rule that minors are not bound by their general contracts, and especially by their executory contracts. This settlement, had it taken place between parties of full age, would be set aside upon a showing of fraud or mistake; it being only *prima facie* evidence of the correctness of the account between the parties. The defendant did not plead this settlement in his answer, the only defense alleged therein being payment of the amount due, except $2.50, for which an offer to confess judgment was made. That the settlement, if made, was not binding upon the plaintiff is established by defendant's own evidence, as it clearly appears therefrom that more than $50 was due Kussel for his work at the time. Under these circumstances, it is not necessary to discuss this instruction. The verdict returned by the jury is fully sustained by the evidence, and 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.

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## IN RE JOSEPH ADAMEK.

## A. M. MUTTER ET AL., APPELLANTS, V. A. M. DANIELS, MAYOR, ET AL., APPELLEEES.

FILED OCTOBER 22, 1908. No. 15,276.

1. **Intoxicating Liquors:** LICENSE: APPEAL. Under the act of 1905 (laws 1905, ch. 174; code, secs. 675-675*d*), providing for appeals to the supreme court, the final order of a district court rendered upon appeal from an order of the city council granting a license to sell intoxicating liquors is reviewable in the supreme court on appeal.
2. ———: SALOONS: REGULATION: LIABILITY OF EMPLOYEE. A bartender or employee of a licensed saloon-keeper does not violate section 7179, Ann. St. 1907, making it a criminal offense for a vendor of intoxicating liquors to keep the windows and doors of his saloon obstructed by screens, blinds, etc., where such bartender or employee has had nothing whatever to do with the placing or maintaining of such screens, blinds, etc.
3. ———: SALES TO DRUNKARDS. It is a violation of the liquor laws of this state for a bartender or employee of a licensed liquor dealer to sell intoxicating liquor to an habitual drunkard.
4. ———: REFUSAL OF LICENSE. It is the duty of a licensing board to refuse a license if the evidence establishes that the applicant, during the past year, while employed as a bartender, sold intoxicating liquors to an habitual drunkard.

APPEAL from the district court for Valley county: JAMES N. PAUL, JUDGE. *Reversed.*

*A. G. Wolfenbarger* and *R. L. Staple,* for appellants.

*Clements Bros.* and *A. Norman, contra.*

EPPERSON, C.

Joseph Adamek applied to the mayor and council of the city of Ord for a license to vend intoxicating liquors

in said city for the municipal year 1907. A. M. Mutter and others remonstrated against the issuance of a license, and, among other things, charged in the remonstrance that the applicant for himself, and as bartender and servant of W. F. Adamek, within the space of one year, had been guilty of allowing and permitting the windows and doors of the saloon in which he was employed and doing business to be obstructed with blinds, screens and other devices, so as to obstruct and prevent a view from the street into the saloon; that said applicant for himself, and as bartender for the said W. F. Adamek, had been guilty of selling intoxicating liquors on the 2d day of April, 1907, that being the day of the general municipal election held within the city of Ord; and that said applicant had, within the space of one year, been guilty of selling intoxicating liquors to habitual drunkards. A hearing was had before the city council, resulting in the overruling of the remonstrance and granting of the license as prayed. The remonstrators appealed to the district court, where the action of the city council was sustained, and the remonstrators have appealed to this court.

We are confronted, on the threshold of this case, with the question as to whether or not this court by appeal can review the judgment of the district court. The appellees contend that cases of this character are not appealable, and may only be brought here by petition in error. In *Halverstadt v. Berger,* 72 Neb. 462, it was held that a final order by a district court, rendered upon appeal from an order of a village board granting or refusing a license to sell intoxicating liquors, is not reviewable on appeal in this court. Appellants, however, contend that this ruling is no longer applicable, in view of the statutory change in procedure in which cases are reviewed in this court. The effect of the former decision was that the case could only be reviewed under section 582 of the code, as it then existed. In 1905 the legislature passed an act to provide for appeals to the supreme court in all cases, except criminal

cases, and repealed certain sections of the code as then existing. Section 1 of that act provides in part as follows: "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 conviction for felonies and misdemeanors under the criminal code of this state, shall be by filing in the supreme court a transcript * * * within six months from the rendition of such judgment or decree or the making of such final order." Code, sec. 675. The following section provides that the party seeking the reversal, vacation or modification of the judgment, decree or final order shall be designated as appellant, and the adverse party the appellee. It seems clear that these provisions of the statute are applicable to cases of this character, and that such cases are now reviewable in this court on appeal.

It is unnecessary to determine whether or not a city election is a general election within the meaning of section 7164, Ann. St. 1907, as the judgment must be reversed for other reasons. And, again, the evidence of the sale made on election day is not clear and convincing, and not such as would call for a reversal of the judgment. The saloon was open on election day, but this is not forbidden. No witness testified that applicant sold intoxicating drinks that day. One witness, who observed him from without the saloon, testified relative to a drink sold by applicant, in substance, that from all appearances, and from what he knew about beer, it was beer. It was not shown that the witness was sufficiently familiar with intoxicants to make him a good witness on this point, and his testimony in this regard must be taken as mere expressions of opinion.

The record discloses that during the previous year the applicant was employed as a bartender in the saloon of a liquor licensee, his brother, W. F. Adamek, in the city of Ord, and that he, in his employer's place of business, sold intoxicating liquors to an habitual drunkard, and that in

the saloon where applicant was employed screens had been kept and maintained in such a manner as to obstruct the view into the saloon. Remonstrators contend that the city council, under the evidence adduced, had no discretion in the matter, and was by law required to refuse the license. Section 7152, Ann. St. 1907, requires the licensing board to refuse to grant a license if it shall be satisfactorily proved that the applicant has been guilty of the violation of any of the provisions of the act within the space of one year. But the applicant contends that the provisions of the liquor license act do not require an employee to see that the doors and windows of the saloon are kept free from screens or other obstructions, and that the sale of intoxicating liquor to an habitual drunkard by the employee of a licensee does not violate any of the provisions of the act. Section 7179, Ann. St. 1907, makes it a criminal offense for a vendor of intoxicating liquors to keep the windows and doors of his place of business obstructed by screens, blinds or other articles. It does not appear from the evidence that applicant while a bartender placed or caused to be placed any screens or obstructions, or that he had anything to do with placing or maintaining them. We do not think it can be said that any employee of a saloon-keeper, who works in or around a saloon, can be said to be guilty of a violation of this section of the statute by reason of the fact that screens are maintained there in violation of the law. If a bartender or employee of a licensed saloon-keeper may be guilty of a violation of this section at all, it would be necessary that such a bartender or employee should actively participate in placing or maintaining, or causing to be placed or maintained, the screens or other obstructions. We are of the opinion that under the evidence the council was not divested of discretion to grant a license because of the fact that screens were maintained in violation of law in the saloon where applicant worked as bartender.

Section 7159 reads as follows: "Every person so licensed who shall sell any intoxicating liquor to any In-

dian, insane person, or idiot, or habitual drunkard shall forfeit and pay for each offense the sum of fifty dollars." This section provides a penalty for the violation thereof by the licensee. It provides no penalty for a sale to one in the prohibited classes by an employee of a licensee, but it does not necessarily follow that an employee can sell intoxicating liquors to an habitual drunkard or to any one in the prohibited classes without violating the act. Section 7161 makes it a misdemeanor for any person to sell intoxicating liquor without first having obtained a license as provided. Thus we see that by the act it is made unlawful for any person whomsoever to sell intoxicating liquors to an habitual drunkard. It would indeed be unfortunate if our statutes permit the employee of a licensee to sell intoxicating liquors to Indians, insane persons, idiots and habitual drunkards. The mere fact that the act nowhere provides a penalty specially applicable to employees does not make the act of selling to such persons a legal one. It is contrary, not only to the spirit, but the letter, of the law. An employee cannot hide behind the license of his employer by doing an act which his employer was not authorized to do. There are numerous decisions to the effect that in criminal prosecutions, under statutes similar to section 7159, *supra,* it must be shown that the accused was a licensed liquor dealer. Those decisions, so far as we have been able to observe, are right, but they are not applicable to the case at bar. In order that a licensing board is required to refuse an application for license, it is unnecessary that they should find that the applicant has violated a penal statute which may be found within the provisions of the act, but it is sufficient if the evidence discloses that the applicant has violated any of the provisions of the act, although a penalty may not be imposed. The pertinent inquiry is not whether the applicant could have been punished criminally for the act relied upon by the remonstrators, but rather is: Was the act a violation of the liquor law? A violation of a law is the doing of some act which the law forbids. A bartender

cannot legally make a sale which his employer was forbidden to make.

We therefore recommend that the judgment of the district court be reversed. Time has canceled the license illegally issued.

DUFFIE and GOOD, CC., concur.

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

REVERSED.

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JOSEPH THROENER ET AL., APPELLANTS, V. BOARD OF SUPERVISORS OF CUMING COUNTY ET AL., APPELLEES.

FILED OCTOBER 22, 1908. No. 15,321.

1. Highways: ESTABLISHMENT: INJUNCTION. A court of equity will not restrain the county board from considering or approving a petition for the establishment of a public road on the alleged grounds that public necessity does not require the road, or that the public would be best served by the establishment of roads upon section lines in the vicinity of the proposed road.
2. ———: ———: ———. A landowner is furnished an adequate remedy at law to recover damages for the taking of his property for a public use.
3. ———: POWERS OF COUNTY BOARD. A decision of a county board rejecting a petition for the establishment of a public road will not bar interested parties from later filing another petition therefor.
4. ———: REESTABLISHMENT. The public cannot be deprived of its right to have a proposed public highway established because the officers have been negligent in not preserving one previously established along the same route.
5. ———: ———. The fact that there are no funds available to pay damages and no tax levied therefor will not justify a court of equity in restraining a county board from considering and approving a petition for the establishing of a public road.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Affirmed.*

*T. M. Franse* and *J. C. Elliott,* for appellants.

*M. McLaughlin* and *P. M. Moodie, contra.*

EPPERSON, C.

Plaintiffs, who are the joint owners of a stock farm of 240 acres in Cuming county, filed their petition in the district court for an injunction against the board of supervisors to restrain said board from establishing a public road through their land, and from passing upon a petition for the establishment thereof. Other parties were made defendants but, as it is not alleged that they are threatening plaintiff with any wrong, no further mention of them will be made. The facts pleaded upon which plaintiffs assert their right to an injunction may be substantially stated as follows: Numerous petitions for the establishment of said proposed road have been heretofore filed, and during the last fifteen years at least five petitions therefor have been rejected by the board on the ground that public necessity did not require the road. That the order of the county board refusing to establish said road is *res judicata.* That the filing of numerous petitions for the establishment of such road has made the plaintiffs' opposition hereto burdensome and vexatious. That the county board has four times exercised the right of eminent domain in taking the lands of the plaintiffs for public roads, and have established three public roads parallel with the one now proposed, and have thereby exhausted their right under the law to take any portion of said lands. That the roads heretofore established were permitted to wash away and become useless through the negligence of the county board and the road overseers in not protecting them. That said proposed road is not necessary to the public convenience, for the reason that the opening of certain section lines described in the petition would be ample and sufficient. That the proposed road would cut the most valuable of plaintiffs' land diagonally in two, and destroy running water, rendering the land almost value-

less, and damaging the same to the extent of at least $3,000. There are no road funds in the county or township treasuries, nor is there any levy of taxes or other provisions made by the said township board or the board of supervisors for the payment of damages. Plaintiffs failed to allege the absence of any jurisdictional facts necessary to invest the county board with jurisdiction to consider the application for the road. Demurrers to the petition were sustained, and judgment of dismissal entered, from which the plaintiffs appeal.

July 1, 1905, the application for the public road was filed, and, as it is alleged in the petition, the board appointed a committee of three to view said proposed road according to the provisions of chapter 123, laws 1905. Said committee made a majority and a minority report upon which no action was taken by the board, but, upon the filing of the same, the notice required by law was published. The fact that no action was taken upon the reports of the committee we consider immaterial. We find nothing in the statutes requiring the board to act upon the report of the committee appointed to consider the necessity of the road prior to the notice to interested parties to file remonstrances or claims for damages. This court cannot by injunction control the action of the county board on the ground that public necessity does not require the establishment of the proposed road, or that the public would be better served by the establishing of roads upon section lines in the vicinity of the proposed road. In *Howard v. Board of Supervisors,* 54 Neb. 443, it was held: "The propriety or necessity of opening and working a section line road is committed to the discretion of the county board, and its decision is not subject to review." In *Otto v. Conroy,* 76 Neb. 517, it was held that the action of the county board in their decision of the expediency of establishing a public road was not subject to judicial review. Although both cases cited apply the rule to public roads established upon section lines, the rule is equally applicable to any proposed road, and the courts

have no more right to interfere by injunction than by an appeal from the decision of the county board.

As to plaintiffs' complaint that the establishment of the road would be of considerable damage, we are equally helpless. The statutes provide an adequate remedy for the recovery of all damages which an owner of real estate sustains by the condemnation of his land for public use. It appears that the plaintiffs have been considerably annoyed heretofore upon numerous occasions wherein it was sought to establish the road now proposed, and that upon former occasions the county board has refused to establish the road on the ground that public necessity did not require it. We have looked in vain for authority holding that such a decision by an administrative body should be considered an adjudication to such an extent that interested citizens competent to petition would be barred from subsequently filing a similar petition asking for the establishment of the road. Public interests are constantly changing, and it is quite apparent that a public road might not be necessary at one time, but become so later, and it is for the county board to decide whether or not conditions have changed. The legislature has placed no restriction upon the number of petitions which may be filed for the establishment of a public road.

Neither do we consider the allegation regarding the former establishment of public roads paralleling the proposed road sufficient ground for the issuance of an injunction, especially in this case wherein it appears that the formerly established roads have become useless. It is alleged that they were rendered useless through the negligence of the county board and the road overseers. The negligence of these officers should not be permitted to stand in the way of further condemnation proceedings. The county board and the road overseers have no personal interest in the road. The public is the beneficiary, and, if entitled to the same, should have it established, although former officers were derelict in their duties in their failure to maintain previously established roads.

The fact that there are no road funds available to pay damages nor taxes levied for such purpose is not sufficient to justify an injunction restraining the county board from considering or allowing the application for the establishment of a road. It is quite true that the constitution will not permit the taking of property for public purposes without just compensation therefor, and, where property is taken for a public road, the funds must be in existence or taxes levied therefor before the property may be taken. Such has been the decision in many cases by this court. See *Hodges v. Board of Supervisors,* 49 Neb. 666, and cases cited. But an appropriation of the property is not affected by the decision of the county board that the road should be established. Indeed, it would be difficult in many instances for the proper officers to provide the necessary funds until the amount be first ascertained by the assessment of damages. Neither the constitution nor the statutes prohibit the consideration of such a petition by the board when there are no funds available or provided for. If the defendants in this case or other officers hereafter undertake to appropriate the plaintiff's property without first having provided funds to pay him whatever damages may be awarded, he will then have time to protect his interests. But, until an appropriation of the property is actually threatened, he cannot apply to a court of equity in contemplation that the officers will do him an injury.

The petition does not contain facts sufficient to entitle the plaintiffs to the relief sought, and we recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

THOMAS B. ROBERTS, APPELLEE, V. FRANK THOMPSON ET AL., APPELLANTS.

FILED OCTOBER 22, 1908. No. 15,732.

1. **County Board:** POWERS: INJUNCTION. Except as otherwise provided, the statutes confer upon county boards the duty of looking after the business and property of the several counties; and in the administration of such affairs a court of equity will not interfere unless the county board acts wantonly or fraudulently, or exceeds the limitations placed upon the exercise of such powers.

2. ———: ———: ———. Section 4443, Ann. St. 1907, makes it the duty of the county board to erect or otherwise provide a suitable courthouse and other county buildings to provide suitable rooms and offices for the several courts of record and county officers, and, when the finances of the county will permit, to provide suitable fire-proof safes for the county clerk and county treasurer. *Held*, That the questions of necessity and of the finances permitting it are for the county board to determine.

3. ———: ———: ESTIMATE OF EXPENSES. In making an estimate of expenses required for the county during the current year, a county board may provide for probable expenses, the exact amounts of which are then unknown.

4. ———: TAXATION: LEVY FOR FUTURE EXPENSES. A county board is not authorized to levy taxes to pay the expenses of subsequent years, nor to contract with reference to levies of subsequent years, nor to create an obligation which would bind the county to levy taxes in the future, unless authorized by a vote of the electors.

5. **Injunction:** OFFICERS: ILLEGAL DEBT. In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation.

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

*Hiram Chase, Herman Freese* and *R. E. Evans,* for appellants.

*Curtis L. Day, contra.*

EPPERSON, C.

The courthouse of Thurston county was, in the opinion of the county commissioners, defendants herein, insufficient for the accommodation of the county officers and the courts, and an insufficient protection of the records against fire. In January, 1908, a resolution was passed by the county board providing that they should enter into an agreement with one Severson to procure by lease additional offices and vaults in what is known as the "Palace Hotel Block" for the use of the county officers and the protection of the records. It is the defendants' purpose to rent said additional office rooms and vaults for a period of five years for the specified rental of $60 a month. The plaintiff herein instituted this action March 2, 1908, and obtained a temporary restraining order which enjoined the defendants, as county commissioners, from entering into a contract of lease for office purposes of any portion of the Palace hotel block, and from disposing of the county courthouse and the fire-proof safes belonging to the county. The defendants appealed from a judgment making the temporary order perpetual.

The courthouse is a frame building built in 1889 at a cost of $1,500. There is no office room therein for the county attorney. The county superintendent and assessor occupy one small room. The county clerk and clerk of the district court occupy one and the same office room, the dimensions of which are 18 by 30 feet, one-half of which is occupied by furniture. The county commissioners also hold their meetings here. There is a very small court room. The county clerk is the only county officer who has fire-proof safes for the protection of his records. On one side and adjoining the courthouse is a frame printing office in which a gasoline engine is operated. Sessions of the district court, and at times sessions of the county court, are held in another building, although with little or no expense to the county. It would seem from these facts that the county board has good reason to take some

steps to provide better offices and better protection of the records against fire.

The plaintiff contends that the financial condition of the county is such that the county board is not justified in now providing the additional offices, and that the contemplated action of the county board is arbitrary and an abuse of discretion. There are outstanding claims and warrants against the county aggregating $25,000. The maximum levy authorized has heretofore been exhausted. However, a part of the 1907 levy was used in reducing the indebtedness. If $720 is expended annually for the payment of rent, there will, of course, be less each year to apply upon the indebtedness. By section 4441, Ann. St. 1907, the county boards of the several counties are given the charge and custody of all real and personal estate owned by the county, the management of the county funds and county business, except as is otherwise specifically provided. Section 4443 makes it the duty of the county board to erect or otherwise provide a suitable courthouse, jail, and other necessary county buildings, to keep such buildings in repair, and to provide suitable rooms and offices for the accommodation of the several courts of record, the county board, clerk, treasurer, sheriff, clerk of the district court, county superintendent, county surveyor, and county attorney (provided the county attorney shall hold his office at the county seat), to provide and keep in repair, when the finances of the county will permit, suitable fire-proof safes for the county clerk and county treasurer. By these statutory provisions the county board is given the power to provide the necessary offices for the use of the county, and, if the finances will permit, to provide suitable vaults for the records of the county clerk and the county treasurer. If funds are not available for the construction of the necessary buildings, or if for any reason the county has not a sufficient building of its own and cannot construct or purchase the same, or if the county board considers it inadvisable to construct or purchase, they may provide offices and vaults or safes

by lease. It is left to the county board to determine what are suitable rooms and offices, and also to determine when the finances of the county will permit suitable fire-proof safes for the county clerk and the county treasurer. Its judgment, however, must be exercised in good faith. The court undoubtedly would have jurisdiction over the county board in the event that it acted wantonly or fraudulently, or exceeded any of the limitations placed upon the exercise of such powers. But, where funds are available which may be expended for one of two or more purposes, the judgment of the county board appropriating such to one legal purpose will not be set aside by the court, although the funds might legally have been expended in the payment of general indebtedness. If the board, acting in the manner authorized, in good faith determine that such available funds should be used in furnishing protection against fire of the records of the county, a court of equity will not interfere. This court has frequently refused to interfere with the administrative or political powers conferred upon county boards. *Howard v. Board of Supervisors,* 54 Neb. 443; *Dodge County v. Acom,* 61 Neb. 376; *Otto v. Conroy,* 76 Neb. 517; *Tyson v. Washington County,* 78 Neb. 211. The county commissioners act in an administrative capacity, and the legislature has conferred upon them the duty of deciding how the affairs of the county shall be managed, and, unless there is a gross abuse of their discretion, or unless they act fraudulently, or contrary to some express provision of the statutes, or beyond some limitation, a court cannot interfere.

It was the intention of the framers of our constitution that in the administrative affairs of the government the courts should not substitute their judgment for that of the administrative officers, although the courts might disagree with them as to what business policies should be adopted. But it is the contention of the plaintiff that the defendants threaten to step beyond the limitation fixed by statute, in that they propose to create a liability for rent where no funds are provided wherewith to meet such ob-

ligation. Section 4443, Ann. St. 1907, among other things, provides that the county commissioners at their regular meeting in January shall prepare an estimate of the necessary expenses of the county during the ensuing year, the total of which shall in no instance exceed the amount of taxes authorized by law to be levied during that year, including the amounts necessary to meet outstanding indebtedness as evidenced by bonds, coupons or warrants legally issued; and no levy of taxes shall be made for any other purpose or for more than is specified in such estimate at the time levy is made. Pursuant to this section the defendants in January made an estimate of expenses for the current year and published the same according to law. Many of the estimated expenses were itemized, but the estimate for rent appears as follows: "Unforeseen expenses, rent, repairing, $5,000."

The plaintiff contends that the said estimate of expenses is void, in that the amount which the board proposes to expend for any of the unforeseen expenses cannot be ascertained. The statute does not provide that the estimate shall contain a separate statement of each item which it is estimated would be required. It is not intended by the legislature that the estimate should contain only such items as the county commissioners then knew would be required. Where the exact amounts of expenditure are known, it is the duty of the board to include such items in their estimate, but, where not known, it is the privilege and the duty of the county board to make a general statement in their estimate sufficient to include probable expenses. The board undoubtedly stated their estimate as definitely as they could under the circumstances. They had not at that time contracted to rent the Palace hotel building or any part thereof. In the opinion of the county commissioners they needed to rent office rooms. At the time of the regular January meeting they were unable to state the amount of money required for rental during the year. There is no evidence that the

estimate was made as it was for the purpose of deceiving or defrauding the taxpayers.

Having made an estimate as the initial step toward providing funds with which to pay rent, the county board was authorized to contract with reference thereto. *Austin Mfg. Co. v. Brown County,* 65 Neb. 60. But the estimate was for the current expenses of 1908. The board was not authorized to levy taxes in 1908 to pay the expenses of subsequent years. They had no right to contract with reference to subsequent levies, nor to create an obligation which would bind the county to levy taxes in future years. Section 4452, Ann. St. 1907, provides: "It shall be unlawful for the county board * * * to make any contracts for or to incur any indebtedness against the county in excess of the tax levied for county expense during the current year; nor shall any expenditure be made, or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund." In *Austin Mfg. Co. v. Colfax County,* 67 Neb. 101, it appears that the county commissioners of defendant county purchased a road grader for a stipulated sum, payable in instalments due in 1897, 1898 and 1899. There, as here, there was no cash on hand against which warrants could be drawn. It was held that the contract was "an attempt to escape the limitations imposed upon the power of the board of county commissioners by section 34, art. I, ch. 18, Comp. St." In principle there is no difference between the contract for the road grader and the contract for rent. Each provides for an expenditure in excess of the funds available. The county commissioners had the power to rent office rooms and fire-proof safes. But in the exercise of this power they were limited to such provisions as the financial conditions of the county would permit. The judgment of the lower court restrained them from renting for any period of time, and must be set aside. There is nothing in the record which would justify the court in restraining the sale of the property belonging to the county. As the defendants propose to rent for five

years, the lower court, under the circumstances of this case, should have enjoined them from entering into a contract extending beyond one year, until such time as the funds available will permit such a contract.

Defendants contend that injunction is not the proper remedy, and that the plaintiff has an adequate remedy at law. It is a well-settled rule that a court of equity will restrain public officers from doing an illegal act which, if consummated, would result in the wasting of public funds (*Solomon v. Fleming*, 34 Neb. 40), or from an illegal disposition of the public money, or the creation of a debt which must be paid by taxation (*Tukey v. City of Omaha*, 54 Neb. 370). A further discussion of this question is unnecessary.

We recommend that the judgment of the district court be reversed and this cause remanded, with instructions to the lower court to modify its judgment as herein suggested.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the lower court is reversed and this cause is remanded, with instructions to the lower court to modify the judgment as recommended.

REVERSED.

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CHARLES C. WHITNACK, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,261.

1. **Parol Evidence:** CONTRACT IN WRITING: BILL OF LADING. When a bill of lading has been issued by a common carrier, and signed and accepted by the shipper, it constitutes the contract for the shipment of merchandise therein described, and its terms cannot be altered or varied by parol testimony.
2. **Contracts:** BILL OF LADING: CONSTRUCTION. The language used in a bill of lading is subject to the same rules of construction which

govern other contracts, and, while the instrument is to be construed as a whole, invalid conditions will not necessarily render the contract invalid, and it may be enforced so far as it is valid.

3. Carriers: LIABILITY. Where a common carrier accepts goods for shipment to be delivered to a connecting carrier, the first carrier will be liable for any damages to the goods resulting directly from the negligence of such carrier, although the loss may not actually occur until after the goods are delivered to the second carrier.

4. ———: ———. A common carrier undertook during extreme cold weather to carry two car-loads of potatoes and deliver them to a connecting carrier. The contract provided that the shipper should furnish a caretaker to accompany the shipment and keep fires in the car to prevent the potatoes from freezing. The carrier separated the two cars while they were in transit and on its lines of railway, so that the caretaker was prevented from attending to one car of the potatoes, and they were thereby permitted to freeze. *Held*, That the first carrier was liable, even though the potatoes may not have frozen until after they were delivered to the second carrier.

5. ———: NEGLIGENCE: BURDEN OF PROOF. Where a common carrier's contract contemplates keeping two car-loads of merchandise together in charge of a caretaker, and it separates the two cars, so that the caretaker is prevented from attending to one of them, and loss thereby ensues, the burden of proof is upon the carrier to prove that there was sufficient cause for separating the two cars. The fact of the separation of the two cars under the circumstances imports negligence.

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

*J. E. Kelby, Frank E. Bishop, Fred M. Deweese* and *Arthur R. Wells,* for appellant.

*George W. Berge* and *Morning & Ledwith, contra.*

GOOD, C.

The plaintiff, Charles C. Whitnack, recovered a judgment against the defendant railway company for damages to a shipment of potatoes while in transit from Omaha,

Nebraska, to Fort Worth, Texas, alleged to have been sustained by reason of defendant's negligence. The defendant has brought the case to this court on appeal.

In February, 1905, plaintiff shipped from Omaha, over defendant's line of railway, two car-loads of potatoes consigned to himself at Fort Worth, Texas. Defendant's line of railway extended no further than Kansas City, Missouri, and from that point the potatoes were to be carried over the line of the Missouri, Kansas & Texas Railroad. The weather was very cold, and, to prevent the potatoes from freezing, it was arranged that a caretaker should accompany the shipment and keep a fire in each of the cars. The potatoes, which were in bags, were so placed in the cars as to leave an open or vacant space in the center of each car. In these vacant spaces oil stoves were placed and lighted to keep the cars warm. A. C. Brown was employed by the plaintiff as caretaker to accompany the potatoes, and to attend to the stoves and see that they were kept filled and burning. The potatoes in charge of Mr. Brown reached St. Joseph, Missouri, in good condition. At this point the train was stopped for some time. Mr. Brown refilled the stoves and adjusted the wicks preparatory to continuing the journey. As the train was leaving St. Joseph, Brown discovered that one of the cars was missing from the train. He made inquiries of the train crew; but received no information as to the missing car. The train was in motion, and he was informed that, if he was going on that train, he must get aboard. He got aboard the train, and proceeded on the journey with but one car. The other car, having been cut out of the train at St. Joseph, was left behind. Brown reached Fort Worth with the one car of potatoes in good condition. The other car-load of potatoes, with which we have to deal in this case, reached their destination several days later badly frozen and wholly worthless.

The plaintiff contends that the contract for the transportation of the potatoes was for a through shipment, while the defendant contends that the contract of the

defendant was to carry the potatoes to Kansas City and turn them over to the connecting carrier. The only act of negligence pleaded by the plaintiff was that the defendant negligently separated the cars at St. Joseph, whereby the caretaker was prevented from taking care of the potatoes in the car that was left at St. Joseph, and that, by reason of that negligence, the potatoes were permitted to freeze. The evidence shows that the car-load of potatoes, after being detained at St. Joseph for a few hours, was carried to Kansas City and turned over to the connecting carrier from 12 to 15 hours after the fires had been attended to at St. Joseph. Defendant contends that the freezing of the potatoes did not occur while on its lines or in its possession, and contends that the potatoes froze after they were delivered to the connecting carrier, and that under the contract of shipment, which will be referred to hereafter, the defendant was not liable for the loss sustained. Defendant relies upon the bill of lading as the contract of shipment, while the plaintiff contends that the contract for the shipment was oral, and that he is not bound by the provisions contained in the bill of lading. The evidence shows that on the day previous to the loading of the potatoes for shipment plaintiff arranged with the defendant for their transportation to Fort Worth. At this time it was arranged that the potatoes should be loaded the next day by A. C. Brown, who would accompany the potatoes as the agent of the plaintiff. The freight rate, the kind of cars to be furnished, and the route were agreed upon. Plaintiff further admits that he understood and knew that a written contract or bill of lading was to be executed, and that he authorized Brown, as his agent, to ship the potatoes and sign such a contract. Brown also testified that he was authorized to, and did, sign the bill of lading. The greater part of this instrument is printed matter, and it clearly shows that it was originally designed as a contract for the shipment of live stock. Most of its provisions relate to live stock shipments, and can have no application to a shipment of po-

tatoes. There are other provisions of a general nature which might apply to such merchandise as potatoes as well as to live stock. It is clear that many of the provisions relating to the shipment of live stock must be disregarded. In the printed form, and following the words "cars loaded with," occurs the word "potatoes." The names and numbers of the cars are written in their appropriate places. This contract was used by Brown to secure his free passage as caretaker on the train.

The question is: Does the bill of lading constitute the contract of shipment, or may the plaintiff rely upon the prior oral agreement which preceded the making of the written contract? No doubt exists that an oral contract for the transportation of freight would be valid, but the question is not whether an oral contract would be valid, but whether a written contract was made. That such a one was made is beyond question. May a written contract be disregarded and set aside when it contains many provisions which cannot be given effect because they are wholly inapplicable to the subject matter of the contract? The rule of law is general that, where a written contract has been made between the parties, it cannot be altered or contradicted by parol, and that all oral negotiations leading up to the making of the written contract are merged therein, and this rule is applicable to bills of lading. 6 Cyc. 427. It was clearly the intention of the parties that there should be a written contract, and one was deliberately made and entered into. The fact that the contract contains many provisions which cannot be given effect, and which it is apparent were never intended to be given effect, does not appear to be any sufficient reason for holding the contract invalid, or to justify setting aside and disregarding the provisions which are applicable to the subject matter of the contract. A bill of lading is an instrument issued by a carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination. 6 Cyc. 417, and cases there cited. The language

used in a bill of lading is subject to the same rules of construction which govern other contracts, and, while the instrument is to be construed as a whole, invalid conditions will not necessarily render the contract invalid, and it may be enforced so far as it is valid. *Grieve v. Illinois C. R. Co.*, 104 Ia. 659; 6 Cyc. 418.

The bill of lading in the case at bar contains the following provisions: "Nor shall said railway company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line." The defendant contends that the evidence shows that the loss or damage complained of occurred after the delivery of the potatoes to the Missouri, Kansas & Texas Railway Company at Kansas City, and that, under the provisions of the contract above quoted, it is not liable to the plaintiff in this case. The evidence shows that the oil stoves used to keep the potatoes warm would ordinarily burn about 12 hours, and the evidence shows that the stove in the car that was left at St. Joseph was filled and lighted about 12 or 14 hours previous to its being turned over to the connecting carrier at Kansas City. The defendant argues that the presumption is that the stove continued to burn and keep the car warm, and that the potatoes were not frozen while in its possession. The evidence also shows that the potatoes remained in the yards of the connecting carrier at Kansas City for several days, and that the car when received by it at Kansas City was in bad condition; that several of the boards constituting one end of the car were broken, thus exposing the interior of the car to the cold air. The weather was shown to have been extremely cold during the time the potatoes were in the yards of the connecting carrier at Kansas City. It is not clearly shown from the record when the potatoes froze, whether they suffered from the cold prior to the time they were delivered to the connecting carrier or afterwards. We do not think, however, that this is material.

The rule both at common law and in this state is that a

common carrier is not liable for the negligence or default of the connecting carrier in the absence of a contract making it liable therefor. *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.,* 66 Neb. 159. But this rule does not relieve the initial carrier from liability on account of its own negligence. The first carrier may by its own negligence in dealing with the goods render itself liable to the shipper, even though the actual loss resulting is not apparent until the goods are in the possession of the second carrier. The real question is: Did the loss occur as the direct result of the negligence of the initial carrier? If so, then its negligence was the proximate cause, and it would be liable. *Selma & M. R. Co. v. Butts & Foster,* 43 Ala. 385, 94 Am. Dec. 694; *Norfolk & W. R. Co. v. Sutherland,* 89 Va. 703; *Fox v. Boston & M. R. Co.,* 148 Mass. 220. Under our constitution, as interpreted by this court, a railroad company cannot by contract with the shipper limit its liability as a common carrier, nor may it by contract relieve itself from the consequences of its negligence as a common carrier. *Missouri P. R. Co. v. Vandeventer,* 26 Neb. 222; *St. Joseph & G. I. R. Co. v. Palmer,* 38 Neb. 463. In the instant case it may be admitted, for sake of argument, that the potatoes did not freeze until after they were delivered to the connecting carrier at Kansas City. But this would not relieve the defendant from liability if its negligence was the proximate cause of the freezing of the potatoes. The contract of shipment bound the defendant, not only to deliver the potatoes to the connecting carrier, but to deliver them with a caretaker in charge. In this defendant failed. By its act in separating the two cars it made it impossible for the caretaker to remain in charge of both cars. The caretaker could not maintain the fires in the car left behind, and thereby the potatoes in that car were permitted to freeze. This was sufficient to justify the jury in finding that the loss was sustained in consequence of defendant's negligence.

Defendant urges that the record is silent as to what

cause the defendant may have had for separating the cars, and, as there may have been a sufficient cause, that negligence is not proved by showing the mere separation of the cars. The cars were in good condition when started from Omaha. It was contemplated by the contract that the two cars should be kept together. If any fact existed which would justify defendant in separating the cars, we think it was its duty to notify the caretaker. At any rate, we do not think plaintiff should be required to prove absence of any act that would be a justification. Such a rule would be harsh and unreasonable, and would practically result in a denial of justice.

The trial court instructed the jury, in effect, that if one suffers damage as the proximate result of the concurrent negligence of two other parties, and if the damage would not have occurred from the negligent act alone of either party, then both would be liable to the party injured. Defendant assails this instruction which submitted the question of concurrent liability, because no concurrent negligence of the defendant and the connecting carrier was pleaded. It is apparent from the pleadings and the evidence that the defendant attempted to shift the responsibility for the damage to the connecting carrier, and it was doubtless to meet this phase of the case that the instruction was given. We think it is immaterial that the plaintiff did not plead concurrent negligence on the part of the connecting carrier, nor is it necessary for us to determine whether the evidence disclosed any negligence upon the part of the connecting carrier. The instruction placed no greater burden upon the defendant than the law required. Under this evidence the defendant could not be held liable unless it was negligent, and then only in the event that the loss would not have occurred except for the negligence of the defendant. The instruction as an abstract proposition of law appears to be sound, and we are unable to perceive wherein it was prejudicial to the defendant, and, in view of the defendant's attempt to shift the responsi-

bility for the loss to the connecting carrier, we think the instruction was properly given.

Defendant has criticised the rulings of the trial court in the giving and the refusal of several other instructions, but the question of the correctness of these rulings is disposed of by the foregoing discussion, and it is not necessary to further refer to them.

We fail to discover any prejudicial error in the record, and therefore recommend that the judgment 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.

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GEORGE E. COX, APPELLANT, V. JOHN SHEEN, APPELLEE.

FILED OCTOBER 22, 1908. No. 15,328.

1. **Injunction:** TRESPASS. A single trespass upon real estate, in the absence of a showing that the trespass will be repeated, will not warrant the issuance of an injunction.

2. ———: PLEADING. An allegation in an answer in an action to enjoin trespass upon real estate, whereby the defendant seeks to justify a single act of trespass, is not sufficient to show an attempt or purpose to repeat the trespass.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Affirmed.*

*W. H. Thompson,* for appellant.

*Charles G. Ryan, contra.*

GOOD, C.

On August 29, 1906, George E. Cox brought this action to enjoin John Sheen from trespassing upon a certain

described tract of farm land in Hall county. Upon the trial the defendant had judgment, and plaintiff has appealed.

The record discloses that the plaintiff was in possession of the land as tenant under a lease from year to year, and that his tenancy did not expire until March 1, 1907. The defendant purchased the land from plaintiff's landlord, subject to "the rights of the tenant under his lease for the year 1906." Early in the spring of 1906 the defendant made an unsuccessful attempt to arrange with the plaintiff for the immediate possession of the land. By agreement he was permitted to have the use of three acres on which to erect buildings, and plaintiff raised a crop of wheat and oats on the remainder of the land. The defendant claims that, when he was awarded the use of the three acres, it was further agreed that he should be permitted to enter and plow the remainder of the land after the crops were harvested. This is denied by the plaintiff. Whether such an agreement was made is immaterial. No consideration existed therefor, if it was made, and it amounted to nothing more than a license, which the plaintiff had the right to revoke at any time. It appears that in the summer of 1906 there were further negotiations between the parties looking to defendant acquiring a right to enter and plow the land after the harvest. But no agreement was perfected. We think this clearly discloses that, if any agreement was made in the spring, it must have been revoked later, for the defendant would have scarcely been negotiating to purchase the right to enter upon the land if it had already been given him. On the 26th of August, 1906, the defendant, without right, entered upon and began plowing up the stubble. Thereupon a controversy arose between the son of the plaintiff and the defendant regarding the latter's right to plow the land. After some wrangling, the defendant left the land and never reentered. Three days later this action was brought.

It appears that a volunteer crop of wheat and oats grew

up in the stubble, which had some value for pasturage purposes and of which the plaintiff would be deprived if defendant were permitted to plow up the land. Sufficient was alleged in the petition to entitle the plaintiff to an injunction, provided the allegations thereof had been sustained by the evidence. The record, however, discloses but a single trespass, nor does it show that there were any attempts or threats to repeat the trespass. This court has held that "an injunction will be granted to restrain a threatened trespass upon real estate, where such act would result in the destruction of the premises, in the character of their use and enjoyment, or a deprivation thereof." *Peterson v. Hopewell,* 55 Neb. 670. It has also held that simple acts of trespass are in most cases insufficient to warrant the issuance of an injunction; but, if the nature and frequency of the trespasses are such as to prevent or threaten the substantial enjoyment of the right to the possession of the property, then an injunction will be granted. *Sillasen v. Winterer,* 76 Neb. 52. It was also held in *Hackney v. McIninch,* 79 Neb. 128, that "equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim of right which indicates a continuous and constant repetition of it." We think that, in order to entitle one to an injunction to prevent trespass upon real estate, it must appear that the acts of trespass will be repeated, and that they would result in irreparable injury to the plaintiff. In this case the evidence goes no further than to show a single act of trespass. The evidence disclosed that the defendant was solvent, and that ample means of redress by an action at law was open to the plaintiff.

There is another phase of the case, however, that merits attention. The defendant pleaded in his answer that he was in possession of the land in controversy and that plaintiff's lease had expired. He admitted the plowing of the land, and apparently sought to justify his act upon the theory that he was the owner and entitled to the pos-

session of the land, but nowhere in his answer does he plead any intention or purpose to renew the trespass or to attempt to further plow the land. We think the allegations of the answer go no further than an attempt to justify the first and only trespass. It does not show any intent or purpose upon the part of the defendant to renew the controversy or to attempt to further molest the plaintiff in the occupancy of the premises. The allegations of the answer are, in our opinion, insufficient to supply the want of proof of an intent or purpose upon the part of the plaintiff to further trespass upon the real estate or interfere with his enjoyment of the premises.

It appears to us that the judgment of the district court is right, and we recommend that it be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, we recommend that the judgment of the district court be

AFFIRMED.

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CHARLES E. GIBSON, APPELLEE, V. JOHN G. SEXSON ET AL., APPELLANTS.

FILED OCTOBER 22, 1908. No. 15,283.

1. **Appeal:** JUDGMENT: ESTOPPEL. Where the plaintiff in a foreclosure suit offers in his petition to pay the amount of a supposed tax lien on the property covered by his mortgage, and in the prayer of his petition prays the right to make such payment, and the court so decrees, he cannot complain of such decree, even though it appears from the evidence on the trial that he was under no legal obligation to make such payment.

2. **Receivers:** APPOINTMENT: NOTICE: HEARING. Where plaintiff in an application for the appointment of a receiver serves notice upon the parties interested that such application will be presented to the court or to a judge in vacation on a certain day and hour and at a designated place, the court or judge is without power,

except by stipulation or appearance of the parties, to hear such application at an earlier date than that specified in such notice.

3. ———: ———: COLLATERAL ATTACK. And where the record on its face shows that the court or judge acted on such application one day earlier than the date specified in such notice, and appointed a receiver as requested in said application, without any appearance or consent by the adverse party, such appointment is void, and the judgment of the court or judge making the same may be attacked collaterally.

4. Judgment: COLLATERAL ATTACK. Where the record of a case foreclosing a tax lien shows upon its face that the only service attempted to be made upon a defendant corporation was upon a stranger to such corporation, as receiver thereof, when no receiver had in fact ever been appointed for such corporation, a judgment rendered in such case against such corporation is void and may be attacked collaterally by such corporation or its assigns.

5. Tax Lien: FORECLOSURE: DECREE: CONCLUSIVENESS. In a foreclosure proceeding by H., the holder of a tax sale certificate, against the M. S. bank, mortgagee, and S., the owner of the land, it was alleged that "the defendant is or claims to be the owner of said real estate, that defendant M. S. bank and all of the defendants herein have or claim to have some right, title, lien or interest in said land, either by deed, judgment, mortgage or mechanic's lien, or otherwise, the exact nature and extent of which is to plaintiff unknown, but plaintiff avers that, if said defendants or any or either of them have any right, title, lien or interest in or against said real estate or any part thereof, the same is junior, inferior, and subject to the lien of the plaintiff herein set forth." The defendants all having made default, a decree of foreclosure was entered, in which it was adjudged that the M. S. bank "be foreclosed of all equity of redemption or other interest in said premises." In a subsequent action by an assignee of the M. S. bank to foreclose his mortgage, *held*, that the former decree cannot be pleaded by S. as a bar. *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735.

6. Tax Sale: PURCHASE BY OWNER. A purchase of land at sheriff's sale in a suit foreclosing a tax lien made by one whose duty it was to pay the taxes operates as payment only. He can acquire no rights as against a third party by a neglect of the duty which he owed to such party. *Concordia Loan & Trust Co. v. Parrotte*, 62 Neb. 629; *Pitman v. Boner*, 81 Neb. 736.

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

*B. F. Hastings,* for appellants.

*H. M. Sinclair* and *C. A. Robinson, contra.*

FAWCETT, C.

This action was commenced to foreclose a mortgage for $700 executed and delivered by Aaron N. Clark and wife to the Mead's State Bank of York, Nebraska, dated November 1, 1899. After the usual allegations by an assignee of a mortgage in a petition to foreclose, the petition further alleges that the mortgagor Clark conveyed the premises described in the mortgage by warranty deed to Sawyer and Walker subject to the mortgage; that Sawyer and Walker conveyed to A. J. Miller subject to the mortgage; that on the 5th day of November, 1892, Miller conveyed the lands to Eugene H. Hill by warranty deed subject to the mortgage and the taxes; that on January 20, 1894, the said Hill conveyed the premises to the defendant Sexson subject to all liens of record; that said Hill and said Sexson are brothers-in-law; that, with the design of having the lien created by said mortgage discharged and divested without payment of the mortgage, Hill and Sexson confederated, conspired and colluded together, and in pursuance of such conspiracy, and to accomplish said design, said Hill purchased a tax sale certificate on said land for the taxes of 1893, which taxes became due and delinquent while Hill was the owner of the land, and prior to his conveyance to Sexson; that Hill, in pursuance of such conspiracy, foreclosed the tax lien represented by such certificate, and became the purchaser of the land at the foreclosure sale, and two months later executed another deed to defendant Sexson for a consideration of $2; that during all of the time Hill was proceeding with such foreclosure proceedings defendant Sexson was the owner and in possession of the land, and that the subsequent conveyance to him was without consideration, and that all of the acts of Hill and Sexson aforesaid

were done for the purposes aforesaid. Plaintiff further alleges that in the foreclosure proceedings so prosecuted by Hill, defendant Sexson and the Mead's State Bank were made defendants; that defendant Sexson, without the issuance of a summons, entered a personal appearance, but did not file any answer or make any defense to Hill's foreclosure proceeding. That the Mead's State Bank was not served with summons, nor by publication, neither did it make any appearance in said action; that summons for such bank was served upon one W. W. Wycoff, as receiver of said bank, but that said bank was a corporation, not then dissolved, and that said Wycoff was not then an officer, assignee, trustee, receiver, or person having charge of the assets or business of said corporation; that said Wycoff was not a party to said action, either as receiver or otherwise; that in said tax foreclosure proceedings plaintiff's mortgage was not, by the decree rendered therein, barred, nor was the right to adjudicate thereon put in issue by the pleadings filed in said action; that the taxes that went into and made up the tax liens which Hill attempted to foreclose were the taxes assessed and levied against the land while the defendant Sexson and his grantor, Hill, were the owners of said land, and that said tax liens were created by their own default and neglect of duty in not paying the same; that, by reason of the premises, defendant Sexson is now estopped to assert that he or his grantor Hill, or either of them, are purchasers of said land in good faith without notice, and estopped to deny that plaintiff's mortgage is a valid lien on said lands. Plaintiff further alleges that he is ready and willing to pay said tax liens and redeem the incumbrance created thereby, and offers to do so. The prayer is that plaintiff be allowed to redeem said tax liens and the incumbrance created thereby, and that he have a foreclosure of his mortgage. For answer defendant sets out the foreclosure proceeding by said Hill, instituted on February 4, 1901, which shows that such foreclosure suit was based upon a tax sale certificate for the

unpaid taxes for the year 1893, the year during which Hill was the owner of the property, and prior to his first deed to defendant Sexson. The petition in the tax foreclosure suit, which was commenced in Perkins county, is set out in full in the answer, and shows the defendants in that action to have been John G. Sexson and Mead's State Bank. There is no allegation in that petition that the Mead's State Bank was a corporation; that it had gone out of business, or was insolvent, or that any recveiver had been appointed for such bank. The summons was issued to the sheriff of York county. He returned the same with the following indorsement thereon: "The State of Nebraska, York County, ss.: I hereby certify that on the 9th day of February, 1901, I served the within writ of summons on the within named Mead's State Bank by delivering to W. W. Wycoff, receiver of Mead's State Bank, a true and certified copy of this writ as required by law. W. L. Lancaster, Sheriff." The answer further alleges that at the time of such foreclosure suit Sexson was an unmarried man, and entered his voluntary appearance in said action in the following form: "Comes now John G. Sexson, defendant herein, and waives the issuance and service of summons in this action, voluntarily subjecting himself to the jurisdiction of the court herein." The answer further alleges that both defendants made default, and a decree was entered against them, in which it was decreed, among other things, "that the defendants be foreclosed of all equity of redemption or other interests in said premises." The only allegation in the petition in said tax foreclosure suit, as to the defendant, Mead's State Bank, or the mortgage in controversy here, is as follows: "(8) That the defendant John B. Sexson is or claims to be the owner of said real estate; that defendant Mead's State Bank and all of the defendants herein have or claim to have some right, title, lien or interest in said land, either by debt, judgment, mortgage or mechanic's lien, or otherwise, the exact nature and extent of which is to plaintiff unknown, but plaintiff avers that

if said defendants or any or either of them have any right, title, lien or interest in or against said real estate or any part thereof, the same is junior, inferior, and subject to the lien of the plaintiff herein set forth."

The answer then alleges the sale of the premises by the sheriff of Perkins county, the confirmation of the sale, the execution and delivery to Hill of the sheriff's deed, and adds a general denial. For reply the plaintiff denies that the pretended summons, or any summons, in said foreclosure suit was ever served upon Mead's State Bank, and alleges that the said Wycoff was not the receiver of said bank, and was not in possession of the estate or in charge of the business of said bank at the time of the pretended service of said pretended summons, and alleges that at that time the Mead's State Bank was a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, and not dissolved; that the pretended service of said pretended summons upon said bank was and is void; denies each and every other allegation of new matter in the answer contained; and alleges that the facts set forth in the answer are not sufficient to constitute a defense to the action. Upon these issues the case proceeded to trial in the district court for Perkins county. The court entered a decree ordering plaintiff to pay the sum of $113.71 as the amount necessary to redeem from said tax lien, and giving plaintiff a foreclosure of his mortgage. From that part of the decree ordering plaintiff to pay the said sum of $113.71, plaintiff appeals; and, from that portion of the decree giving plaintiff a foreclosure of its mortgage, defendant appeals.

Plaintiff having alleged in his petition his willingness to pay the money necessary to redeem from said tax liens, and having therein prayed that he be allowed to make such redemption, his appeal from that portion of the court's decree is without merit, and must be decided adversely to him.

On the trial of the case, all of the files in the tax foreclosure suit referred to in the pleadings were received in

evidence. There was also received in evidence a transcript showing the entire proceedings in the district court for York county in the case wherein defendants claim the said Wycoff was appointed receiver of the Mead's State Bank, and it is strenuously insisted by defendants that the proceedings in that case, as well as in the tax foreclosure suit, show that the court in each case had jurisdiction of the parties and of the subject matter; in other words, that in each case the proceedings are regular upon their face, and, hence, neither case can be assailed collaterally. We are unable to see wherein the proceedings in the receivership matter in York county are material in this case. Defendants must stand or fall by what was done or omitted to be done in the tax foreclosure suit. No reference was made in the tax foreclosure suit to any insolvency of the Mead's State Bank, or to any receivership for said bank, and the district court for Perkins county could not take judicial notice of what had been done by the district court for York county. The only reference in the tax foreclosure suit to any receivership was in the return of the sheriff of York county to the summons in the tax foreclosure suit, in which he stated that he had served the summons upon the Mead's State Bank by delivering a copy thereof to W. W. Wycoff, receiver of Mead's State Bank. We do not think this was sufficient to establish the fact that the bank was in the hands of a receiver and that Mr. Wycoff was such receiver. But, be that as it may, the evidence shows that Mr. Wycoff never took possession of any of the assets of the bank; that, in fact, he never did anything in the matter except to file his bond as such receiver a little over three months after his appointment. His own testimony in the record shows he never performed a single act as such receiver. Moreover, in the findings of the court in this case, which counsel for defendants in his brief says is "a very full finding of the facts from the evidence, to which we invite the attention of the court," and to which he again refers in his reply

brief as a "very careful and complete statement of facts," we find that the notice of hearing on the application for the appointment of the receiver, which was served upon the cashier of the Mead's State Bank, advised the bank that such hearing would be had in the office of the clerk of the district court for York county at 10 o'clock A. M. on November 3, 1897; that the court subsequently appointed such receiver on November 2, 1897, which order was filed on that date. The transcript of the clerk of the district court for York county also shows that the order appointing the receiver was filed on November 2, 1897. In that state of the record, if the matter were material, we would be compelled to hold that, under the requirements of section 274 of the code, the appointment of Mr. Wycoff as receiver was void. The section of the code just referred to reads: "Every order appointing a receiver without the notice provided for herein shall be void, and every such order heretofore made, under which the appointee has not possessed himself of the property in question, shall be suspended until an order shall have been made, and the bonds executed and filed in accordance with the provisions of this chapter." The notice of the hearing of an application for the appointment of a receiver is by this statute made jurisdictional, and it requires neither argument nor citation of authorities to show that the notice must state the time and place where the hearing will be had, and that the hearing must be upon that date. If the court attempts to adjudicate the question at an earlier date than that specified in the notice, its action is wholly void. The facts above recited appearing upon the face of the record, the judgment in that case is subject to collateral attack. And, the record in the tax foreclosure suit not showing any proper service upon the Mead's State Bank, the judgment in that suit is also open to collateral attack.

In addition to what has been said, we think *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735, settles the question that plaintiff's rights under his mortgage were not barred by

the decree in the tax foreclosure suit, even if there had been proper service upon Mead's State Bank. In the third paragraph of the syllabus in that case it is said: "In a foreclosure proceeding by N. against the M. bank, a subsequent mortgagee, and V., their common mortgagor, it was alleged that 'the M. bank claims some interest in the premises, the nature and extent of which is to the plaintiff unknown, but is subordinate to plaintiff's claim, wherefore plaintiff asks that defendant be compelled to set the same up or be forever barred.' The defendants all having made default, a decree of foreclosure was entered in which it was found that the M. bank had no right, title, or interest in the mortgaged property. In a subsequent action by the M. bank to foreclose its mortgage, *held,* that the former decree cannot be pleaded as a bar by V. or his grantees." The averments in the petition in that case and in the petition in the tax foreclosure case are practically identical, and the discussion by POST, J., on pages 739 and 740 is applicable to and decisive of this case. In any view of the case, therefore, plaintiffs' rights under the mortgage in suit, as against the defendant Sexson, were not barred.

Having held that the tax foreclosure suit prosecuted by Hill is subject to attack in this suit, what follows? The tax certificate upon which that suit was based was for the taxes unpaid and delinquent during the year 1893, while the duty rested upon Hill to pay the same. The subsequent taxes involved were taxes for the years while the defendant Sexson owned the property under a deed which conveyed the premises to him subject to the mortgage. Hence, they were taxes which it was his duty to pay. Furthermore, we think the evidence fully sustains the allegations in plaintiff's petition that this tax foreclosure proceeding was a device by the brothers-in-law, Hill and Sexson, to defeat plaintiff's mortgage. It is remarkable indeed that defendant Sexson would enter his voluntary appearance in a *bona fide* suit by Hill to foreclose a tax lien upon his, Sexson's, land, and then never

make any further appearance in the case, but allow his land to be sold for the paltry sum involved in such suit. It is also a significant circumstance that two months after Hill received his sheriff's deed he conveyed the land to his brother-in-law, Sexson, for a consideration of $2. In Jones, Mortgages (6th ed.), sec. 736, it is said: "When one purchases land expressly subject to a mortgage, the land conveyed is as effectually charged with the incumbrance of the mortgage debt as if the purchaser had expressly assumed the payment of the debt, or had himself made a mortgage of the land to secure it. * * * The difference between the purchaser's assuming the payment of the mortgage and buying subject to the mortgage is simply that in the one case he makes himself personally liable for the payment of the debt, and in the other case he does not assume such liability." In section 680 the same author says: "A mortgagor or his grantee cannot, by acquiring a tax title upon the land, defeat the lien of the mortgagee. It is his duty to pay the taxes, and he is not allowed to acquire a title through his own default. The same obligation rests upon one who has purchased the land of the mortgagor." In *Concordia Loan & Trust Co. v. Parrotte,* 62 Neb. 629, we quote from Cooley on Taxation, page 500, as follows: "The mortgagor, remaining in possession of the land, owes to the mortgagee a duty to keep down the taxes; and the law would justly be chargeable with connivance at fraud and dishonesty, if a mortgagor might be suffered to permit the taxes to become delinquent, and then discharge them by a purchase which would at the same time extinguish his mortgage. There is a general principle applicable to such cases which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party, by a neglect of the duty which he owed to such party. This principle is universal, and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made

out in every instance." Under the above authorities, and many others which might be cited, and the facts in this case, it is clear that the duty to pay the taxes involved in the tax foreclosure suit rested upon Hill and the defendant Sexson, and, hence, Hill's alleged purchase in his tax foreclosure proceeding must be held to have been simply a payment of the taxes involved in that suit, and the deed which he received from the sheriff nothing more than a receipt for the same.

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.

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NORTHWEST THRESHER COMPANY, APPELLANT, V. MATEJ KUBICEK ET AL., APPELLEES.

FILED OCTOBER 22, 1908. No. 15,315.

1. **Sales:** CONTRACT: OFFER: ACCEPTANCE. A mere uncommunicated purpose to accept an offer for the sale or purchase of property does not constitute an acceptance, and where parties are distant and the contract is to be made by correspondence, the writing of a letter or telegram containing notice of acceptance is not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the telegraph office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then, unless the offer is still standing.

2. ———: COUNTERMAND OF ORDER. Where an order given for machinery contains a clause giving the vendor the right to accept such order or not as he pleases, and no time is fixed within which such acceptance shall be made, the vendee has the right, up to the time of acceptance, to countermand such order.

3. **Principal and Agent:** AUTHORITY OF AGENT. The facts stated in the opinion *held* ample to sustain the conclusion that plaintiff's representative, J. F. Hennessy, in his negotiations with defendants on July 11 and 12, 1904, had power to bind the plaintiff in that transaction.

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

*Hastings & Ireland* and *S. B. McBeath,* for appellant.

*Ralph D. Brown* and *J. Reid Green, contra.*

FAWCETT, C.

Plaintiff instituted this suit in the district court for Saline county to foreclose a chattel mortgage, and for judgment upon three promissory notes described in said mortgage, which it claims were given to it by defendant Matej Kubicek in settlement for a traction engine and sundry attachments, which plaintiff claims said defendant Matej Kubicek and his son, Joe Kubicek, had ordered from plaintiff on June 9, 1904, in a written order, which provided for the delivery of said engine and attachments on board the cars at Crete, Nebraska. The defendants allege substantially that within two weeks subsequent to the giving of such order, and before the same had been accepted by plaintiff, they countermanded said order, but that, regardless of such countermand, plaintiff shipped said engine to Crete; that when it arrived at Crete defendants refused to accept it; that thereupon plaintiff sent one of its representatives, one J. F. Hennessy, to Crete, to attempt to make delivery of such engine; that defendants refused to receive the engine; that after somewhat extended negotiations it was agreed between Hennessy and defendants that Hennessy was to unload the engine and attachments, put them together, and deliver them to defendants on the farm of Matej Kubicek, about four and a half miles southwest of Crete; that, in consideration of that agreement, defendant Matej Kubicek

paid the freight on the engine, and signed the notes and mortgage in controversy; that said Hennessy thereupon proceeded to and did unload the engine from the car, attached the necessary parts thereto, and, in company with another employee of plaintiff, started with said engine for the farm of defendants; that when said Hennessy had proceeded about three-quarters of a mile from Crete, while attempting to cross a bridge, the bridge gave way and precipitated the engine and the two men who were upon it into the ditch below, a fall of about 18 feet, killing Hennessy and slightly injuring his companion; that on the next day Mr. E. W. Chambers, general manager of plaintiff for the state of Nebraska, called upon defendants and informed them of the accident which had happened on the previous evening; that Chambers then agreed that plaintiff would extricate the engine from the ditch, take it back to Crete, replace all broken parts, make the engine as good as ever, and deliver it to defendants upon their farm within five days thereafter; that in accordance with that agreement plaintiff did remove the engine from the ditch to Crete and expend considerable time, much more than five days, in trying to restore the engine to its former condition, but utterly failed to succeed in so doing; that plaintiff has never delivered the engine or any of the attachments to defendants as agreed, but at all times has had and still has possession of the same.

Plaintiff denies that Mr. Chambers ever made any such an agreement, and alleges that the only agreement he made was that, in consideration of the unfortunate circumstances, he would, as a matter of accommodation to defendants, and at plaintiff's expense, restore the engine to its former condition as soon as possible, and that when this was done defendants were to go to Crete and get the engine. Plaintiff also denies that Hennessy ever made the agreement claimed by defendants about delivering the engine to defendants' farm, and alleges that, if he did make such agreement, he had no authority so to do, and that plaintiff was not bound thereby. Plaintiff also al-

leges that it had accepted the order of defendants before it received any notice of an intention on the part of defendants to countermand the same.

The case was tried to the court, and a decree entered, in which the court found "for the defendants, and finds that the plaintiff has the property in controversy in its possession and ever has had, and the defendants or either of them never had possession thereof, and the foreclosure of the chattel mortgage in question is not plaintiff's remedy," and dismissed plaintiff's action without prejudice.

The principal questions involved, and the ones upon which the case must turn, are: (1) Did the defendants countermand their order of June 9 in apt time? If so, then the shipping of the engine and attachments, as was done, was without authority on plaintiff's part. (2) Did Hennessy agree to unload the engine and deliver it to defendants on defendants' farm? (3) Did Hennessy have authority to make such an agreement. We will consider these questions in the order named.

The evidence fairly shows that Jelinek & Company were the local representatives of plaintiff at Crete, and that Hennessy was a general salesman for plaintiff. Hennessy visited Crete on June 8, 1904, and in company with one of the Jelineks, their local agent, started out to canvass the country adjacent thereto. They made a sale to one Pawlish on June 8, and on the morning of June 9 called at the home of the Kubiceks, and as a result of that call obtained the signatures of the two defendants to an order for the machinery in controversy. This order expressly stipulated that it was not binding upon the plaintiff until accepted by plaintiff at its home office at Stillwater, Minnesota. Defendants claim and testify that after the order was signed, and just before he left, Hennessy told them they could have two weeks to think the matter over, and would have the right at any time within such two weeks to countermand this order. In this they are corroborated by Mr. Jelinek. Plaintiff contends that no such permis-

sion was indorsed upon the contract, and that Mr. Hennessy was without authority to in any manner vary the terms of the contract by parol. It is unnecessary to decide this point, for the reason that the uncontradicted evidence shows that on June 23 Mr. Kubicek, Sr., went to the place of business of the Jelineks, and stated to them that plaintiff had failed to ship the engine promptly as agreed, and that they would not now take the machine, and told Jelinek to either write or telephone plaintiff that the order was countermanded. Mr. Jelinek at once called up the general manager of plaintiff at his office in Council Bluffs, Iowa, and notified him of this countermand on the part of the Kubiceks. The general manager, Mr. Chambers, immediately wrote plaintiff as follows: "Council Bluffs, Iowa, June 23, 1904. Northwest Thresher Co., Stillwater, Minn. Gentlemen: On the 20th inst. we mailed you order of Matej and Joe Kubicek, Crete, Neb. We have just received a phone call from our agents S. Jelinek & Co., Crete, Neb., and they say that Kubicek was in and claims that he will not accept the engine now, that it was ordered to be shipped at once, and that it is too late now for him to take it. Of course, this is only a bluff, but we would suggest that you let us know by return mail whether or not you accept Kubicek's order, and send us settlement papers at once so that we can deliver the engine that is now at Crete, Neb. Yours truly, Northwest Thresher Company, E. W. Chambers, Mgr." It appears from this letter that Mr. Chambers held the order of the Kubiceks from the time it was executed, on June 9, until June 20 before he mailed it to the company at Stillwater. The order, as appears from the testimony of one of plaintiff's officers at the home office, was not received at Stillwater until June 22. The above letter of June 23 was received by the plaintiff at Stillwater on the next day, June 24, and on that day the company wrote to its manager at Council Bluffs the following letter: "June 24, 1904. Northwest Thresher Company, Council Bluffs, Ia. Gentlemen: We have your favor of the 20th, handing us

order dated June 9 of Matej Kubicek and Joe Kubicek for 16 H. Northwest straw burning engine, 150 ft. 8 in. 6 ply gendy belt, 14 bbl. steel mounted tank and cab. We accept the order, and will authorize you to take notes with interest from July 1st. If we fail to send you settlement made out in that way, remember that mortgage will have to be made out to correspond to the notes. Regarding the matter of tank pump and hose, we presume we are to get additional price for that, as it is not included in the order. As this order calls for delivery at once, and as the engine is on hand at Crete, presume there will be no immediate rush about getting settlement to you, as you say the engine may be held by the agent for a time to be further used as a sample. However, the settlement will get to you in the regular course of business at the earliest possible moment. Very truly, Northwest Thresher Company, per Sales Manager." The above letter is typewritten, and below the signature, written with a pen, is the following postcript: "P. S. Yours of the 23d at hand. Make them settle per order and no monkey work. Settlement papers go today."

It will be observed that this letter bears date June 24, the day after the Kubiceks countermanded their order, but the writer of the letter testified that he dictated the letter on the day previous, viz., June 23, which would be on the same day that Mr. Kubicek countermanded the order. Counsel for defendants express considerable doubt as to the truthfulness of this testimony. That fact we do not have to determine, for the reason that it is immaterial whether the letter was dictated on the 23d, or even written on the 23d, as the evidence is uncontradicted that it was not signed and mailed until the 24th, one day after plaintiff had been notified of the countermanding of the order by the Kubiceks. We think the law is well settled that "a mere uncommunicated purpose to accept an offer does not constitute an acceptance, and where parties are distant and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of

acceptance is not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then, unless the offer is still standing." *Trounstine & Co. v. Sellers,* 35 Kan. 447; *Averill v. Hedge,* 12 Conn. *424; *Peck v. Freese,* 101 Mich. 321. We must hold therefore, that the order given by the Kubiceks on June 9 for the machinery in controversy, which was not to become binding until accepted by the plaintiff at its home office at Stillwater, Minnesota, was countermanded by the defendants in apt time, viz., prior to the acceptance of that order by plaintiff, and that such countermand terminated all right of plaintiff to proceed thereunder. *Peck v. Freese, supra.*

As to the second point, the Kubiceks both testified that, when Mr. Hennessy came to their home on the evening of the day prior to the day of the accident, they refused to receive the engine, and that, as one of them put it, "Hennessy took himself off." On the next day Mr. Kubicek, Sr., went to Crete, arriving there early in the forenoon. After arriving there he had several interviews with Mr. Hennessy, at which one W. S. Chemlir acted as interpreter. Mr. Kubicek testifies that he persisted in his refusal to take the engine, but that finally it was agreed between himself and Mr. Hennessy that Hennessy was to unload the engine and deliver it to defendant on his farm, four and a half miles southwest of town; that, in accordance with and on the strength of that agreement, the papers were all prepared, and that he signed them at that time, but that the deal was not to be considered completed until Joe had signed the papers, which he told Hennessy Joe would do when the engine was delivered at the farm. One reason given by Mr. Kubicek why he insisted upon delivery at the farm was that he had had trouble once before by having an engine go through a bridge while it

was being driven from town to his farm. He admits that it is his signature to the receipt for the machinery, but he says the contents of the receipt were not made known to him, and that he did not know he was signing any such paper. Chemlir denies that Hennessy agreed to deliver the engine to defendants' farm, as the representative of plaintiff, but says that Hennessy agreed to do it as an accommodation to Kubicek. Hennessy is not alive to testify. Mr. Jelinek, however, the local agent of plaintiff, testified that after the notes and mortgage had been signed Hennessy brought them to him, and told him to take them to the bank and see if they were properly executed; that Hennessy told him that the settlement was not yet complete and would not be so until Joe had signed the papers; that Hennessy told him that he had made arrangements to unload the engine "and deliver it on the farm, and when they delivered it up there that Joe Kubicek will sign settlement." Thereupon Hennessy hired help, and at once proceeded to unload the engine and attach the necessary parts, after which he fired up, and in the evening, in company with the plaintiff's expert machinist, De Haas, started with the engine for defendants' farm. In the light of this testimony and this conduct on the part of Hennessy, we must hold that the contract between Hennessy and Mr. Kubicek was as claimed by the latter, and that Kubicek's agreement to take the engine if delivered at his farm was a sufficient consideration for Hennessy's agreement to deliver it.

This brings us to the third point, viz., did Hennessy have power to make this contract? It is urged by counsel for plaintiff that Hennessy was simply a salesman with authority to take orders, and that he had no authority beyond that. If so, why was he sent by plaintiff to Crete to represent plaintiff after the engine had arrived at that station? If the order had been properly accepted by plaintiff and was in full force and effect, then plaintiff had discharged its entire duty to defendants by shipping the engine to Crete, as by the terms of their order plaintiff

was only required to deliver the engine on board the cars at that point; so that there was nothing there calling for the services of a mere salesman. It is very evident that Mr. Hennessy was more than a mere salesman of plaintiff, with power only to take orders. When he went to Crete to adjust this particular matter, he possessed power to represent the plaintiff in that transaction. This is clearly shown by two letters mailed to him on July 10 and 11, which two letters were received and read in evidence without objection. The letter of July 10 reads as follows: "Council Bluffs, Iowa. 7-10-1904. J. F. Hennessy, Crete, Neb. Dear Sir: We wired you today to go to Crete and get mail. We found out yesterday that the engine shipped to S. Jelinek & Co. was still on the car. This is to fill the Mike Kubicek order. It is to have a cab on it, which is at Crete. We will have a man there in the morning to put it on. Now you have S. Jelinek & Co. pay the freight, unload the engine at once, and as soon as the cab is on notify Mike Kubicek that you are ready to deliver the engine to him on his order. You employ a good attorney, if necessary, and if he refuses outright to receive and settle for the machinery it will be necessary to sue him. He has never countermanded this order, and the order is straight, and we have been ready to deliver at any time. Will send you copy of order with this. If you find it necessary to keep Mr. De Haas, the man who will put on the cab, there to deliver the engine, do so. If not, let him come home as soon as he has the cab (word lost). If there is any demurrage on car, Jelinek & Co. should pay it, as Mr. Chambers called them up, and they said they would pay the (word lost), and unload the engine, which it seems they never have done. There is freight from here to Crete and $57 advance charges. The advance charges were not put on the bill of lading through oversight, but the agent here wired agent at Crete to collect the $57, and you see that it is collected with the fr't from Co. Bluffs to Crete. Jelinek & Co. told me over the phone that they see a lawyer, and he told them not to touch the engine.

But the writer can see no reason why they should not, as it is only consigned to them. You will know all about the deal much better than we can tell you, as you will be on the ground. And keep in mind that the machinery must be settled for by the purchaser as per the terms of the order he gave. Think Mr. Chambers has the settlement papers with him, and have told him to send to you at once to Crete, and you will doubtless receive them about the same time you receive this. Yours truly, Northwest Thresher Co., by C. Crocker." The letter of July 11 reads: "Co. Bluffs, Ia. 7-11-04. J. F. Hennessy, Crete, Neb. Dear Sir: Inclosed find settlement papers for the Kubicek engine. You will fill in all blanks for dates when they are signed. Have the mortgages duly signed and witnessed, sending the original to the Co. clerk with his fee 20c, also card inclosed. Have the purchaser's receipt properly dated, signed, and return all papers here. Be sure the numbers in the mortgage correspond with the numbers on machinery sold and delivered. Yours truly, Northwest Thresher Co., by C. Crocker." The duties which these letters called upon Mr. Hennessy to perform were greater than those of a mere solicitor or ordinary salesman. We do not see how any greater authority could have been given Mr. Hennessy under the circumstances than is given in the first of the two letters above set out. They very correctly say to Mr. Hennessy: "You will know all about the deal much better than we can tell you, as you will be on the ground." It is clear to our minds that Mr. Hennessy went to Crete on that occasion with as full power to represent the plaintiff as its general manager would have had if he had been personally present.

We do not deem it necessary to go into the details of what took place in the subsequent interviews between Mr. Chambers and the defendants. The uncontradicted evidence shows that plaintiff extricated the engine from the ditch, took it to Crete, attempted to restore it to its former condition, and furnished all necessary parts for so doing, and all at the expense and cost of plaintiff; that the ma-

chine is still in Crete, where plaintiff's agents left it, and that it never has been in the possession of the Kubiceks for a single moment of time.

A number of minor questions are discussed in the briefs of counsel which we do not deem it necessary to consider.

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.

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PHILIP HESPEN, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,322.

1. **Evidence of Value:** OPINION OF OWNER. In an action for damages on account of an injury to chattels, the owner of such chattels is qualified by reason of that relationship to give his estimate of their value.

2. **Damages, Measure of.** "Where chattels are injured by the negligence of another, but not wholly destroyed, the measure of damages is the difference between the value of the chattels immediately before the injury and immediately thereafter." *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848, reaffirmed.

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

*Edson Rich* and *John A. Sheean,* for appellant.

*Warrington & Stewart, contra.*

FAWCETT, C.

Plaintiff alleges that on November 17, 1905, while he was unloading sugar beets from his wagon into a car of

the defendant on one of defendant's side-tracks, in the village of Sutherland, Nebraska, the defendant negligently and without due warning ran a train of cars and engine on to the side-track on which the car was situated in which plaintiff was unloading said beets, which train and engine ran against the said car, causing it to collide with plaintiff's wagon and team, thereby breaking and destroying said wagon, and throwing and dragging plaintiff's team for a distance of about 60 feet; that by reason of such collision one of plaintiff's mares which was hitched to the wagon was so injured that she sickened and afterwards, on December 9, 1905, died, and that his wagon was broken and destroyed; that the value of the mare was $125 and of the wagon $60. The answer is a general denial and a plea of contributory negligence. The reply is a general denial. There was a trial to the court and a jury, which resulted in a verdict in favor of plaintiff for $152.28, upon which judgment was rendered. A motion for new trial was duly filed and overruled, and judgment entered on the verdict.

In their brief, counsel for defendant say: "There is a great deal of doubt as to whether the company caused any injury to the mare which afterwards died, but this question was properly submitted upon conflicting testimony, as were the questions of defendant's negligence and the contributory negligence of plaintiff, and the defendant will therefore confine itself to the limits above suggested." The limits suggested and upon which defendant relies for a reversal are: "(1) The court erred in admitting certain testimony from the plaintiff over the objection of defendant. (2) The court erred in overruling the defendant's motion for a new trial. (3) The verdict is contrary to instructions, is excessive, appearing to have been given under the influence of passion and prejudice, and is not supported by the evidence."

The testimony which it is claimed the court erred in admitting was the testimony of plaintiff as to the value of the mare in controversy. Defendant's objection is that

the evidence was "incompetent, irrelevant, and immaterial, no foundation laid, and that the witness had not shown himself competent to testify." The testimony objected to is as follows: "Q. Tell me if you know the value of this mare prior to the accident at Sutherland, Nebraska? A. Yes. Q. Tell the jury whether or not you have seen horses bought and sold, whether you have seen and know of horses bought and sold at Sutherland, Nebraska, on or about this time? A. Just hearing the purchase price between the parties. Q. You had not bought or sold any yourself prior to that time? A. No, sir. Q. This team you bought in this county, did you, down at Gothenburg? A. Yes, sir. Q. Tell the jury what the value of this mare was, what it would fairly and reasonably bring on the market? A. $100." Defendant contends that questions concerning the value of animals are largely the subject of expert testimony; that, to be competent, a foundation must be laid showing that the witness is qualified by experience and observation to fix a value upon the animal. While this rule is sound as to third parties testifying as to the value of an animal, it has been very much modified when applied to the owner of the animal. "The owner of chattels is qualified by reason of that relationship to give his estimate of their value." 17 Cyc. 113; citing Colorado, Illinois, Iowa, Massachusetts, Michigan, Nebraska, New York, Pennsylvania, Wisconsin. In fact, this rule has been extended also to apply to real estate: "The owner of real estate is assumed to possess sufficient acquaintance with it to estimate the value of the property." 17 Cyc. 115, citing Alabama, California, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New York, Ohio, Pennsylvania, South Dakota. We do not think the court erred in admitting this testimony. The only witness offered by defendant upon this point was one John Keith, who admits that he was in the employ of defendant for the special purpose of investigating this particular case, and that he had been

doing similar work for the defendant for many years. While it is true that Mr. Keith shows far greater knowledge of the value of horses than that possessed by plaintiff, we cannot say that the jury were not warranted under all the circumstances in giving more credence to the testimony of plaintiff than to the witness Keith.

It appears from the evidence that plaintiff paid $75 for the wagon about a year before the accident. He testified that at the time of the accident the wagon was as good as new. Only the running gear of the wagon was involved, as the box and seat were not on the running gear at the time of the accident. The undisputed evidence shows that the running gear alone was worth, new, $51. Plaintiff says that at the time of the accident it was just as good as new. Of that fact the jury were the judges. Plaintiff testified that immediately after the accident the wagon was not worth to exceed $5, and expressed doubt as to his ability to sell it for even that amount. No evidence was offered by defendant as to the value of the wagon immediately after the accident, but an attempt was made to minimize its loss by proving that after the accident plaintiff abandoned the wagon; that he left it on defendant's track, and notified defendant that it was its wagon; that defendant thereupon had the wagon repaired at a cost of $20.75; and its same witness, Keith, testified that after it was repaired the wagon was worth $35. Defendant therefore insists that this $35 be deducted from the value of the wagon immediately prior to the accident in determining the amount for which defendant should be held liable. We have very grave doubt as to the right of defendant to offer this proof under the general denial and plea of contributory negligence contained in its answer. But, whatever view may be taken of that question, the measure offered by defendant is not the true measure of damages in this state. The rule which we laid down in *Chicago, B. & Q. R. Co. v. Metcalf,* 44 Neb. 848, is the established rule in this state, viz.: "Where chattels are injured by the negligence of another, but not wholly de-

stroyed, the measure of damages is the difference between the value of the chattels immediately before the injury and immediately thereafter." This was the rule adopted by the trial court in its instructions to the jury.

We see no error in the record, and 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.

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BEDILIA WARD, APPELLEE, V. ÆTNA LIFE INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,279.

1. **Evidence:** INJURY: RES GESTÆ. In an action brought to recover upon an accident insurance policy, where the question is whether death resulted from an accidental injury for which the insurer is admitted to have been liable, the bodily condition of the insured between the date of receiving such injury and his death is a relevant fact, and all things done or said by the insured which expressed or showed his bodily condition in reference to the injury are relevant.

2. ———: HYPOTHETICAL QUESTIONS. Where his opinion as to the cause of death is asked of a physician called as a witness, it is neither necessary nor proper to include in the hypothesis the fact that the attending physician had pronounced the patient cured of an injury from which it was claimed his death resulted.

3. ———: ———. Error is not committed in permitting a hypothetical question which fairly reflects the case as made by the plaintiff because other facts afterwards established by the defendant's evidence are not included in the question. The fact that the defendant's evidence is on file in the form of a deposition does not alter the rule.

4. **Insurance:** ACTION ON POLICY: QUESTION FOR JURY. Whether the death of a person whose life was insured against death by accident was caused by an admitted accident or resulted from some

other cause is a question for the jury, unless the proofs as to such cause of death are so convincing that from them all reasonable men in the fair exercise of their judgment would adopt the same conclusion.

5. ———: DEATH: PROXIMATE CAUSE. Where a person accidentally injured is insured against accident under a policy which provides for the payment of a sum named in case death results solely from such injury within 90 days, all morbid changes in the exercise of vital functions or the texture of bodily organs which result from or are induced by such injury should be regarded as the effect thereof, and not as independent causes; and, when death results from such morbid changes, it is caused by such accident within the meaning of such policy.

6. ———: ———: ———. Where a person, after recovery from an accidental injury, succumbs to a disease which would not have been fatal but for the lowered vitality following such injury, the disease, and not the lowered vitality, is the cause of death.

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

*Greene, Breckenridge & Matters,* for appellant.

*Weaver & Giller* and *John M. Macfarland, contra.*

CALKINS, C.

The defendant issued an accident insurance policy to plaintiff's son on the 1st day of December, 1904. On August 1, 1905, the insured, who was by occupation a locomotive fireman, was injured in an accident occurring while he was at work in the railroad yards at Omaha. He was treated for this injury by his employer's physician, Dr. Smith, until August 9, 1905, when he was pronounced cured. On August 15 he again entered upon his duties as fireman upon a train leaving Omaha for Grand Island that night at about 11:30 o'clock. He performed his usual duties until reaching Central City the next day, when he became so ill as to be unable to fire his engine from that point to Grand Island. On reaching Grand Island, he went to a hotel, whence he was removed the next morning to the hospital, where he died that evening. The plaintiff,

who was the beneficiary named in said policy in case of death, brought this action, claiming that the injuries suffered by the insured on the 1st of August caused his death. The liability of the defendant for the accident occurring on the 1st of August was not denied, but it was contended that said injury was confined to the crushing or bruising of one foot of the insured, and that his death was not caused by said accident. There was a verdict for the plaintiff, from which the defendant appeals.

1. The plaintiff offered evidence as to complaints made by the insured concerning his bodily suffering from the time of his injury to the date of his departure on the trip to Grand Island. This evidence was objected to on the ground that it was hearsay; and its reception is now assigned as error. The rule in such cases, as stated by Mr. Stephen (Digest of the Law of Evidence, art. 11), is that, when any bodily feeling or state of the body of any person is a fact in issue or relevant to the issue, all things done or said by any such person which express or show the existence of any such state of body in reference to the particular matter in question are relevant, although they may not have been done or said on the occasion when the fact in issue happened. This rule has been recognized by our own court in *Western Travelers' Accident Ass'n v. Munson,* 73 Neb. 858, where it is said: "Statements of fact fairly indicative of a relevant bodily condition of the declarant at the time of the declaration will be received as circumstantial evidence of the existence of that condition, although made a considerable time after the injury was received." The claim of the plaintiff being that the injuries received by the insured on the 1st day of August caused bodily lesions which continued, and resulted in his death two weeks later, his bodily condition during that period was relevant to the issue. It therefore follows, under the rule above stated, that the things done or said by the insured which expressed or showed the state of his body were admissible.

2. The plaintiff called a physician, Dr. Walker, to whom

the principal facts concerning the injury were stated, and asked his opinion as to the cause of the death of the insured, assuming the facts so stated to be true. The defendant contends that the hypothetical question so propounded did not fairly reflect the evidence because it did not include the statement that the doctor who had treated the insured for the injury had discharged him. We do not think the plaintiff was bound to include in the hypothetical question this fact. To have done so would have required the witness to base his opinion partly upon the opinion of the attending physician, when he should be required to give his judgment independently upon the facts stated to him.

3. Another contention of the defendant was that the hypothetical question did not include the symptoms which developed after the removal of the insured to the hospital at Grand Island. At the time the hypothetical question was asked by the plaintiff, evidence of the symptoms of the insured after his removal had not been offered. We do not think that in making his case the plaintiff was bound to anticipate facts to be proved by defendant, nor to include them in a hypothetical question. It is enough if such question fairly reflects the case as made by the plaintiff. The fact that such testimony was on file in the form of a deposition does not alter the rule. Such deposition might or might not be offered; and the plaintiff was not bound to anticipate its introduction.

4. It is strongly insisted that the court erred in refusing to direct a verdict for the defendant. It was contended by the defendant that the crushing of the foot of the insured was the extent of his injuries, while the plaintiff claimed that he was also hurt in his side. The plaintiff's evidence as to the bodily condition of the insured at the time he left on the trip to Grand Island depended largely upon complaints made by him to his mother and sisters as to the existence of pain in his left side and groin. The significance of these pains was not explained by any of the professional witnesses called, and the jury

were left, if it believed the testimony of the members of the family of the insured, to draw without expert guidance such inference as seemed proper to it concerning the bodily condition indicated thereby. To the nonprofessional person pain is usually considered an indication of functional or organic derangement; and the jury, if it believed the insured suffered from such pains, might have drawn therefrom the inference that lesions of the affected parts still existed to which could be attributed his death, in the absence of any intervening cause.

The plaintiff, as we have already seen, called Dr. Walker, who was allowed to give his opinion of the cause of death in answer to a hypothetical question propounded to him, and he testified that he considered the injury the relative cause of the death. The evidence as to the cause of death offered by defendant was not at all conclusive. It appears that the weather was hot; that the insured drank more or less cold water before arriving at Central City, and that he there became sick and vomited. Dr. Hoge, the physician at Grand Island, says that the patient's skin was cold and clammy and his temperature a little subnormal at the time he came under his care, and that he diagnosed the case as one of heat exhaustion. Further testifying, he says the patient told him he had been working hard; that it was an exceptionally hot day, and that he had drank several gallons of ice water; and the doctor attributed his death to being overheated and to the drinking of the ice water, and finally gave the cause of death as collapse. Dr. Smith testifies as to treating the injured foot, but he does not disclose what, if any, examination he made of the patient to discover the extent of his injuries. A hypothetical case was submitted to Dr. Smith, omitting the evidence of complaints made by the insured as to pains in his side, but otherwise fairly reflecting the evidence, and he was asked whether the facts indicated that the death of the insured resulted from the injury of August 1. His answer was: "My opinion is that the injury had nothing to do with this other trouble.

Simply because I released him would show, so far as the injury was concerned, he was well and able to work." From this reply it would seem that Dr. Smith was principally concerned in vindicating his former diagnosis of the case. It is unfortunate that the only physicians who saw and treated the insured appear to have given the case such perfunctory attention. Both Drs. Hoge and Smith were in the service of the employer of the insured, whose interest it was to minimize the effects of the accident and to establish another cause of death; and the latter was also in the service of the defendant. This is to be given due consideration in determining the value of their opinions. Four other physicians were called by defendant, and upon a hypothetical case submitted to them gave as their opinion that the injury received by the insured August 1 was not the cause of his death. Three of them expressed the opinion that his death was caused by heat exhaustion, and the fourth that it was due to heart failure caused by overexertion and the drinking of ice water while in a state of overheat. In the hypothesis submitted to these witnesses, the fact that the insured had been treated by Dr. Smith for the injury and pronounced cured, or, to use the exact language, "released," was included. This was, as we have already seen, unnecessary, and is, we think, objectionable. The witness might understand that he was to assume the correctness of Dr. Smith's diagnosis, in which case the opinion he gave was not his own; and, if he did not so construe the question, he would be placed in the embarrassing position of criticising the conclusion of another member of his own profession. An expert witness should give his own judgment uninfluenced by the opinion of other experts; and a hypothetical question in which the opinion of another expert is stated is objectionable.

Again, in each question the drinking of large quantities of ice water was one of the facts assumed, and it seems to have been regarded as an important element by some of the physicians testifying. Yet this assumption was

founded wholly on the evidence of statements said to have been made to Dr. Hoge and the nurse by the patient. The direct testimony of the engineer for whom the insured was firing, as to the drinking of water, is that the insured went over to a windmill at Thummel and got a pail of water, and that before that both he and the insured drank "the water" until it got warm. Whether by "the water" he meant the water in the tank it is unnecessary to decide. Nothing was said by him to show that there was any ice water accessible, and the jury would have been justified in rejecting that part of the hypothesis as not proved. It certainly cannot be said that the evidence was so clear in support of one theory that no reasonable man fairly exercising his judgment could have refused his assent thereto.

The question whether the death of the insured was caused by the accident was therefore one to be submitted to the jury, and the court did not err in refusing to direct a verdict. *Modern Woodman Accident Ass'n v. Shryock*, 54 Neb. 250.

5. In the fourth instruction to the jury, given by the court on its own motion, the jury were told that the theory of the plaintiff's case was that the condition of the weather, the exertions of the insured, what he drank or might have eaten, and the different incidents of the trip to Grand Island brought on acute bodily disease from which he died, but that said causes would have been without avail to occasion such death if he had not been in a weakened and debilitated condition in consequence of the injuries received by him on the 1st day of August, and that, if the jury so believed, they might find for the plaintiff. The insurance was against bodily injuries effected through external, visible and accidental means, and the particular clause of the policy under which the plaintiff sought to recover provided that the defendant should pay the amount of the policy if death resulted solely from such injuries within 90 days. Great stress is placed by defendant upon the use of the word "solely"; and it is

urged that the effect of its use is to preclude a recovery if any other disorder manifests itself and causes or contributes to the cause of death. If the word "solely" is left out of the sentence, the logical meaning of the clause is not changed. It is still required that death should result from the injury, and this excludes the idea of other independent or cooperating causes. Starting with a bodily injury, all morbid changes in the exercise of vital functions or the texture of the bodily organs which result from or are induced by such injury should be regarded as the effect thereof, and not as independent causes. When death results from any such morbid change so resulting from or induced by such injury, the injury, and not the morbid change induced by it, is the cause of death. Beginning with a primary cause, conditions induced by such cause are effects thereof, and every condition so induced must be considered in relation thereto as an effect, and not as a cause. This doctrine, if not stated in so many words, is illustrated by the case of *Delaney v. Modern Accident Club,* 121 Ia. 528, where erysipelas and blood poisoning followed an insignificant cut; and it was held that disease brought about as the result of a wound is properly attributed to the wound, and death resulting from the disease is death resulting from the wound.

6. The instruction complained of goes still further, and permits the jury to find for the plaintiff, even if it should believe that no morbid condition remained as the result of said injury, if it found that the insured succumbed to causes which would not have produced death but for his lowered vitality. The power of the healthy body to resist disease varies greatly in different individuals, and in the same individual at different times. Undoubtedly a lower state of this power follows convalescence from a serious injury for a considerable period, and an attack of disease is more likely to prove fatal when the patient is found in such lowered state. When an attack of disease is followed by death, which would not have occurred but for the lowered vitality of the patient, such lowered state may

be considered as a condition that opens the way for the production of the effect, but not as its cause. In other words, it is not the cause of death, but the occasion, in that sense of the latter word in which it is understood to mean that which furnishes an opportunity for the event to occur, without being itself the efficient cause or sufficient reason therefor. Under the instruction referred to, the jury were authorized to consider any lowered vitality of the insured as a cause of death if they believed that death would not have occurred if the insured had been as strong in the power of resistance as before the injury, even though it might believe he was cured of the injury proper. For this reason, we think the giving of the instruction complained of was error.

Objections to other instructions were argued, but, as the same questions are not likely to recur, it is not necessary to discuss the same.

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

FAWCETT and ROOT, CC., concur.

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

REVERSED.

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HOME SAVINGS BANK, APPELLANT, V. A. C. SHALLENBERGER, APPELLEE.

FILED OCTOBER 22, 1908. No. 15,286.

1. **Guaranty:** CONSIDERATION. The extension of time of payment to a principal debtor is a sufficient consideration to support a new contract of guaranty made after the date of the renewal of such obligation, especially when the guarantor at the time of making such guaranty is still liable as guarantor for the payment of the debt renewed.

2. **Subrogation.** A third party guaranteeing payment to the payee of a promissory note is not entitled, upon payment of such note by him, to have the same delivered with a guaranty of the payee made to any indorsee of the note intact.

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

*W. S. Morlan,* for appellant.

*J. G. Thompson* and *Flansburg & Williams, contra.*

CALKINS, C.

This is an action upon the written guaranty by the defendant of a promissory note secured by chattel mortgage, of which one Summers was the maker and the Shelly-Rogers Company was the payee. The note was executed in renewal of one made to and guaranteed by the same parties, which became due on or before December 16, 1902. On the latter date Summers executed the note in question; and on December 20 the Shelly-Rogers Company indorsed the same to the plaintiff, agreeing that the defendant should guarantee the payment thereof. On the 30th day of December the defendant, who was absent from the state, executed upon a separate paper a guaranty in the words and figures following: "I hereby waive protest and guarantee payment of a note of $830.05 of date December 16, '02, due June 14, 1903, signed by W. P. Summers in favor of Shelly-Rogers Co. Signed this 30th day of December, 1902. A. C. Shallenberger." This guaranty was mailed by defendant to the Shelly-Rogers Company, who, in compliance with the agreement mentioned, delivered it to the plaintiff, who attached it to the note described therein. When the note matured, the maker having failed to pay the same, plaintiff demanded payment of defendant, who on July 18, 1903, sent to plaintiff a draft for the amount due thereon, with the request that the plaintiff forward to him the note uncanceled, together with the mortgage securing the same. Upon receipt of

this draft plaintiff forwarded the note and mortgage to defendant, first canceling the indorsement of the Shelly-Rogers Company. The defendant stopped payment of this draft, giving as a reason in a letter written by him on July 20 that he had since the transmission of said draft on July 18 discovered that the plaintiff had failed to protect the chattel mortgage securing the same, which had been lost through its neglect. The plaintiff thereupon brought this action, which resulted in a judgment for the defendant, from which the plaintiff appeals.

1. It is contended by the defendant that the contract of guaranty, being executed after the renewal note, required a new and independent consideration, for want of which it is void. This defense wholly depends upon the assumption that the defendant at the time he executed the guaranty had been released from liability upon his former guaranty by the unauthorized act of the Shelly-Rogers Company in renewing such note. It is urged on the part of the plaintiff (1) that such extension was expressly authorized; (2) that the guaranty was executed in fulfilment of a previous verbal promise; and (3) that a contract of guaranty executed after the date of the principal obligation is supported by the original consideration. As we deem the assumption above referred to unfounded, we shall consider none of these questions. It is not denied that prior to the 16th day of December the defendant was liable to the Shelly-Rogers Company upon his guaranty of the note in renewal of which the note in question was executed. It appears that, as between the Shelly-Rogers Company and the plaintiff, the discounting of the note was conditioned upon the Shelly-Rogers Company supplying the guaranty of defendant. Whether, as between the Shelly-Rogers Company and Summers, the maker of the note, the acceptance of the renewal note was also conditional upon the making of the guaranty by the defendant is not shown. It is clear that, as between the plaintiff and the Shelly-Rogers Company, the plaintiff would have had the right to cancel the transaction in case the

latter had failed to procure the defendant's guaranty. There is nothing in the fact of the conditional discounting of the renewal note from which it can be inferred that it had been unconditionally accepted from the maker Summers; and, in the absence of some proof that the note and the guaranty upon which it is conceded defendant was liable had been surrendered, it cannot be said that there was no present consideration for the signing of the guaranty at the time it was executed. If at that date the defendant was liable upon his guaranty of the matured note, there was a present consideration for the execution of such guaranty. There is nothing to show that, if the defendant had declined to execute the guaranty in suit and offered to take up the matured note, the Shelly-Rogers Company was not in condition to surrender him the Summers note and the mortgage securing the same upon such payment, nor that it might not have maintained an action against him upon his guaranty of the matured note had he refused to pay the same or to execute the guaranty of the renewal note. It is elementary that the extension of time to a principal debtor is a sufficient consideration to support a guaranty by a stranger for the payment of a new obligation (*Faulkner v. Gilbert,* 57 Neb. 544), and the fact that the guarantor is not a stranger to the obligation renewed, but is himself liable for the payment thereof, does not alter the rule.

2. The defendant's answer sets up that the Shelly-Rogers Company agreed with the defendant that it would keep the note in question secured by a chattel mortgage in conformity with the laws of the state of Colorado, but that the mortgage taken did not comply with such laws, and that in consequence the security was lost. This was denied by the reply, and, no proof being offered sufficient to support the allegation, this defense is not now urged in defendant's brief. It is, however, insisted that the defendant was, upon the payment of the note, entitled to have the same delivered to him with the indorsements thereon, and that the erasure of the guaranty made by the Shelly-

Rogers Company when it indorsed the note to the plaintiff was a breach of the duty owed by plaintiff to defendant. The defendant fails to point out what interest he had in this indorsement, or any circumstances under which he might have maintained an action against the Shelly-Rogers Company upon the same. As between the defendant and the Shelly-Rogers Company, the defendant was primarily liable, and could have made no claim against said company upon an indorsement which it had made to a third party. He was not, therefore, entitled to have the note with this indorsement upon it; and of the fact that it was canceled when returned to him he cannot complain.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

FAWCETT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial in accordance therewith.

REVERSED.

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ANNIE ZELENKA, ADMINISTRATRIX, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,320.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE. The negligence of one who carelessly places himself in a position exposed to danger cannot as a matter of law be said to be the proximate cause of an injury, if his position was discovered in time to avoid the injury by the use of reasonable care, and such care was not exercised. The third point in the syllabus of *Chicago, B. & Q. R. Co. v. Lilley*, 4 Neb. (Unof.) 286, disapproved.

2. **Railroads:** NEGLIGENCE: QUESTIONS FOR JURY. In an action charging the defendant with negligently operating its engine so as to cause the death of the plaintiff's intestate, where the evidence

as to whether the defendant might, after the discovery of the dangerous position in which the deceased had placed himself, by the exercise of reasonable care, have prevented the injury is such that different minds might honestly arrive at different conclusions, the question is properly submitted to the jury.

3. Appeal: INSTRUCTIONS: HARMLESS ERROR. Instructions, awkward in form and ungrammatical, are not for that reason prejudicially erroneous, unless it appears that the same were likely to mislead the jury. Where different instructions are given upon the same point they should be considered together; and if, so considered, they fairly submit the case, it will not be reversed for defects in any one instruction.

4. Evidence: OPINIONS OF EXPERTS. Where the question is within what distance an engine running at a given rate of speed can be brought to a stop, such question is within the rule that, as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are relevant facts.

5. Witnesses: CROSS-EXAMINATION. While ordinarily it is not permitted to cross-examine a witness upon a matter not related to his testimony in chief, this does not mean that the cross-examination must be confined to questions asked upon the direct examination, but rather to the subject matter of his examination in chief.

6. Appeal: EVIDENCE ON IMMATERIAL QUESTION. Where the cause of death is admitted by the pleadings to have been a physical injury, the question whether death resulted from shock or from morbid changes in the vital functions is immaterial; and the judgment will not be reversed for the reception of evidence upon this point, unless it can be pointed out in what manner the same was prejudicial to the party objecting thereto.

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

*Greene, Breckenridge & Matters,* for appellant.

*E. R. Leigh* and *Byron G. Burbank, contra.*

CALKINS, C.

The defendant is a corporation engaged in the business of maintaining stock yards at South Omaha in this state. The conduct of its business requires the moving of railroad cars from place to place in said stock yards, over

tracks provided for that purpose, for which the defendant employs some 12 or 14 locomotive engines, with the crews necessary to operate the same. The plaintiff's intestate, Philip Zelenka, was a car oiler and repairer, whose duties required him to be in the defendant's yards; and on the 13th day of November, 1905, while walking along and upon one of the railroad tracks in said yards, he was struck by one of defendant's engines, which was passing along said track, and received injuries from which he shortly afterwards died. The plaintiff brought this action to recover damages for his death, alleging that the same was due to the negligent operation of said engine. The jury found for the plaintiff in the sum of $2,250, and from a judgment upon this verdict the defendant appeals.

1. It was conceded that the deceased carelessly placed himself in a dangerous position; but the jury were told, in substance, that if his peril was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the proximate cause of the resulting injury. The soundness of this doctrine is severely criticised by the defendant, who urges that it is inconsistent with the doctrine of contributory negligence which obtains in this state, and quotes in support of his position extracts from the opinion of AMES, C., in *Chicago, B. & Q. R. Co. v. Lilley,* 4 Neb. (Unof.) 286. In the rehearing of the case the conclusion reached in the first opinion was adhered to, upon the sole ground that the evidence was insufficient to establish the fact that the defendant might have avoided the injury by the exercise of reasonable care on its part after discovering the dangerous position in which the deceased had placed himself; and we do not therefore regard the case as authority for the position contended for by defendant. The doctrine there questioned was definitely approved in *Omaha Street R. Co. v. Larson,* 70 Neb. 591, in an opinion by OLDHAM, C., in which AMES, C., concurred. The learned commis-

sioner in writing the opinion reviewed the decisions in this and other states, and the doctrine is too firmly adopted here to be further questioned. It has recently been reiterated by the United States supreme court (*Chunn v. City & Suburban Railway,* 207 U. S. 302), and we believe is generally sustained by the great weight of authority.

2. It is, however, contended that the evidence in this case was insufficient to sustain a finding by the jury that the defendant's agents and servants, after discovering the danger in which the deceased had placed himself, might, by the exercise of reasonable care, have avoided the injury which resulted, and that the court therefore erred in refusing to direct a verdict for the defendant. It appears that the engine was moving north along one of the tracks in the yard, with the tender in front, and hauling one car. The train crew was composed of Mr. Wonder the foreman, the engineer, the fireman and one brakeman. The engineer and fireman were at their respective places in the cab of the engine, while the foreman Wonder was stationed at one corner of the tender upon the footboard, and the brakeman at the other, on the front of the train as described. The position of the tender obstructed the sight of the engineer, and he was compelled to rely upon signals given by the foreman and brakeman, who were riding where they had a full view of the track before them. The engine was moving at the rate of six miles an hour, and the deceased was first discovered walking along an adjoining track at the rate of about three miles an hour. Both the foreman and brakeman discovered the deceased when about 200 feet from the engine. Up to this point there seems to be no dispute about the facts; and the principal discrepancy in the testimony of the witnesses concerning what occurred thereafter is in their estimates of time and distance. The foreman testifies that, when the engine came within about 30 feet of the deceased, he stepped upon the track along which the engine was moving, and that, as he did so, the foreman shouted to him; that the deceased did not seem to hear the first shout, which was

immediately repeated, and that thereupon he turned and apparently discovered the engine; that he tried to pass over the track but was struck by the footboard on the end of the tender, and thrown down upon the bed of the track, rolled under the footboard of the tender, and in that position was dragged 20 feet or more. He testified that immediately as he shouted he gave the stop signal, and that the brakeman, standing on the other side, also gave the stop signal. The engineer did not see the deceased at all, and testifies that he reversed the engine and applied the brakes on account of hearing the fireman shout, "Look out!" for the second time. It appears from the testimony of some of the witnesses that this engine, while being operated at the speed at which it was then moving, should be stopped within the distance of 6 feet, and the engineer himself admitted that it could be stopped in less than 15 feet. According to the testimony of the witnesses most favorable to the plaintiff's contention, the engine ran from 20 to 30 feet after the danger signals were given, and about the same distance after it struck the deceased. Other witnesses testified that the deceased was much nearer the engine when he stepped upon the track. If it is true that this engine might have been stopped within 6 to 15 feet, and that it ran from 40 to 60 feet after the danger signals were or should have been given, it would seem that this could only be explained upon the theory that there was an unjustifiable delay in giving, watching for or acting upon the signals. Whether, after the discovery of the dangerous position in which Zelenka had placed himself, the engine could, by the use of reasonable care, have been stopped in time to avoid the injury was a question upon which different minds might honestly come to different conclusions, and was therefore a question for the jury to decide, and the court did not err in refusing defendant's request to direct a verdict in its favor.

3. The instructions of the court are severely criticised; the defendant's principal objection being directed to instruction numbered 8, given by the court on its own mo-

tion, which was as follows: "One should use reasonable diligence and caution, and especially in places of extra danger, in looking out for his own safety, and, if one is negligent in his own behalf, he cannot complain of the negligence of another, if the negligence of both, acting together, *approximately* contributes to his injury. This, however, does not admit of one's being run down by an engine because he has carelessly placed himself in a position of danger in front of an engine, and he being unaware of the engine's approach, if those in charge of the engine, after knowing of the presence of the one in front of it, and that he is apparently unaware of his peril, can, by the use of ordinary care in the manipulation of appliances for such purpose, stop the engine and thus avoid the injury. There could be no recovery, however, where the act of placing one's self in a place of peril was concurrent with acts of negligence of those in charge of the engine. In order that the one injured may complain of his injuries, who has carelessly placed himself in a position of peril, he must make it appear by a preponderance of the evidence that, after he had unwittingly placed himself in such position, the other, by the use of ordinary care and caution in his behalf, knowing of his situation or reasonably being charged with such knowledge, might have prevented his injury." The foregoing instruction is not a model of clear and concise statement. The judge, evidently by a slip of the pen, used the word "approximately" when he meant "proximately," in the first sentence of the instruction, which made that paragraph meaningless. Some of the succeeding sentences are involved in style; but we have long ago held that instructions are not prejudicially erroneous because awkward in phraseology or ungrammatical, provided that their meaning is clear and not likely to be misunderstood by the jury. *Langdon v. Wintersteen,* 58 Neb. 278. We have often held that instructions must be taken together and considered as a whole, and this instruction should therefore be considered in connection with the others given upon the same point.

It was followed by instruction numbered 9, in the words following: "It was the duty of the ones in charge of said engine that struck the deceased to use such means as was in their power to stop said engine, after it was apparent to them that the deceased was in a place of peril, unconscious of said peril, and that, unless said engine was stopped, deceased was liable to be injured. A failure to use ordinary care to so stop said engine by the immediate use of appliances at hand, after knowing of the dangerous position of the deceased to said approaching engine, or that there was an urgent reason for stopping said engine, would be negligence. After knowing of the dangerous situation of one in peril, or that there is reasonable grounds to believe one may be in peril, a reasonable use of appliances at hand for the purpose of stopping machinery, and thus avoiding the peril of the one threatened, is absence of negligence. In considering whether or not the agents and servants of defendant were negligent in the manner complained of by the plaintiff, you will consider all the facts and circumstances of the case bearing thereon and therein; the manner of the deceased's approach and entering upon said track over which said engine was proceeding; the fact of the deceased being an employee at said place; his acquaintance with the work of the yard; the fact that he was known to said trainmen; the speed of the engine that struck him; the conditions of the weather; the ringing of the bell; the distance in front of said engine of the deceased stepping upon the track; the efforts made by the trainmen to attract his attention; his actions at such time; signals and communications to the engineer in charge of the engine; and efforts made by the engineer by use of his appliances to stop said engine, and all the facts and examinations bearing thereon, disclosed by evidence." This instruction makes clear much that was obscure in the preceding one, and we think the two, taken together, were not likely to mislead the jury upon the essential point thereof; but the defendant tendered, upon this question, another instruction, which was

given by the court, in the words following: "You cannot infer that the defendant was negligent merely because the defendant's engine ran upon Philip J. Zelenka and injured him so that he died. But the burden rests upon the plaintiff to establish by a preponderance of all the testimony that the defendant negligently and carelessly ran upon and injured Zelenka after he was seen upon the track upon which the engine was running. All persons connected with the engine crew had the right to assume that Zelenka, who was known to them to be employed in the stock yards as a car repairer and oiler, would appreciate the danger of going upon the tracks of the defendant and walking thereon, and a mere failure to stop the train after Zelenka was seen thereon does not create a presumption of negligence, and, to find the defendant negligent in that regard, the burden rests upon the plaintiff to show by a preponderance of the testimony that the defendant's engineer failed in the exercise of reasonable care to bring the engine to a stop as quickly as he could after he was advised of the emergency or under the circumstances should have known of it." This instruction served to explain whatever obscurity existed in those preceding it, and we are satisfied that the three, taken together, were as favorable to the defendant as the law permitted.

Complaint is made of the court's action in giving other instructions on its own motion, and of its refusal to give certain instructions tendered by the defendant. The objections to the other instructions were of the same character, although less serious than those made to instruction numbered 8. The instructions tendered and refused related to the same subject, and are disposed of by the conclusion that the three instructions quoted, considered together, fairly state the law of the case.

4. The defendant complains of the admission of testimony of witnesses who were permitted to give an opinion as to the distance within which the engine in question might have been brought to a stop. These witnesses ap-

pear to have been familiar with and to have had experience in running this particular engine. The argument of the defendant does not disclose the legal nature of the objections to their testimony, but seems to be directed against its veracity and probability. It is a general principle that, where there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are relevant facts. Stephen, Digest of Evidence, ch. 5, art. 49. We think the question of the distance required to bring a locomotive engine to a stop is within the rule stated, and that an opinion concerning the same may be properly given by a witness shown to be skilled in the art of handling such engine.

5. William Metz, the brakeman who was standing on the footboard of the tender, was called as a witness, and testified concerning the accident. He stated that he saw the deceased step onto the track about 8 feet ahead of the engine; that he "hollered," and turned around and put his arms in the hind railing to protect himself from being pulled under the engine, and that he did not see Zelenka at the moment he was struck, but that he was the first man to reach him after the injury. On the cross-examination he testified that, after turning and taking hold of the rail, he saw no more of Zelenka until his head appeared under his feet. He was then asked the following question: "And you saw his head in that condition until the train slowed down and stopped?" This was objected to by the defendant as not being a proper cross-examination; and, the court having overruled the objection, its action is now urged as error. In this state the strict rule of cross-examination has been adopted, and it is not ordinarily permitted to cross-examine a witness upon a matter not related to his testimony in chief, simply because such matter is relevant to the issues. This does not, however, mean that a cross-examination must be confined to the questions asked upon the direct examination. Any question concerning the matter which is the subject of the direct ex-

amination may be inquired into. In this case the witness had sought to give a history of the circumstances of this accident as observed by him, and the fact that he failed to mention some of them on the direct examination does not preclude the right to bring out such circumstances on cross-examination.

6. The defendant assigns error of the court in permitting a witness, Dr. Shindel, to testify that in his opinion the inflammation of the wound, due to infiltration of sand and dirt, caused the death of Zelenka. The answer admits that the death of Zelenka resulted from the injury he received while attempting to cross one of defendant's tracks, and it would follow that, if the defendant was responsible for the injury, it was responsible for the death, and that the question whether death resulted from the shock of the accident or from some morbid change in the exercise of vital functions induced by the injury would be immaterial. We cannot see how the defendant could be prejudiced by the introduction of such testimony, and the error in the introduction thereof, if error there was, was error without prejudice.

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

ROOT, C., concurs.

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

AFFIRMED.

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WILLIAM BISENIUS, APPELLEE, V. CITY OF RANDOLPH, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,127.

1. Constitutional Law: JUDICIAL POWERS. Section 8978, Ann. St. 1907, does not delegate legislative authority to the courts. Said statute is valid, and may be enforced without violating article II, or section 1, art. III, of the constitution of Nebraska.

2. **Cities:** ACTION TO DISCONNECT TERRITORY: DEFENSES. In proceedings under section 8978 aforesaid, it is not a defense that the defendant is indebted upon its bonds or otherwise.

3. **Appeal:** AFFIRMANCE. Upon an appeal in an action under said statute, the judgment of the district court will be affirmed, unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law. *Michaelson v. Village of Tilden*, 72 Neb. 744; *Gregory v. Village of Franklin*, 77 Neb 62.

4. **Case Distinguished.** *City of Hastings v. Hansen*, 44 Neb. 704, distinguished.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

*Wilbur F. Bryant*, for appellant.

*Clarence B. Willey, contra.*

ROOT, C.

Defendant is a municipal corporation having more than 1,000 and less than 5,000 inhabitants. Plaintiff owns and occupies a tract of land containing about 150 acres within and contiguous to the boundary of said city, and also owns another parcel of real estate of about 60 acres in like situation, except that he does not reside thereon. Plaintiff brought this action under section 8978, Ann. St. 1907, to have said territory disconnected from the defendant corporation. In addition to alleging the foregoing facts, he stated that said lands were unplatted, and that at all times since their incorporation within defendant's boundaries had been, and now are, used exclusively for agricultural purposes, and that they receive no benefits in common with the platted portion of defendant, and were included and retained therein solely for the purpose of subjecting them to municipal taxation. Defendant demurred to the petition, for the reason, among other things, that the court did not have jurisdiction of the subject matter of the controversy, and later answered over, admitting plaintiff's ownership and residence, and denying all other allegations in said pleading. As a separate de-

fense defendant alleged that, while said real estate was within its corporate limits, bonds in the aggregate of $20,000 were legally issued and sold by it for corporate purposes, and that said debt is now wholly unpaid; that to detach the said territory will impair the security pledged for the payment of said bonds, and an additional burden will thereby be laid upon the remaining property owners within said city limits; that the bonds are payable to bearer, and defendant does not know who now owns them. Plaintiff demurred generally to the second defense, and the demurrer was sustained. Upon a trial of the other issues, the court found for plaintiff, and disconnected said territory. Defendant appeals. We have been favored with exhaustive and helpful arguments by counsel, and thereby our labor has been materially lightened.

1. Defendant contends that the statute under which this action is prosecuted (section 8978, Ann. St. 1907) is unconstitutional and void because it attempts to vest the court with legislative and administrative power. In effect, it provides that one situated as is plaintiff may petition the district court to disconnect unplatted real estate from the city limits. A summons is thereupon issued and served as in a civil action. If a majority of all the members of the city council vote to disconnect said territory, the court enters a decree in conformity therewith, but, if the city desires to contest, it shall answer, and, if the court finds in favor of the petitioner, "and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly." With some slight amendments this law has been upon our statute book for 29 years, during which time the courts have assumed on many occasions the functions therein prescribed, and, unless the statute appears beyond all reasonable question to be unconstitutional, it ought not to be cut down at this late day. *Dean v. Borchsenius,* 30 Wis. 236. It is argued that the words "justice and equity" mean merely the dictate of right in accordance with some positive man-

date of the law; that the legislature does not direct the court to ascertain any fact or group of facts upon which the law by its operation will exclude the territory, but that the court under the statute may exercise legislative policy. We cannot agree with counsel. The court is certainly called upon to find, as a matter of fact, whether the lands described in the petition are unplatted and situate adjacent to the boundary of the city; whether the petitioners represent a majority of the resident electors of that territory; or, if the lands are unoccupied, whether the petitioner is the owner thereof.

In *City of Wahoo v. Dickinson,* 23 Neb. 426, in considering the preceding section of said statute, we held that the court had power in a proceeding instituted for the annexation of territory to a municipality to consider and determine whether that real estate would receive material benefits, and also whether justice and equity required such annexation. In *Village of Hartington v. Luge,* 33 Neb. 623, we again held that the district court had power to determine either or both of said propositions. No attempt was made in either of those cases to give legal definition to the words "justice and equity" as used in the particular statute. In *State v. Dimond,* 44 Neb. 154, speaking through Mr. Justice POST, we adopted from the opinion of Mr. Justice Mitchell in *State v. Village of Minnetonka,* 57 Minn. 526, a definition of the conditions essential to vest county commissioners with power to incorporate territory within a municipality; that is, such lands must "have some unity of interest with the platted portion, in the maintenance of a village government." And Mr. Justice POST continues in his opinion that the rule applied is not only reasonable, but safe and logical. In *City of Wahoo v. Tharp,* 45 Neb. 563, the definition given in *State v. Dimond, supra,* is adopted in the syllabus and applied to section 99, ch. 14, Comp. St. 1893. In *Village of Syracuse v. Mapes,* 55 Neb. 738, the opinion of Mr. Justice NORVAL recognizes said test in determining whether justice and equity call for the incor-

poration of any particular tract within the boundary of a municipal corporation. The consensus of the opinions is that the legislature only authorizes the annexation of territory, against the will of its owner, to a city of the second class or a village where the lands are urban in character and have some unity of interest with the platted portion in maintaining city or village government. It follows that in construing section 8978, *supra,* it should be considered that whenever unplatted lands within the boundaries of, and adjacent to, the corporate limits of such city or village are so situated that they do not have that unity of interest with the platted portion hereof, justice and equity dictate that they should be excluded therefrom. If the municipal authorities will not concede those facts, the district court, upon the landowner's application, may find whether they exist, and, upon a decision in favor of the individual, the law automatically works the desired change, the decree being the settled evidence of those facts. The legislature dictates the facts upon which the change shall be made; and the court adjudges whether those facts exist in the particular case. The tendency of the courts of sister states is to uphold as constitutional like statutes. *Young v. Salt Lake City,* 24 Utah, 321; *Pelletier v. City of Ashton,* 12 S. Dak. 366; *Forysthe v. City of Hammond,* 142 Ind. 505, 516, 30, L. R. A. 576; *City of Burlington v. Leebrick,* 43 Ia. 252; *Henrico County v. City of Richmond,* 106 Va. 282; *City of Jackson v. Whiting,* 84 Miss. 163, 36 So. 611; *Morton v. Woodford,* 99 Ky. 367, 35 S. W. 1112; *Nash v. Fries,* 129 Wis. 120; *Village of Fairview v. Giffee,* 73 Ohio St. 183.

We have recently recognized the principle in *Barnes v. Minor,* 80 Neb. 189. Counsel cites and seems to rely on *City of Hastings v. Hansen,* 44 Neb. 704. The city of Hastings was governed by the act of March 14, 1889 (laws 1889, ch. 15), which did not provide for disconnecting territory from cities of the class thereby established. The general statements in the syllabus and in the opinion of Mr. Commissioner RAGAN, when applied to the subject

matter considered in that case, are not essentially misleading. All that we decided in that case was that the statute relating to the city of Hastings specifically provided that the limits and boundaries of all cities affected thereby should be and continue as they had theretofore existed, and did not make any provision for the diminution of that territory. So that, in the circumstances of that case, for the courts to have assumed jurisdiction would have been to usurp legislative power.

The case of *State v. Dimond,* 44 Neb. 154, and *Village of Osmond v. Smathers,* 62 Neb. 509, do not, as counsel argues, conflict with the actual decision in *City of Hastings v. Hansen, supra.* In *State v. Dimond* we had occasion to consider an entirely different statute from that controlling us in the *City of Hastings* case, and Mr. Justice POST, on page 161 of said report, recognizes the principle that protected the municipality in the *City of Hastings* case: "We do not doubt the unlimited power of the legislature, in the absence of constitutional restriction, with respect to the boundaries of municipal corporations." In *Village of Osmond v. Smathers, supra,* it will be noticed that Mr. Chief Justice NORVAL justifies his opinion by reference to *State v. Dimond, supra.* We did not hold in *Village of Osmond v. Smathers, supra,* that a court of equity had inherent power to change the boundaries of the various municipalities within the state, but that, as the statute had fixed the conditions upon which the authorities might include land within a village or city of the second class, a court would in a proper case, upon application and notice, inquire and find whether those facts actually existed, and, if they did not, would grant the individual relief from a plain usurpation of power. *City of Galesburg v. Hawkinson,* 75 Ill. 152, is cited as a proper exposition of the principles that should control our decision in the instant case. The Illinois case was examined by Mr. Justice MAXWELL and disapproved in *City of Wahoo v. Dickinson,* 23 Neb. 426. The opinion of Mr. Justice MAXWELL has been extensively cited and approved

by the courts of sister states, and we have no inclination to discredit his reasoning. It was marked, as are most of his writings, with his strong appreciation for the practical, and has furnished a safe guide for the district courts during the past 20 years.

The evidence in this case does not conflict as to any material fact, and therefrom it appears that plaintiff's realty forms two compact tracts of farm land aggregating over 200 acres, separated only by a road; that not only is this land not platted, but there intervenes between it and the platted portion of defendant unplatted real estate used for pasturage. None of the municipal improvements extend to plaintiff's said property, and he devotes said real estate to farming purposes exclusively. It appears in the record that at the time plaintiff purchased the land, eight years ago, it was within defendant's limits, but there is no evidence whatever to inform us under what circumstances defendant's boundaries were located so as to include this territory. Defendant proved that its water mains extend to within 200 feet of plaintiff's property; that it had expended considerable money in improving the highway which bisects his farm, and that, if plaintiff would agree to take electric lights, a wire to convey the current from its power house would be extended to his home. Notwithstanding this evidence, we are of opinion that the land under consideration does not have a unity of interest with the platted part of said city in the maintenance of municipal government, and that the district court ruled correctly in so finding. We are bound by those findings, unless it appears that the trial judge committed an important mistake of fact or an erroneous inference of fact or law, and that he has not done. *Michaelson v. Village of Tilden,* 72 Neb. 744; *Gregory v. Village of Franklin,* 77 Neb. 62.

2. It is argued that as defendant incurred $20,000 indebtedness during the time that plaintiff's land was within said corporation, and as said obligation is wholly unpaid, it is unjust and inequitable to permit said real estate to

escape taxation for the satisfaction of said debt. So far as the question between the municipality and plaintiff is concerned, the fact that the bonds of the city have been issued and sold, and the money applied to needed city improvements, can constitute no defense to this action. The money was no doubt legitimately and honestly expended, and the city has the proceeds in the form of public utilities, which every city and village in the state should own. The question whether plaintiff's land should be released from this burden or not is one which might be of importance to the holders of the bonds of the city, and, as they are not parties to this action, their rights cannot now be determined. The subject is, in the first instance, for the legislature. But the courts cannot pass upon the rights of parties interested unless they are made parties to the action. It necessarily follows that the statements contained in paragraphs 3 to 10, both inclusive, in said answer did not constitute a defense to the petition. *Richards v. Dagget,* 4 Mass. *534; *State v. City of Lake City,* 25 Minn. 404; *Town of Depere v. Town of Bellevue,* 31 Wis. 120; *Johnson v. City of San Diego,* 109 Cal. 468, 30 L. R. A. 178; *Miller v. City of Pineville,* 121 Ky. 211, 89 S. W. 261; *Commissioners of Laramie County v. Commissioners of Albany County,* 92 U. S. 310; *Gottschalk v. Becher,* 32 Neb. 653.

Complaint is made that the court erred in permitting plaintiff to introduce certain photographs in evidence. It appears from the other evidence that at least two of the three photographs correctly reproduce the appearance of said tracts. Whether the evidence is competent or incompetent is immaterial, as the case was tried to the court without a jury, and error cannot be predicated upon its admission. Furthermore, there is sufficient evidence to sustain the findings of the court without considering said photographs.

A careful consideration of the record and of all points argued before us satisfies us that the judgment of the district court should be affirmed, and we so recommend.

FAWCETT, C., concurs.

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

AFFIRMED.

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J. T. ARTHUR, APPELLANT, V. M. J. GLOVER ET AL., APPELLEES.

FILED OCTOBER 22, 1908. No. 15,227.

1. **Surface Water:** DRAINAGE. "Every proprietor may lawfully improve his property by doing what is reasonably necessary for this purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause surface water to flow on the premises of the latter to his damage." *Aldritt v. Fleischauer*, 74 Neb. 66, approved and followed.
2. ———: ———. "An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence." *Aldritt v. Fleischauer*, 74 Neb. 66, approved and followed.
3. **Waters:** DRAINAGE. Two or more adjoining landowners may lawfully join in the construction of a ditch solely upon the premises of one thereof, where the object and purpose is to drain a pond situated partly on the lands of all of said proprietors.

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

*Sullivan & Squires,* for appellant.

*C. L. Gutterson* and *N. T. Gadd, contra.*

ROOT, C.

The defendants Glover own the north half of section 35 and the south half of section 26, in town 18, range 18,

Custer county. Mrs. Amos owns the northwest quarter of said section 26, and plaintiff owns the west half of section 23, all in said town and range. Near the center of section 26 is a depression covering some 50 acres, and extending into the southeast quarter, the southwest quarter and the northwest quarter of said section. Surface water from some 400 acres of land drains into said depression, forming a pond at times two to three feet in depth. This water escapes by evaporation or percolation only, and entirely disappears for months at a time, but not so that said land may be cultivated or utilized for meadow or pasture. Extending south close to the half section line in section 26 is a draw or canyon some 10 feet in depth, and running thence in a generally northern direction through the Amos land, and over the southwest quarter of section 23 owned by plaintiff, till within some 15 rods of Waggoner creek, at which point the banks of the draw disappear, and a wide and very slight depression marks the course of said channel over the bottom land to Waggoner creek, which flows in a general east and west direction. The bed of this creek is about eight feet in width, and the banks some three feet in height. Ordinarily said bed is dry, but after rainstorms surface water passes along said creek till it reaches the Loup river. Plaintiff farms the bed of said creek and of the draw referred to, and, by reason of some years of cultivation, the banks of said drains have been sloped so that ordinary farming machinery can be used to plant, till and garner the crops grown therein. Waggoner creek drains some 5,000 acres of land. But a few rods separate the lowest point in the rim of said pond and the canyon or draw hereinbefore referred to. Mrs. Amos and the Glovers made arrangements whereby the latter were to dig a ditch to connect the part of said pond on Mrs. Amos' farm with the said draw, so that the lagoon might be drained and the land reclaimed. The ditch would conduct the water into said draw, and thence northward

to and over the bottom of and into Waggoner creek. To prevent the completion of said ditch, this action was brought against the Glovers, omitting Mrs. Amos from the suit. It is not alleged, nor was there any proof to the effect, that defendants were guilty of any negligence, but the broad ground was taken that they did not have any right to discharge the waters from said lagoon into the canyon, and thence down to and over the bottom and into the aforesaid creek. There is little, if any, conflict in the evidence, which is fairly reflected in this statement of fact.

Elaborate briefs have been furnished and many authorities cited for our consideration. We shall not attempt to review them, as this case is clearly ruled by *Aldritt v. Fleischauer,* 74 Neb. 66, and *Todd v. York County,* 72 Neb. 207. The only possible distinction between *Aldritt v. Fleischauer* and the instant case is that in the former the draw seemed to extend, with well-defined banks, to Turkey creek, whereas in the case at bar the water from the draw or canyon must pass over a few rods of bottom land to reach Waggoner creek; but in each case the draw is the provision made by nature for the drainage of the nearby lands, and in each case the draw furnished the nearest and most natural way for the drainage of the pond. The case can be disposed of without reference to sections 5543, 5544, Ann. St. 1907, which plaintiff's counsel insist are unconstitutional. The fact that defendants were turning the water into a channel on Mrs. Amos' land is immaterial, when we understand that the ditch was for the mutual benefit of Mrs. Amos and defendants, and that the effect thereof was to drain her land, as well as that of defendants.

The judgment of the trial court dismissing plaintiff's petition was right, and we recommend that it 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.

BARNES, C. J., concurring.

The opinion of the commissioner meets with my approval. I do not understand it in any way to be a departure from the common law rule that a party has no right to collect surface water in a ditch or drain, and discharge it or permit it to flow onto the land of another without the latter's consent, as we first held in *Davis v. Londgreen,* 8 Neb. 43, and to which we have adhered in an unbroken line of decisions down to and including *Town v. Missouri P. R. Co.,* 50 Neb. 768. There can be no doubt but that we are firmly committed to this rule, and it is not our purpose to depart from it. My concurrence is based on the fact that the evidence in this case takes it out of the common law rule, and brings it clearly within the rule announced in *Todd v. York County,* 72 Neb. 207, and *Aldritt v. Fleischauer,* 74 Neb. 66. I am of opinion that the evidence in this case fairly shows that the waterway, into which the defendant proposes to drain the pond situated on his land, when it reaches the plaintiff's premises, does not lose its distinctive character as a waterway. It is true that it widens out somewhat, and for a short distance allows the water to spread and cover more surface than it does where it is turned into the ravine. Still the flow at the place in question is unobstructed, and is continuous until it reaches Waggoner creek.

For this reason, I concur in the conclusion reached by the commissioner.

LETTON, J.

I dissent. I think the facts in the case bring it within the rule of *Davis v. Londgreen,* and that the doctrine of *Todd v. York County* and *Aldritt v. Fleischauer* is not applicable.

# FIRST NATIONAL BANK, APPELLANT, V. F. W. SAMUELSON ET AL., APPELLEES.*

FILED OCTOBER 22, 1908. No. 15,290.

**Principal and Surety:** DURATION OF LIABILITY. A bond given to a national bank by its president to insure the faithful performance of his duties as such officer, which purports to continue "during his appointment," must be read in connection with the term of that appointment, and, if it is for a definite period, the sureties will not be liable for their principal's misconduct subsequent to the expiration of the time for which he was appointed.

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

*John M. Stewart,* for appellant.

*C. Gillespie, contra.*

ROOT, C.

Plaintiff is a corporation organized under the national banking laws of the United States. In January, 1897, one Samuelson was elected or appointed by the directors of said bank as its president. Shortly thereafter the bond in suit was executed. Said instrument recites: "The condition of this obligation is such that, whereas the said F. W. Samuelson has been elected president of the First National Bank of Humboldt, Nebraska, now, if the said F. W. Samuelson shall well and truly perform all the duties required of him as such president, and shall well and truly account to the directors of the said First National Bank of Humboldt, or their successors in office for all moneys, securities, rights and property that may come into his possession or under his control during his appointment from time to time as such president as aforesaid, and shall well and truly render a true account of all transactions pertaining to his said office at the termina-

* Rehearing denied. See opinion, p. 535, *post.*

tion thereof, to the said directors, or their successors in office, or to such persons as they shall designate, then this obligation to be void, otherwise to be in full force and effect." A copy of the by-laws of the bank, and of the proceedings at the annual stockholders' and directors' meetings thereof in the years 1897 to 1903, both inclusive, was attached as an exhibit to the petition. The by-laws provide that the president shall hold his office "for the current year for which the board, of which he shall be a member, was elected, unless he shall resign, become disqualified, or be removed," and that the president shall execute a bond to the bank. In 1898, and thereafter for five years, Samuelson was reelected as a director and the president of the bank. During all that time no other bond was exacted by said corporation or given to it by Samuelson. In 1899, at a special meeting of the board of directors, a resolution was passed to the effect that the instrument in suit was a good and sufficient bond, but it is not claimed that the sureties were present at said meeting, or authorized, or thereafter ratified, that action of the board, nor is there any allegation to explain whether the sufficiency of the bond referred to the past, present or future. In 1903, and while president of said bank, Samuelson, it is alleged, created a liability on said bond. To a petition reciting the facts a general demurrer was filed by the defendant sureties, which was sustained by the court. Plaintiff appeals.

A consideration of the record satisfies us that defendants' liability in this action will be measured by the proper construction to be given the words "during his appointment," as recited in the undertaking. Was that appointment for an indefinite term, or but for one year? Plaintiff argues that the president of a national bank has an indefinite tenure of office, to be terminated only by his removal by the directors, or his resignation from, or disability to fill, the office. *Ida County Savings Bank v. Seidensticker,* 92 N. W. (Ia.) 862, and *Westervelt v. Mohrenstecher,* 76 Fed. 118, 22 C. C. A. 93, are cited as

sustaining this proposition. In the Iowa case a rehearing was granted (128 Ia. 54) and the final decision of that court is against plaintiff. The opinion of Mr. Justice Sanborn in the court of appeals is based upon a cashier's bond conditioned *"for and during all the time he shall hold the said office of cashier of the said bank."* The cashier had been appointed generally, so that neither the bond nor the record of the officer's appointment contained any limitation as to the sureties' liability other than that it should continue so long as Mohrenstecher was cashier of the bank. Unless the office of president of a national bank is a continuing one, then the court, having reference to the by-laws and the records of the directors' annual meetings, will easily understand the interpretation to be given the words "during his appointment." The appointment was "for the ensuing year." Section 5136 of the Revised Statutes of the United States empowers the board of directors of a national bank "to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places." Said act (sec. 5150) also provides that a director must be a stockholder of the bank and own at least ten shares of its capital stock. Said directors are to be elected annually, and "one of the directors, to be chosen by the board, shall be president of the board." The president of the bank and president of the board are identical. *Movius v. Lee,* 30 Fed. 298. Considering the law regulating national banks, one will ascertain that the cashier need not own any stock in the bank or be a director thereof, and his tenure of office is plainly at the pleasure of the board. Now, while the president also holds office at the pleasure of the directors, yet, unless he is reelected at the end of the year, first by the stockholders as a director, and then by the directors as president, his office terminates with the year for which he is appointed, so that it may be fairly said that his appointment is for one year, unless

annulled by death, resignation, disqualification or dismissal at the hands of the board of directors. With that construction of the law, the undertaking of the sureties is plain and unambiguous. It was for a year, and no more. *Treasurer v. Mann,* 34 Vt. 371, 80 Am. Dec. 688; *First Nat. Bank v. Briggs' Assignees,* 69 Vt. 12, 60 Am. St. Rep. 922; *Ida County Savings Bank v. Seidensticker,* 128 Ia. 54, 111 Am. St. Rep. 189; *Kaw Life Ass'n v. Lemke,* 40 Kan. 661; *Ulster County Savings Institution v. Ostrander,* 163 N. Y. 430; *Blades v. Dewey,* 136 N. Car. 176, 103 Am. St. Rep. 924.

In coming to this conclusion we construe the undertaking in the light of the surrounding facts as evidenced by the record, and, so far as we can, have tried to sit in the seat occupied by the parties to this undertaking when it was signed, and we do not believe that the defendants at that time thought, nor that plaintiff through its board of directors believed, or had any right to believe, or that the wording of the bond justified the belief, that the sureties were binding themselves and their estates, through the expectancy of Samuelson's life, to the plaintiff in this case.

We do not find any error in the record, and recommend that the judgment of the district court be affirmed.

CALKINS, C., concurs.

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

AFFIRMED.

The following opinion on motion for rehearing was filed January 9, 1909. *Rehearing denied:*

CALKINS, C.

No new question is raised by the motion for rehearing, and the brief in support thereof is a reargument of the questions discussed in the opinion. The sole contention

of the plaintiff is that a right interpretation of the express terms of the bond shows an intent to create an obligation continuing over the term of specific appointments.

Conceding that the strict rule of grammatical construction is that relative words refer to the nearest antecedents, we still think that the use of the words "from time to time" after the word "appointment" is insufficient to show that the obligors intended, or the obligees understood, that the bond was being given for all future terms for which the defendant Samuelson might be appointed. Considering the situation of the parties, and the fact that it was an annual office, and the absence of any circumstance tending to show that any one anticipated the reelection of Samuelson from year to year, we think the language, in order to embrace a future term, would need to be specific and certain.

Another reason which influences the mind of the writer is that the words "from time to time" are commonly used in drafting bonds securing payment and accounting by fiduciary officers for moneys received by them; the words "from time to time" uniformly qualifying the words "money received."

We think the question is fully and clearly disposed of in the opinion, and we therefore recommend that the motion for rehearing be overruled.

ROOT, C., concurs.

By the Court: For the reasons given in the foregoing opinion, the motion for rehearing is

OVERRULED.

## IN RE MITCHELL U. CLYDE.

## M. B. CARMAN ET AL., APPELLANTS, V. MITCHELL U. CLYDE, APPELLEE.

FILED OCTOBER 22, 1908. No. 15,323.

1. **Intoxicating Liquors:** LICENSE: BOND. If an applicant for license to vend intoxicating liquors in Nebraska tenders a bond not conditioned as required by statute, it is error for the license board to approve said bond and issue a license over the objections of remonstrators.
2. ———: ———: ———. In case a bond not conditioned as required by statute has been thus accepted, the applicant cannot, upon appeal in the district court, cure the defect by filing an amended bond conditioned as the law directs, and thereby validate the action of the license board.

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

*Perry & Lambe,* for appellants.

*Starr & Reeder, contra.*

ROOT, C.

Appeal from a judgment of the district court for Red Willow county affirming the action of the city council of McCook in overruling a remonstrance to the application of Clyde for license to sell intoxicating liquors in said city, and in granting said license.

Remonstrants objected in writing to the sufficiency of the bond tendered by Clyde, and to the sureties thereon, and upon the introduction in evidence of said undertaking specifically objected that said bond was not conditioned as required by chapter 50, Comp. St. 1907. The bond was plainly insufficient. The conditions therein were specifically detailed, but vital requirements of the statute were omitted, *i. e.,* that the vendor would not violate any of the provisions of chapter 50 aforesaid. The bond was so evidently inadequate that Clyde requested

the district court to make an order that he might file an amended bond with the city clerk, and said motion was sustained. Therein the learned district judge erred. A liquor bond must be conditioned as provided by statute. *Sexson v. Kelley,* 3 Neb. 104. The city council is limited in its authority, and, unless all of the jurisdictional facts existed, was without power to issue a license to applicant. *Zielke v. State,* 42 Neb. 750; *Pisar v. State,* 56 Neb. 455. Whether the defect was jurisdictional or not, the council should not have approved a bond that did not fully comply with the law. It was the duty of that board to compel the execution of an undertaking that would be free from defects, so that, in case of suit thereon, the plaintiff might not be compelled to rely upon estoppel to maintain his action. The district court should not have permitted the giving of an amended bond. If this may be done, then an applicant may substitute competent for incompetent signers to his petition. The court did not know whether the amended bond would be in any better form than the one accepted by the council, nor did it know whether the sureties thereon were solvent, nor do we know any of those facts. Any citizen of the state has a right to inspect the proposed bond of an applicant for license to sell intoxicating liquors, opportunity to object thereto, and a day in court upon those objections, but by the action of the district court all those possibilities were foreclosed, and the mayor and city council were made the final and *ex parte* arbiters of the sufficiency of said bond. We have uniformly held that, unless the record brought to this court sustained the applicant's right to a license, it should be denied him. *State v. Bonsfield,* 24 Neb. 517; *Bennett v. Otto,* 68 Neb. 652; *Payne v. Ryan,* 79 Neb. 414. The record in this case does not sustain the action of the city council or of the district court.

There are other assignments of error, but we do not determine any of them, as the foregoing is ample for the disposition of this case.

We therefore recommend that the judgment of the dis-

trict court be reversed and that the cause be remanded, with directions to that court to enter judgment reversing the order of the city council and revoking the license granted to Clyde.

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 the cause remanded, with directions to that court to enter judgment reversing the order of the city council and revoking the license granted to Clyde.

REVERSED.

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IN RE WILLIAM Y. JOHNSON.

M. B. CARMAN ET AL., APPELLANTS, V. WILLIAM Y. JOHNSON, APPELLEE.

FILED OCTOBER 22, 1908. No. 15,324.

1. **Intoxicating Liquors:** LICENSE: BOND. If an applicant for license to vend intoxicating liquors in Nebraska tenders a bond not conditioned as required by statute, it is error for the license board to approve said bond and issue a license over the objections of remonstrators.

2. ———: ———: ———. In case a bond not conditioned as required by statute has been thus accepted, the applicant cannot, upon appeal in the district court, cure the defect by filing an amended bond conditioned as the law directs, and thereby validate the action of the license board.

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

*Perry & Lambe,* for appellants.

*W. S. Morlan* and *P. E. Reeder, contra.*

ROOT, C.

Appeal from a judgment of the district court for Red Willow county affirming an order of the city council of

McCook overruling a remonstrance to the application of William Y. Johnson to vend intoxicating liquors in said city, and from the order granting said license.

The bond in the instant case contains the same infirmities as existed in the undertaking referred to in *In re Clyde, ante,* p. 537. Remonstrants' objections thereto were not as definite as those interposed in the *Clyde* case, but they were sufficient to warn the applicant that his bond was challenged as not complying with the law. At the close of applicant's testimony his counsel offered to amend the bond in any particular, if remonstrants would state the defect therein. The record is silent as to remonstrants' conduct, but it may be assumed that no further specifications, oral or otherwise, were made concerning the bond. If no one other than the applicant and remonstrants were interested in said transaction, and a bond conditioned in all particulars as the statute directs was not a jurisdictional fact in the case, there might be some justice in holding that thereby all objections to the bond were waived, but in the instant case the undertaking was for the benefit of all persons who might have occasion to sue thereon, possibly for the protection of infants then unborn, and, under the circumstances of this case, the objection to the bond, in our judgment, was sufficient. The statute plainly indicates the form of, and conditions to be inserted in, a liquor bond, and the applicant was not entitled to the counsel of his adversary. For the reasons given in the *Clyde* case, we hold that the city council wrongfully directed that a license should issue to Mr. Johnson, that the district court was confined to a consideration of the record certified to it by said council in the matter of said application, and that its judgment affirming the action of the city council and permitting the filing of an amended bond was erroneous.

We therefore recommend that the judgment of the district court be reversed and that the cause be remanded, with directions to that court to enter judgment reversing

the order of the city council and revoking the license granted to Johnson.

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 the cause remanded, with directions to that court to enter judgment reversing the order of the city council and revoking the license granted to Johnson.

REVERSED.

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R. E. FISH, APPELLEE, V. TOM SUNDAHL, APPELLANT.

FILED OCTOBER 22, 1908. No. 15,325.

**Set-Off:** ACTION ON NOTE. S. executed to F. & B., a partnership, his negotiable promissory note which said firm discounted, but later, after the note matured, again became the owner thereof. Thereafter said firm dissolved, and, upon a division of its assets, said note became the property of F., one of said partners, who brought suit against S. thereon. S. set up a contract which he alleged had been made between himself and said firm upon which he claimed there was more due him than the balance unpaid upon said note, and asked judgment therefor. *Held*, under section 106 of the code, that if the contract pleaded by S. was made, and there accrued to him a cause of action thereon after the maturity of said note and during the time that F. & B. owned it, to said extent, as against said firm or its members, the note was satisfied, and that S. was entitled to make said defense in this case.

APPEAL from the district court for Wayne county: JOHN F. BOYD, JUDGE. *Reversed.*

*F. A. Berry,* for appellant.

*H. E. Siman, contra.*

ROOT, C.

Suit for a balance alleged to be due upon a promissory note executed by defendant to Fish & Brugger, a partner-

ship, and indorsed by said firm to plaintiff, who was a member thereof. Defendant admitted the execution of said instrument, but alleged that in July next preceding the making thereof he purchased from the J. I. Case Threshing Machine Company, through Fish & Brugger, its agents, certain chattels for the agreed price of $2,611.-50, and as partial payment thereof delivered to Fish & Brugger an engine and separator at the agreed price of $850, leaving a balance of $1,761.50 due thereon; that, to induce defendant to make said purchase, said firm agreed with him that, if he would pay said company about October 15 the balance due on said machinery in cash, and Fish & Brugger were able to sell the second-hand engine and separator for $850, said agents would procure said company to discount defendant's bill 10 per cent. Defendant alleged his performance, and that said machinery had been sold by said firm for $850; that Fish & Brugger had collected the 10 per cent. discount from said company, but had not accounted to defendant therefor, and prayed judgment for said $261.15. The trial judge instructed the jury to find for plaintiff, and defendant appeals.

We are convinced that the learned trial judge erred in said direction. Although the pleadings are crude and the evidence somewhat uncertain, the proof tends to establish that Fish & Brugger, to induce defendant to purchase an engine and separator from the threshing machine company for the consideration of $2,611.50, agreed to take from defendant his old engine and separator, and to sell it, if possible, for $850, and to credit defendant in that sum on the purchase price of the new machinery, and, if Sundahl would pay the balance of his said bill in cash on or before October 15, 1903, that they would secure for him a discount of 10 per cent. upon the purchase price of said chattels from said company. When defendant settled, he did not have the cash, but gave the note in suit, which was discounted at a local bank, and thereby said company received its money. Brugger testified that the firm traded

the old engine and separator for other chattels and notes, so that but $825 were realized therefrom, but he is not altogether definite, and it appears from the testimony of defendant's brother that Brugger had stated to him that the engine and separator netted said firm more than $850. The agreement of Fish & Brugger was collateral to that entered into between the machine company and defendant, and the consideration was sufficient. So far as the machine company was concerned, it was immaterial whether the cash received was acquired by defendant from the sale of property or the negotiation of notes. Counsel argues that any claim that defendant might have would be against the firm of Fish & Brugger, and that such a demand could not be set off against Fish. Granting that counsel's position is sound, as a general proposition, yet he overlooks the fact that the indorsements on the note and the oral evidence prove that this instrument, although negotiated by Fish & Brugger, later became its property after said note matured, and, upon the dissolution of said firm, was indorsed to Fish, one of the partners, who had personal knowledge of the contract between said firm and defendant. Section 106 of the code provides: "When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other." If during the time Fish & Brugger owned said note and after its maturity defendant had a right to hold said firm for a discount then due defendant, or for damages because of the firm's failure to procure that discount for him, then, to the extent of said discount or damages, the note would be satisfied, and, while defendant could not recover judgment against Fish therefor, he could diminish plaintiff's recovery in this action to that extent. We think that there was sufficient evidence in the record to justify submitting the questions of fact to the jury.

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

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 the cause remanded for further proceedings.

REVERSED.

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## IN RE JACOB C. CALDWELL.

FILED OCTOBER 22, 1908. No. 15,556.

1. **Constitutional Law:** "SUNDAY LAW." Section 241 of the criminal code does not contravene the fourteenth amendment to the constitution of the United States, nor section 15, art. III of the constitution of Nebraska; nor is it repugnant to either section 1 or section 3, art. I of the Bill of Rights.
2. **Habeas Corpus:** MISDEMEANOR: DEFECTIVE COMPLAINT. After trial and conviction for an alleged misdemeanor, a prisoner will not be liberated on a writ of habeas corpus because of the insufficiency of the complaint in said criminal proceedings, if by any possible construction of the language employed therein an offense against the law is thereby even defectively stated.

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

*Jefferis & Howell,* for appellant.

*H. S. Daniel, contra.*

*L. D. Holmes, amicus curiæ.*

ROOT, C.

Relator was convicted in the police court in Omaha of a violation of section 241 of the criminal code, being the "Sunday law." The complaint charged relator with unlawfully engaging in common labor, "said common labor

not being work of necessity or charity, to wit, did operate and manage a barber shop, wherein customers were shaved at the Paxton Hotel in the city of Omaha." A sentence of $1 and the costs of prosecution was imposed, and, to prevent the payment of $3.50, the extraordinary writ of habeas corpus was sought at the hands of the district court. In his application for the writ relator set out a complete copy of the complaint, warrant and record of conviction, and alleged generally that he was unlawfully detained of his liberty. The sheriff justified under his mittimus, and, from a consideration of said return and a demurrer filed to relator's application, the district court refused to liberate relator, and he appeals.

1. Counsel for plaintiff argue with great earnestness that the statute under consideration is repugnant to the fourteenth amendment to the constitution of the United States, and to section 15, art. III of the constitution of the state, and that it contravenes section 1 and section 3 of art. I of the Bill of Rights. It is conceded that, if the statute was intended to and does apply to every person in all vocations within the state, the constitutional objections referred to are not well taken. Without determining whether the law is so general in its application as to include every business and employment, we are not convinced that it is void for any of the reasons advanced by learned counsel. The fourteenth amendment to the constitution of the United States was not intended to interfere with the power of the several states, through their respective legislatures, to enact laws to promote the peace, health, morals, education and good order of the people within those commonwealths. Although the legislation may be limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, it is not obnoxious to said amendment. *Barbier v. Connolly,* 113 U. S. 27; *Wenham v. State,* 65 Neb. 394; *Cleland v. Anderson,* 66 Neb. 252. Nor does the constitution of Nebraska prohibit classification in the

application of the police power so long as the arrangement is not purely arbitrary. The wisdom of the discrimination is not for us to determine. If, from our knowledge of conditions existing at the time that the legislation was adopted, we can say that there was such a sensible distinction between the occupations properly grouped under the head of common labor and those without that term as to form a basis for judgment, then the act cannot be said to be void because of the constitutional inhibitions above referred to.

The statute under consideration, in common with the body of the present criminal code, was adopted by the legislature in 1873. At that time the people engaged in common labor in this state did not include many individuals enlisted in those employments recognized as unhealthy and proper subjects for regulations by law because of that fact. Unskilled labor then represented unorganized labor, the poorest paid and hardest worked of all mankind. With limited capital, or none at all, to provide for transportation to localities where greater demand might exist for his services, no laborer was so subject to long hours and incessant toil as the man without a trade, or who from force of circumstances was compelled to engage in unskilled work. There was, it seems to us, the best possible reasons for the legislature coming to the rescue of those who were "common laborers" within the popular definition of that term, and by law compelling the master to give to those toilers one day in seven wherein to rest. Nor does the fact that a mechanic or a business or professional man might during the particular day engage in common labor within the restricted definition render the classification uncertain or unjust. The man without a trade, business or profession could not engage in any other than common labor, and the more fortunate individuals are not likely to do so. The science of government is a practical one, and the fact that theoretically one may reason out a discrimination where one in practice would not exist is not a serious consideration in passing upon

the constitutionality of a statute. Much less reasonable classifications have been upheld in *Liberman v. State*, 26 Neb. 464; *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707; *State v. Justus*, 91 Minn. 447, 103 Am. St. Rep. 521; *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589; *State v. Sopher*, 25 Utah, 318, 95 Am. St. Rep. 845.

The argument that, by exempting railway companies from the penalty of the statute in running "necessary trains," the carrier is given the right to judge for itself the necessity of operating trains on Sunday, and therefore that the statute is void, does not appeal to us. Work of necessity is excluded generally from the penalty of said statute. Whether any particular work, or whether the running of any certain train, is a necessity is a mixed question of law and fact, to be settled in each case as it may arise. The particular specification did not add anything to the general proviso, and neither strengthens nor weakens the act. *Petit v. Minnesota*, 177 U. S. 164.

Nor can we subscribe to the claim of counsel that, as the votaries of the Koran observe Friday as a day of worship, they are improperly discriminated against in the operation of the law, because the Adventist and the Jew are permitted to pursue their avocations on the first day of the week if they observe the seventh day thereof. We doubt very much whether there were any disciples of Mahomet in Nebraska in 1873, and those who have emigrated to Nebraska since that day came here with full knowledge of the Sunday statute, and their appearance in our commonwealth will hardly render unconstitutional and void an act of the legislature that theretofore was valid. Furthermore, there is nothing in the statute that discriminates between religious sects. Any resident whose employment falls within the inhibition of the statute may choose between the first and the seventh day of the week wherein to refrain from labor, and if he observes the mandate of the law on either of those days, whether he be Gentile, Jew, Mohammedan, Pagan or Agnostic, he is safe from prosecution, not because of the religious signi-

ficance of the day in his eyes, but because he has obeyed the command of the secular law to abstain from labor upon one of the two days named. *Specht v. Commonwealth,* 8 Pa. St. 312, 49 Am. Dec. 518. Unless the individual ceases from labor, he does not observe the day within the meaning of the statute, and if he does upon either of said days refrain from labor he "observes" that day. *Liberman v. State,* 26 Neb. 464; *Johns v. State,* 78 Ind. 332, 41 Am. Rep. 577; *People v. Bellet,* 99 Mich. 151, 41 Am. St. Rep. 589. We therefore hold against relator as to the validity of the statute under which he was prosecuted.

2. We have examined with great care the record to ascertain whether a writ should issue to save relator harmless from the $1 fine imposed upon him, and conclude that he has not pursued the proper remedy. Section 241 of the criminal code, under which it is admitted that said complaint was filed, provides: "If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted), he or she shall be fined in a sum not exceeding five dollars nor less than one dollar." Section 18, art. VI of the constitution, provides that police magistrates shall exercise such jurisdiction as may be provided by law. Section 7742, Ann. St. 1907, invests the police judge of the city of Omaha with jurisdiction to try misdemeanors arising under the laws of the state, in case the fine may not exceed $100, or the imprisonment three months. We therefore have the case of a prisoner before a court having jurisdiction of the individual and of the offense, and the question is whether after conviction that judgment may be ignored and collaterally attacked. In considering the averments of the complaint, they must in this proceeding be read in the light of the judgment of conviction, which cures every informality and insufficiency short of absolute negation of the facts essential to constitute the crime. *State v. Knowles,* 34 Kan. 393; *State v. Freeman,*

63 Vt. 496. Our decisions are not altogether harmonious as to the limit of a court's inquiry in habeas corpus proceedings. In *Ex parte Fisher,* 6 Neb. 309, we refused to consider the constitutionality of the statute under which the relator was convicted, and held that in habeas corpus proceedings the judgment of an inferior court was conclusive as to every question of law, as well as of fact, that might have been considered and determined in the trial of the criminal case, and that we would not go behind the record of conviction therein. This case has never been directly overruled, and has been widely cited in other states on this point. The opinions filed in *Keller v. Davis,* 69 Neb. 494; *Michaelson v. Beemer,* 72 Neb. 761, and *In re McMonics,* 75 Neb. 702, somewhat shake the doctrine announced in *Ex parte Fisher, supra,* but they go no further than to hold that, if the proceedings leading up to the detention are absolutely null and void, the prisoner may be released on a writ of habeas corpus. If the indictment or information purports or attempts to state an offense, and the court has jurisdiction to pass upon the sufficiency of those statements, the dedefendant after conviction will not be released in habeas corpus proceedings. As said by Mr. Justice Van Fleet in *Ex parte Williams,* 121 Cal. 328: "While the inquiry on habeas corpus may extend to the question of whether the complaint or information charges an offense known to the law, since this objection goes to the question of jurisdiction, * * * the proceedings may not be made to subserve the office of a demurrer; and if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie." See, also, *Ex parte Harlan,* 1 Okla. 48; *Ex parte Stacey,* 45 Or. 85; *Ex parte Williford,* 50 Tex. Cr. Rep. 417, 100 S. W. 919; *Ex parte Grubbs,* 79 Miss. 358, 30 So. 708; *McLaughlin v. Etchison,* 127 Ind. 474; *Pritchett v. Cox,*

154 Ind. 108; *Ex parte Upson,* 94 Pac. (Cal.) 855; *In re Ruef,* 150 Cal. 665. On direct attack in later proceedings the indictment under consideration in the last-cited case was held invalid in *People v. Schmitz,* 94 Pac. (Cal.) 407; *State v. Shrader,* 73 Neb. 618.

Counsel argue that operating a barber shop is not common labor, therefore that the complaint does not state an offense. Whether the magistrate was governed by the particular statement, or received evidence of labor other than operating a barber shop, we do not know, as none of the evidence introduced upon relator's trial in the police court is included in the record herein; but, if the evidence strictly conformed to the charge that the common labor was that of operating a barber shop, then whether that conduct amounted to engaging in common labor was a matter of law for the magistrate to consider and decide, and his affirmative finding would not be so absolutely erroneous as to render his judgment void. In some instances courts have held that a barber is a workman who performs mere manual labor (*State v. Nesbit,* 8 Kan. App. 104, 54 Pac. 326; *Regina v. Taylor,* 19 Can. L. J. 362); while within the meaning of exemption laws a barber has been held to be a mechanic (*Terry v. McDaniel,* 103 Tenn. 415, 53 S. W. 732). In New York the statute forbade servile laboring or working on Sunday. One Stewart on Sunday personally solicited signatures to a memorial to the legislature praying their interference with slavery, and in consequence a complaint was filed with a justice of the peace charging him with violating that statute "in circulating a memorial to the legislature." Stewart was convicted, and, in an action of trespass brought by him against said justice and the constable who arrested him, it was held that the conviction was not void; that by means of the complaint the justice had jurisdiction to issue the warrant, and by the service thereof he had jurisdiction of Stewart's person, and that, although the defendant might not have been within the prohibition of the statute in circulating the memorial,

whether he was or not was a matter of law which the justice had power to determine, even if his decision were erroneous. *Stewart v. Hawley & Bartholomew,* 21 Wend. (N. Y.) 552.

Complaints charging the commission of misdemeanors are often most defectively worded, and yet the defendant is tried for an offense known to the law, often with but little regard for the statements in the complaint, and is righteously convicted. The legislature, with knowledge of this fact, has provided in section 325 of the criminal code that, should the defendant appeal from such conviction, the prosecutor may substitute a sufficient complaint in the district court, and this may be done, even though the original one did not state an offense against the law. *Bays v. State,* 6 Neb. 167. Ample provision is made for appeals from convictions in misdemeanor cases, and resorts to writs of habeas corpus ought not to be encouraged. In case the defendant did offend against the law, and the complaint did not state facts sufficient to describe that offense, but upon trial he should be found guilty and should appeal, a proper complaint could be filed in the district court, and defendant be compelled to pay for his violation of law; but if he may ignore direct proceedings and seek shelter under a writ of habeas corpus, he may be delivered from the hands of the law, and many prosecutions in inferior courts be rendered unavailing. The judgment of guilty carried with it of necessity the judgment of the magistrate that the complaint charged relator with unlawfully engaging in common labor on Sunday, and that he was not within any of the exceptions of the statute, and that judgment is not so absolutely void as that it may be successfully attacked in this proceeding.

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

EPPERSON, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

WILLIAM M. RHYN, APPELLANT, V. JOHN W. MCDONALD, SHERIFF, APPELLEE.

FILED OCTOBER 22, 1908. No. 15,561.

**Habeas Corpus:** MISDEMEANOR: DEFECTIVE COMPLAINT. After trial and conviction for an alleged misdemeanor, a prisoner will not be liberated on a writ of habeas corpus because of the insufficiency of the complaint in said criminal proceedings, if by any possible construction of the language employed therein an offense against the law is thereby even defectively stated.

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

*Frank T. Ransom,* for appellant.

*H. S. Daniel, contra.*

*L. D. Holmes, amicus curiæ.*

ROOT, C.

This case presents much the same questions as were discussed in *In re Caldwell, ante,* p. 544. Relator was convicted of an alleged violation of section 241 of the criminal code, and the statement in the complaint is that relator did, in Douglas county, Nebraska, on the 15th day of December, 1907, being the first day of the week, commonly called Sunday, unlawfully engage in common labor, to wit, did sell and offer for sale cigars and newspapers, and negativing the exceptions in said statute. After a trial and conviction, application was made for a writ of habeas corpus, and upon return of the sheriff the writ was denied. In the application for the writ it was alleged that relator was deprived of his liberty contrary to law, and contrary to the constitution of the state of Nebraska, but in none of the assignments of error or in the brief in this court is the claim made that section 241, *supra,* is unconstitutional.

Relator's counsel has filed an elaborate argument to demonstrate that the acts charged in the complaint do not constitute common labor, and hence defendant was not tried for any offense against the laws of the state. Respondent's counsel has likewise presented a well-considered brief demonstrating that the aforesaid acts do amount to common labor within the meaning of said section 241. Friends of the court have also volunteered their assistance, and, upon the identical point presented to the police magistrate, and necessarily decided by him, we have been fully advised. We do not think it necessary for us to decide, and we do not determine, whether the decision of the magistrate was erroneous or not, but we do hold, for the reasons set forth in *In re Caldwell, supra*, that said judgment was not absolutely void, but that it is sufficient to repel this collateral attack thereon.

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

EPPERSON, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

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## REGINALD INGRAHAM V. STATE OF NEBRASKA.

FILED NOVEMBER 6, 1908. No. 15,663.

1. **Information:** WAIVER. By a plea of not guilty the defendant in a criminal prosecution waives all defenses which may be raised by motion to quash or plea in abatement.

2. **Criminal Law:** DISCRETION OF COURT. A request for leave to withdraw a plea of not guilty and file a plea in abatement is addressed to the sound discretion of the trial court; and a reviewing court will not disturb the ruling thereon, unless the record clearly shows an abuse of such discretion.

3. **Judges:** DISQUALIFICATION. A complaining witness in a criminal

prosecution is not a party to the action, and ordinarily has no pecuniary interest therein; and the fact that the examining magistrate is related to the witness within the fourth degree of consanguinity does not disqualify him to conduct the preliminary examination.

4. ———: ———: WAIVER. A defendant with knowledge of such relationship who submits to a preliminary without any objection will be held to have consented thereto within the meaning of section 4747, Ann. St. 1903.

5. Criminal Law: REVIEW. Bill of exceptions examined, and *held* that the district court did not err in refusing to strike certain evidence from the record.

ERROR to the district court for Cheyenne county: HANSON M. GRIMES, JUDGE. *Affirmed.*

*J. E. & W. G. Simonson,* for plaintiff in error.

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

BARNES, C. J.

Reginald Ingraham, hereafter called the defendant, and Mary Ingraham were tried in the district court for Cheyenne county on an information charging them with stealing three steers, the property of one Henry Heard. Mary Ingraham was acquitted, but the defendant was found guilty, and was sentenced to serve a term in the state penitentiary. From that judgment he brings the case to this court by petition in error.

It appears that, when the case came on for trial, the defendant asked leave to withdraw his plea of not guilty and file a plea in abatement. His request was refused, and this ruling of the trial court is assigned as error. The record discloses that the complaint on which defendant was arrested was filed before one Hugh Milhollin, a justice of the peace of Cheyenne county, on the 16th day of May, 1906; that, when he was arraigned, he was granted a continuance to the 16th day of June following, when a preliminary examination was held and the defendant was

bound over to the district court. On the 20th day of November, 1906, he was arraigned in that court on a proper information, charging the same offense set forth in the complaint, to which he then entered a plea of not guilty. Thereupon the case was continued over the term by agreement of parties. On March 19, 1907, the case being called for trial, the defendant made application for and obtained another continuance. At the November, 1907, term of the court defendant failed to appear, and his recognizance was forfeited. He was thereupon rearrested, and was tried at the April, 1908, term of the district court. At the commencement of the trial the defendant, for the first time, asked leave to withdraw his plea of not guilty and file a plea in abatement. It also appears that a like plea had at one time been filed by him and withdrawn. With this situation confronting the district court, the defendant's request was denied.

It is well settled that a defendant in a criminal prosecution by pleading to the general issue waives all defenses which may be raised by a motion to quash or plea in abatement. Criminal code, sec. 444; *Korth v. State,* 46 Neb. 631; *Johnson v. State,* 53 Neb. 103; *Bush v. State,* 55 Neb. 195. It is likewise held that it is a matter of discretion with the district court to permit or refuse to allow a plea of not guilty to be withdrawn in order that a plea in abatement may be interposed. *Clark v. State,* 57 N. J. Law, 489; *People v. Allen,* 43 N. Y. 28; *State v. Van Nice,* 7 S. Dak. 104; *Sunday v. State,* 14 Mo. 417; *Richards v. State,* 82 Wis. 172. It follows that, unless the district court was guilty of an abuse of discretion in this case, the defendant's contention must fail. As above stated, it appears that the case was commenced nearly two years before it was tried. Two continuances had been granted in the district court. One by consent of parties and one on the application of the defendant. His recognizance had been forfeited in open court, and he was thereafter rearrested. A plea in abatement setting up the same matters contained in the plea then offered had been filed and

withdrawn; and at the last moment, when the case was called for trial, the plea in question was tendered and denied. The reasons given therefor by the court were, in substance: "Leave denied because plea in abatement has heretofore been presented and withdrawn, and defendants each have entered a plea of not guilty. Leave denied because the plea raises the same issues that were raised heretofore by defendants and withdrawn."

Under such circumstances it can not be said that the district court was guilty of an abuse of discretion in this matter. Again, if it be conceded that leave should have been given the defendant to withdraw his plea of not guilty and present his plea in abatement, we find that the facts pleaded therein are fully controverted by the record. The substance of the plea is that the accused never had a preliminary hearing, and that the record does not show that such hearing was had in Cheyenne county, or before a justice of the peace of that county. It appears that the complaint was filed before one Hugh Milhollin, who the transcript recites was a justice of the peace within and for Cheyenne county, Nebraska. The record also shows that said justice of the peace issued a warrant for the defendant, which was served by J. W. McDaniel who in his return recites that he is sheriff of Cheyenne county, Nebraska. The record further shows that the defendants were by the order of said justice of the peace bound over to the district court for Cheyenne county, Nebraska. So it may be said that it appears upon the face of the record that the plea, if filed, so far as this matter is concerned, would have been without avail.

The defendant further contends that Hugh Milhollin, who signed the transcript, is related by consanguinity or affinity within the fourth degree to Henry Heard, the complaining witness. It is therefore claimed that the justice of the peace was disqualified, and the preliminary examination held by him was void and of no effect. It is true that section 4747, Ann. St. 1903, provides: "A judge or justice is disqualified from acting as such except by

mutual consent of parties in any case wherein he is a party or interested or where he is related to either party by consanguinity or affinity within the fourth degree." We are of opinion, however, that this provision has no application to the case at bar. Henry Heard was not one of the parties, neither did he possess any pecuniary interest in the result of the examination. In a criminal prosecution the state of Nebraska is the plaintiff, and the complaining witness is considered, and is treated, in all respects the same as any other witness in the case. Again, it is not shown that the defendant was ignorant of this relationship at the time his preliminary examination was held, and it will be presumed that he had such knowledge and consented to the holding of such examination.

Finally, it is urged that the district court erred in refusing to strike the evidence of the witness Frank Smith from the record. We find that Smith testified, in substance, that he saw the defendant and his brother on or about the 1st day of December, 1905, driving some cattle past his place to their ranch. He also described the cattle and it is claimed that they are not identical with those stolen from Mr. Heard. It is further urged that the cattle described by Smith were being driven past his place in December, 1905, while the cattle in question were alleged to have been stolen on or about April 2, 1906; that, therefore, the testimony of Smith was irrelevant and immaterial, and related to altogether a different transaction from that described in the information. It appears from the record, however, that the witness Heard missed the stolen cattle from his place about the 1st of December, 1905. So it would seem perfectly proper for the court to receive the testimony of the witness regarding any cattle which he saw the defendant driving to his ranch at or about the time these animals were missed from the premises of Mr. Heard. While this evidence may not have been entitled to much weight, it was competent, and the jury had the right to consider it and give it such weight

as they deemed under all the circumstances it was entitled to receive.

A careful examination of the whole record fails to disclose any reversible error, and the judgment of the district court is therefore

AFFIRMED.

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## CLARENCE E. BRINEGAR V. STATE OF NEBRASKA.

FILED NOVEMBER 6, 1908. No. 15,706.

1. **Evidence** examined, its substance stated in the opinion, and *held* sufficient to sustain the verdict and judgment.

2. **Criminal Law:** ACCOMPLICES. Something more than mere presence at the commission of a crime is necessary to make one an accomplice. There must be some participation either in the plan or its execution; and, where in a criminal prosecution it appears that a witness for the state was present at the commission of the act, but took no part therein, and entreated and commanded the defendant not to perpetrate it, it is proper for the trial court, when instructing the jury, to refuse to treat the witness as an accomplice.

3. **Instructions** given by the trial court examined, and found to be without prejudicial error.

4. **Jury:** CHALLENGE: HARMLESS ERROR. Error cannot be predicated on the overruling of a challenge of a juror for cause, where the record fails to disclose that the complaining party exhausted his peremptory challenges. *Bartley v. State*, 53 Neb. 310.

5. **Evidence** examined, and found sufficient to prove the venue or the place where, and the time when, the crime in question was committed.

6. **Information:** SUFFICIENCY. In charging an offense upon or in relation to any property belonging to several partners or owners, it is sufficient to allege that such property belonged to any one or more of them, without naming all of such partners or owners.

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

*M. H. Weiss* and *Richards & Haffke,* for plaintiff in error.

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

BARNES, C. J.

At the December, 1907, term of the district court for Thayer county, Clarence E. Brinegar was charged with wrongfully setting on fire, burning and consuming two certain stacks of oats, the property of one G. W. Lovercheck, of the value of $75. The venue was properly laid in Thayer county, Nebraska, and the date of the offense was alleged to be the 16th day of October, 1907. He was tried and convicted in April, 1908, and the jury found that the property destroyed was of the value of $115. On the trial it was made to appear that the defendant was a minor, about 17 years of age at the time the crime was committed, and for that reason the district court, instead of sending him to the penitentiary, committed him to the industrial school at Kearney, Nebraska, until 21 years of age, unless sooner discharged in the manner provided by law. The defendant has brought the case here for review.

1. His first contention is that the verdict is not sustained by the evidence, because (to use the language of his counsel) there was no evidence to connect him with the act of setting fire to the property in question, except the unsupported testimony of an accomplice. An examination of the record discloses that this contention is not well founded. The principal witness for the state was one Frank Vance, who testified, in substance, that he was working for the defendant's father on the 16th day of October, 1907, and had been working for him for some days before that time; that on the evening of that day he accompanied the defendant to the village of Bruning, which is located in the northern part of Thayer county; that the defendant invited him to make the trip; that they drove a span of mules belonging to the defendant's

father; that they arrived at Bruning about 9 o'clock in the evening, and while there they visited a saloon, where each drank two glasses of whiskey and two glasses of beer. Vance further testified that he purchased a pint of alcohol and a half pint of whiskey, which he took home with him without drinking any of it; that the defendant purchased a bottle of beer, which they drank on their way between Bruning and Belvidere, while returning to the defendant's home; that on their return, and a short time before they reached their destination, they passed the stacks of oats in question, which were situated near the highway; that it was a moonlight night, and they saw an old wagon partly loaded with coal, standing near the stacks; that he was driving, and, when they saw the wagon, the defendant called "Whoa!" stopped the team, jumped out of the buggy, and said: "Come on and help me tip this wagon over"; that he refused to assist the defendant, who thereupon took the wrench out of the doubletree, unscrewed the burrs from the wheels of the wagon, and threw two of them to the northeast; that he did not know what was done with the third one; that the defendant then called to him again to help him to turn the wagon over; that he refused to assist the defendant, and entreated him to come on, get into the buggy and go home; that the defendant finally seemed to get one wheel off the wagon, and again called to him to help overturn it; that the defendant then took hold of the team by the bits, turned them around and led them up toward the stacks; that, as soon as the defendant let go of the team, he drove them away and turned them into the road again; that he was all the time commanding and entreating the defendant to come on and get into the buggy and go home; that the defendant thereupon said: "If you don't help me turn this wagon over, I will set fire to these two stacks." I said: "You won't do any such thing. Come on and go home." The defendant thereupon got out a match, lit it, fired the stacks, and then ran to the buggy and got in, remarking: "You didn't think I'd do it, did you?"

This evidence is absolutely undisputed by any one, and it should therefore be taken as true. An accomplice is one who co-operates with or aids and assists another in committing a crime; one who is not the principal actor in or instigator of the commission of a crime, but who to some extent assists in its commission or encourages it beforehand. The term accomplice is sometimes used as equivalent to accessory before the fact. An aider or abettor may be one who so far participates in the commission of a crime as to be present for the purpose of assisting therein, if necessary. In such a case he will also be liable as principal. In 1 McClain, Criminal Law, sec. 199, it is said: "Either an accomplice or an aider and abettor will in general be principal or accessory, depending upon whether he is present or absent when the crime is committed. * * * Something more than mere presence, even accompanied with approval of the act done, is necessary to make one an aider and abettor. There must be some participation, either in the plan or its execution." The evidence shows that Brinegar committed the crime, not only without the assistance or procurement of Vance, but in direct opposition to his importunities not to do it. So it may be said that the evidence fails to show any fact or circumstance which would render Vance an accomplice in the transaction. It further appears from the testimony that, after defendant had fired the stacks, Vance, who was with difficulty holding the team, repeatedly begged him to put the fire out. Again, the record does not show that Vance was ever charged with the commission of the crime or that any one ever claimed that he was responsible for it in any way. It follows that the witness was not an accomplice, and for this reason the defendant's contention is not well founded.

Considering the quantum of the evidence, it may be further stated that the circumstances surrounding the transaction strongly corroborate the testimony of the principal witness. For instance, the defendant and the

witness were seen driving the mule team belonging to the defendant's father on the evening in question, and were recognized by certain of the witnesses on their way to Bruning. They were also seen on their return upon the road that passed the oat stacks in question, and their team and buggy were tracked from the burned stacks to the defendant's home, where they were found the next morning. No evidence was offered which even tended to dispute any of the foregoing facts, and we are constrained to hold that the evidence was amply sufficient to sustain the verdict.

2. Complaint is also made of the refusal of the court to instruct the jury that the testimony of an accomplice should be carefully scrutinized. In the light of what we have said in disposing of the defendant's first contention, further comment on this assignment is unnecessary. As a matter of fact, there was no evidence on which to base such an instruction.

3. Defendant complains of the fourth instruction, by which the jury were informed that they must be satisfied beyond a reasonable doubt of the truth of all the essential elements of the information. It is insisted that the effect of this instruction was to place a limitation upon the presumption of innocence. We do not so understand the record. By the third instruction the court defined the elements of the crime charged in the information. Then followed the fourth instruction, which reads as follows: "The plea of not guilty in this case made by the defendant, places upon the state the burden of proving every essential element of the crime charged in the information by competent evidence which satisfies your minds beyond a reasonable doubt of the truth of such facts, and the resulting guilt of the accused. The defendant is presumed to be innocent until every one of these essential facts is proved beyond a reasonable doubt, and, unless the essential facts constituting the crime charged in the information are established to that degree of certainty, then you should acquit him." This seems to be a correct ex-

position of the law, and we fail to see the force of the defendant's criticism.

4. Defendant's fourth contention is that the court erred in instructing the jury on the question of drunkenness and intoxication. He especially attacks that part of the instruction which reads as follows: "You are instructed that it is the rule of law that a person, having made himself drunk by the voluntary use of intoxicating liquor, cannot make such condition an excuse for crime committed while so intoxicated." In *O'Grady v. State,* 36 Neb. 320, we approved of the instruction above quoted. Again, the instruction complained of, taken as a whole, was most favorable to the defendant, for by it the jury were clearly informed that, even though it were shown that the defendant was intoxicated, the burden of proof still rested upon the state to show beyond a reasonable doubt that he, nothwithstanding his intoxication, was able to distinguish between right and wrong, and know the nature of his act. In concluding our remarks on this assignment, it may be said that the evidence fails to show that the defendant was intoxicated to any appreciable degree, and therefore the court would have been justified in refusing to instruct upon that question at all.

5. Defendant's fifth contention is that the court erred in selecting the jury in this case. That his objection to juryman Fry, for cause, should have been sustained. It appears from the examination of the juror, contained in the record, that he was opposed to the use of intoxicating liquor. Yet he stated that he could render a verdict upon the evidence and the law as given by the court, without being influenced by that fact in any way. He was asked: "Q. Are you able to say that that fact, if it would develop on the trial, would have no influence upon your mind one way or the other in arriving at a verdict? A. No; I don't know as it would. I don't know why it should have. Q. And, if that fact should develop, could you decide this case upon the evidence and the law just as you would if it did not exist, could you? A. Yes, sir." In the light of this

examination, we fail to see any force in the defendant's objection, and we are satisfied that the challenge to the juror was properly overruled. Again, the record fails to show that the defendant exhausted all of his peremptory challenges, and for that reason his exception cannot be considered.

6. Defendant's sixth contention is that the venue was not proved in this case. The record discloses that the witness Lovercheck, after describing the situation of the burned stacks and the wagon, and fixing the value of the property destroyed, and its location, testified as follows: "Q. That was in Thayer county, Nebraska? A. Yes, sir. Q. And on or about the 16th day of October, 1907, last? A. Yes, sir." With this evidence before us it seems clear that defendant's objection is without merit.

Finally, it is contended that the ownership of the property was not proved as stated in the information. It appears that G. W. Lovercheck, who it was alleged was the owner of the property, leased the premises on which the oats were grown; that he was the absolute owner of two-thirds of the crop, and had contracted to deliver one-third of it to the owner of the land, as payment for the rent. The jury by its verdict fixed the value of the property destroyed at $115, and it appears that Mr. Lovercheck's interest therein amounted to more than $75, which was the amount and value alleged in the information. Again, section 418 of the criminal code provides: "When any offense shall be committed upon or in relation to any property belonging to several partners or owners, the indictment for such offense shall be deemed sufficient if it allege such property belonged to any one or more of such partners or owners, without naming all of them." This section of the statute in itself fully disposes of the defendant's objection.

Finding no reversible error in the record the judgment of the district court is in all things

AFFIRMED.

WILLIS C. CROSBY, APPELLANT, V. DAVID HAVERLY ET AL., APPELLEES.

FILED NOVEMBER 8, 1908. No. 15,908.

1. **Mandamus:** ELECTIONS: CANVASS OF BALLOTS. Mandamus will not lie to compel the county board of canvassers to count ballots cast at a primary election for the nomination of state and county officers, which have been rejected by the election board under the provisions of section 5830, Ann. St. 1907, because they were not signed by the judges of election and were not indorsed with the signatures of any of the election officers.

2. ———: ———: REMEDY AT LAW. In such a case the statutes relating to the contest of elections provide a speedy means of determining the validity of such ballots and afford a plain and adequate remedy at law.

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

*Byron G. Burbank*, for appellant.

*A. H. Murdock, contra.*

BARNES, C. J.

This is an appeal from a judgment of the district court for Douglas county denying the appellant a peremptory writ of mandamus and dismissing his action. The facts out of which this controversy arose, briefly stated, are as follows:

The appellant Willis C. Crosby, George H. Brewer, and another were candidates for the republican nomination for the office of coroner of Douglas county at the primary election held in said county on September 1 of the present year. It appears that after the polls were closed the election boards in the several precincts of said county duly canvassed the votes and made their election returns to the county clerk strictly in the manner provided by law; that, thereupon, at the proper time the county

clerk called to his aid two electors, formed the county canvassing board, and upon a proper canvass found that George H. Brewer had received a plurality of all the votes cast for the office of county coroner. The appellant then claimed the right to a recount under the provisions of section 118, ch. 26, Comp. St. 1907, and duly filed his affidavit therefor. Thereupon the canvassing board reconvened, recounted the votes, and again determined that Mr. Brewer had received a plurality of the votes cast at said primary election; he receiving two votes more than the appellant Crosby. It also appears that in making the recount the board discovered in the ballot boxes three ballots among the others, that had not been signed or indorsed with the names of either the judges or the clerk of election, or by any of the election officers, and which contained the name of the appellant. It appears that for that reason these votes had been rejected by the election boards, and therefore the canvassing board refused to count them. The appellant thereupon applied to the district court for a peremptory writ of mandamus commanding the canvassing board to count said votes for the appellant and declare him to be the republican nominee for coroner of Douglas county at the coming general election. As above stated, the district court denied the writ and dismissed the petition.

Appellant contends that it was the duty of the board of canvassers to count the three votes for him which had been rejected by the election board, that the board of canvassers is a ministerial body, that its duty is confined to the ministerial act of counting the ballots contained in the ballot boxes, and that it has no power or authority to pass upon the question of the legality of any ballot. It may be conceded that the board of canvassers is purely a ministerial body, and that ordinarily it has no judicial powers and cannot pass upon the question of the validity of the ballots cast at an election. But it does not follow that the court erred in denying the prayer of appellant's petition. Our election laws provide that the ballots cast

at a primary election shall be counted in the manner and form provided by the law relating to general elections. Ann. St. 1907, sec. 5877. It is likewise declared that all of the provisions of the general election law which are applicable shall govern primary elections in this state. Ann. St. 1907, sec. 5898. By the general election law it is made the duty of the election officers, when the polls are closed, to immediately proceed to canvass the vote. It is provided that such canvass shall be public, and that the board shall commence by a comparison of the poll lists from the beginning and correct any errors that may be found therein until they agree. The poll books must then be signed by the judge and attested by the clerks, and thereupon the names contained therein are to be counted and the number thereof set down at the foot of the poll books. Ann. St. 1907, sec. 5683. The next section (5684) provides, in substance, that the ballot box shall then be opened and the ballots counted without unfolding. If the whole number of votes exceed the number of persons voting, then the ballots shall be replaced in the box, the box locked, and the ballots thoroughly shaken. The box is then to be reopened, and one of the judges is required to draw therefrom as many ballots as shall have been cast exceeding the number shown by the poll books. The ballots so withdrawn are to be marked "excessive ballots" and returned to the county clerk in the manner provided by law. After the poll books have been examined, compared and signed, and the excessive ballots, if any, have been withdrawn, the ballots remaining in the box are to be taken out by one of the judges and the canvass continued; the judges announcing to the clerk the number of votes each candidate balloted for shall have received. The clerk is then required to enter upon the tally list of the poll books, to the right of the names of the persons voted for, all the votes as shown by the ballots, and as declared and read by the judges. The clerks are thereupon required to express in figures, at the end of the tally list of each candidate, the total number of votes cast for said

candidate. The election board are authorized to reject certain ballots as void; the general election law (Ann. St. 1907, sec. 5830) providing: "In the canvass of the votes any ballot which is not indorsed as provided in this act by the signature of two (2) judges upon the back thereof shall be void and shall not be counted."

In the primary election law the following provisions are found bearing directly upon the case presented here: Section 5870 Ann. St. 1907: "There shall be no printing on the back of the ballots, or any mark to distinguish them but the signature of the judge or clerk." Section 5879: "In cities where registration is by law required, no voter shall receive a primary ballot or be entitled to vote, until he shall have first been duly registered as a voter in the manner provided by law. * * * If the right of such person to vote be not challenged, one of the judges of said primary election shall then hand him a ballot of the political party with which he affiliates, which said ballot shall be indorsed with the signature of two of the judges upon the back at the bottom edge." Section 5882: "When the elector has prepared his ballot he shall fold the same with the edges upon which are the signatures of the judges uppermost, and so folded so as to conceal the face thereof and all marks thereon, and hand the same to the judge of the primary election who is in charge of the ballot box." Under the general election law, when all of the votes shall have been examined and counted, the clerks are required to set down in the form in their poll books the names of every person voted for, the number of votes he received, and upon the completion of the canvass the poll books are certified and sealed, and, together with the ballots, are returned to the county clerk, and on the Friday following the election the clerk, together with two electors whom he calls to his aid, shall canvass the election returns as certified by the clerk of the election board, and declare the result of the election. The primary law (Ann. St. 1907, secs. 5877, 5884), provides that the ballots shall be counted and the results returned to the county clerk and the can-

vass made, except where otherwise specified, in the same manner and by the same officers as on a general election. It appears that all this was duly performed, and it seems clear that it was the duty of the election boards to reject the three ballots for the appellant which were not signed by any of the election officers. *Orr v. Bailey,* 59 Neb. 128.

It is unnecessary to consider the contention of relator as to powers of a canvassing board in making a recount under the provisions of section 5887, or to consider whether this section is applicable to other than city primaries. The three ballots were void, and neither the election board nor the canvassing board, if it had the right to count the ballots, which we do not decide, could make them valid. The district court was right in refusing the writ asked for, for these reasons.

There is another reason why the writ in this case was properly denied. The general rule is that the extraordinary writ of mandamus will not be allowed where the relator has an adequate remedy at law. Section 5892, Ann. St. 1907, provides for contesting primary elections. Under the provisions of this law the appellant might have filed his petition for a contest of the primary election before the county judge of Douglas county within 24 hours after the board of canvassers declared the result, and by following the methods of procedure pointed out thereby he could have had the whole matter judicially determined in ample time, if successful, to have enabled the county clerk to place his name upon the official ballot for the coming general election. He was thus afforded a complete and adequate remedy at law before a tribunal vested with full power to determine the question of the legality of the ballots in controversy. We are aware that it has been held, in some cases, that the remedy by contest may not be complete; but it seems clear that in the instant case the remedy was both complete and adequate.

For the foregoing reasons, the judgment of the district court is in all things

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. SEVERAL PARCELS OF LAND ET AL. (CONNELL), APPELLEES.*

FILED NOVEMBER 6, 1908. No. 15,562.

1. **Taxation:** INTEREST. Taxes were levied upon real estate for the years 1892, 1893 and 1894 upon a valuation of $5,200. In 1896, in a suit then pending to enjoin the collection of the taxes upon the ground that the assessment and valuation of the property was grossly excessive, the court found that a just and equitable valuation was $5,000, and directed the county treasurer to correct the tax lists for said years and extend and collect taxes upon such basis. *Held,* That, assuming that the court had jurisdiction and authority to render such decree, and that the decree was effective to cancel the taxes on the valuation in excess of $5,000, the taxes upon the valuation so decreed were not rendered void, and that they drew interest to the same extent as they would have done had no suit been brought.

2. ———: ———: TENDER. The presentation of a certified copy of such decree to the county treasurer, with demand that he correct the tax lists so as to conform to said decree in order that the taxpayer might know the amount of taxes to be paid, followed by the statement of the treasurer that he would consult the county attorney upon the subject, with no further inquiry or demand by such taxpayer, *held* not to be such a tender or offer by the taxpayer as would arrest the running of interest.

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

*Edward W. Simeral,* for appellant.

*W. H. Herdman, contra.*

REESE, J.

This action was commenced in the district court for Douglas county under the provisions of the so-called "Scavenger Act," for the collection of the delinquent taxes for the years 1892, 1893 and 1894 upon a tract of land in

* Judgment modified so as to require defendant Connell to pay interest and penalties on the taxes involved from February 14, 1896, the date of the "Powell" decree.

said county described as the west 52 acres of the east 78 acres of the southwest quarter of section 7, in township 15, range 13. It was alleged in the petition that the taxes for 1892 upon said land were $249.34; interest $284.66—total, $534: For the year 1893, $225.52; interest, $234.92—total, $460.44: For the year 1894, $245.62; interest, $231.29—total, $476.91. Making a total of $1,471.35 due for the three years. The defendants Connell and Omaha Country Club answered, alleging that at the time of and subsequent to the levy of the taxes for the years named the said Connell was the owner of the property, and that he had later conveyed the same to the defendant, the Omaha Country Club, by warranty deed containing covenants against incumbrances, and that the said club is now the owner thereof; that the basis of the levy of the said taxes for each of said years was a valuation and assessment at $5,200; that the total levy for county purposes (exclusive of the sinking fund) was in excess of the rate of $1.50 upon each $100, the maximum allowed by law, the total levy being 15.2 mills, and that by reason thereof the levy for county purposes for said years was and is null and void; that at the time of the commencement of this suit there were no valid taxes against said land, for the reason that in a suit commenced by the defendant Connell in the district court for Douglas county on the 25th day of February, 1893, and upon an amended petition thereafter filed, it was on the 14th day of February, 1896, finally decided that a fair and just valuation of said property for each of said years was and should have been $5,000, and by said decree the valuation was so fixed, and the county treasurer was ordered and directed to change the valuation and levies upon the tax lists for said years to correspond with said decree; that soon after the rendition of said decree the defendant Connell procured a certified copy thereof, and presented the same to the county treasurer, and demanded that the treasurer comply with said decree by correcting the valuation and carrying forward the taxes due upon said land upon the basis fixed

by the decree; that the treasurer neglected and failed so to do until after the commencement of this suit, and a short time before the filing of the answer, and therefore at the time of the commencement of the suit there were no valid or legal taxes against said land; that the valuation of $5,200 for said years as the basis of the levy of taxes was excessive and unjust; that no notice of the equalization of values was ever published or made, nor was a board of equalization held during any of said years in the manner and for the time and at the place required by law; that the defendant Connell had been at all times since the rendition of said decree, and still was, willing, ready and able to pay the said taxes upon the basis of said decree, but by the failure of the treasurer to discharge the duties thereby imposed he had been unable to pay taxes or any part thereof; that said decree was and is in full force and effect, never having been reversed, vacated or set aside, and that by virtue of its provisions and the failure of the treasurer to comply with its requirements the said taxes were wholly canceled, and were null and void at the time of the commencement of the action. A copy of the decree is attached to the answer as an exhibit. This amended answer was filed on September 19, 1907. On the same day an amended reply was filed. As appears by the record, the trial was then in progress. In the light of the trial, the decree, and the briefs and arguments of both parties on this appeal, we find it quite difficult to understand the pleadings. Referring again to the answer, we find that it is divided into numbered paragraphs, which are substantially as follows: (1) That Connell was the former owner of the land and had conveyed it by warranty deed to the Omaha Country Club; (2) that said club is a corporation; (3) that the tract of land involved in the suit is described as the east 78 acres of the quarter section above described; (4) that the taxes and interest as set out in the petition are as herein above copied, with the addition of $1 docket fee; (5) that the taxes for said years and each thereof for state, county and school district purposes

were levied and assessed on the basis of a valuation of $5,200; (6) that the regular county taxes for the year 1892 were null and void for the reason that the percentage of the levy was in excess of the $1.50 on a $100 valuation allowed by law, the levy being 15.2 mills; (7) "that by reason of the premises aforesaid the said levy for county purposes for said year was and is null and void"; (8) that at the time of the commencement of this suit there were no valid taxes against said land for said years or any thereof for the following reasons, setting out the proceedings of the injunction suit and decree as detailed above in this opinion. The amended reply (1) "admits the statement set forth in paragraphs Nos. 1, 2, 3, 4, 5, 6, 7, and that portion of the eighth paragraph" which includes the averments as to the decree above set out; (2) denies all averments not specifically admitted; and (3) "alleges that said defendants are estopped by the decree set forth in said answer as 'Exhibit A' from questioning the validity of the taxes for the years 1892, 1893 and 1894, or any part thereof." As these admissions, some of which would appear to be vital, are not referred to in any of the subsequent proceedings either in the district or supreme court, we must conclude that they were ignored, or disposed of in some way not shown by the record before us. A trial was had in the district court which resulted in a decree that the amount of taxes due, as deducible from the decree in the injunction suit, to wit, $691.01, together with interest thereon at the rate of 1 per cent. a month from the 1st day of July, 1907 (that being the date the treasurer entered the reduction of the taxes upon the tax list) were valid; and that the taxes over and above the $691.01, which amounted to $29.47, and all interest from the dates of May 1 in 1893, 1894, and 1895, to the first of July, 1907, were excessive, null and void, and decreeing a foreclosure for the taxes and interest found due. From this decree plaintiff appeals, alleging that the court erred in refusing to allow interest at the lawful rate from the date fixed by law for the accruing of interest upon unpaid taxes.

As the jurisdiction of the district court in the injunction proceedings seems never to have been questioned, and the efficacy of the decree rendered in that case to reduce the taxes from the basis of the valuation of $5,200 to $5,000, the decree operating alone upon the county treasurer, appears to be conceded, we will assume, without so deciding, that the decree in the injunction case was in all things legal and binding, and that the liability of defendants to pay taxes and interest must be measured thereby, and that the sole question for decision here is, from what date should interest begin to run on the amount of taxes as modified and found due by that decree. We think it may be safely assumed, as a matter of law, that the fact that the property was assessed at $200 more than it should have been would not render the whole tax void. That it was subject to review in a proper proceeding might be conceded, and yet the levy of taxes be valid. In other words that the effect of that decree was to reduce the valuation, and with it the tax, the former to the extent of $200 and the latter $29.47, and that, as thus reduced, the original levy of taxes would stand. 2 Cooley, Taxation (3d ed.), 1440, and cases cited; 27 Am. & Eng. Ency. Law (2d ed.), 719 *et seq.* In *State v. Omaha Country Club,* 78 Neb. 178, we said: "As affecting the merits of the controversy involved in the scavenger suit, and the defense of the state to the claim of the defendants arising out of the decree of 1896, it is apparent from the face of the decree that the most that may be claimed for it, if anything, is that only such portion of the taxes as are levied on the valuation in excess of $5,000 are unenforceable by reason of the decree, and no facts are pleaded from which it could be inferred that any part of the taxes are void for any other reason." See, also, *Miller v. Hurford,* 13 Neb. 13. It may be observed that the most that can be claimed for the decree of 1896 is "that the taxes on the real estate in said petition and hereinafter described for the years 1892, 1893 and 1894, except as herein authorized, are excessive and void." (We quote from the decree.) And it is further

found, determined, adjudged and decreed "that for each of the years mentioned * * * the just, fair and equitable valuation * * * is $5,000"; that "it would be just and equitable that said real estate above described should be taxed on the valuations above set forth," and the county treasurer is directed to make correction on the tax lists, and that "thereupon such taxes, so carried forward, upon each and all of said tracts and pieces of land shall stand as a legal, valid and duly authorized and subsisting lien thereon"; that the treasurer and his successors in office are "authorized and required to accept and receive in satisfaction and payment of each of said liens the amount thereof, respectively, with lawful interest on such liens" and execute the proper receipt therefor, "and thereupon cancel said liens upon the books of his office" for the years designated. It is very clear that it was not the intention of the court to hold the whole tax void and make a relevy, for this it had no power to do, and the record clearly shows that it was not attempted. We therefore hold that the taxes which were allowed to stand were not affected by the decree, and that they will draw interest the same as if no suit had been brought; there having been no tender or offer to pay the just taxes before its commencement. *Western Union T. Co. v. State,* 64 N. H. 265.

It is stated in the answer that soon after the rendition of the decree the defendant presented a copy thereof to the treasurer, and demanded that the treasurer "comply with said decree by correcting the said valuations and carrying forward the amount of taxes due upon said land on the basis of said corrected assessed valuations," but that the treasurer failed and neglected to comply with the said decree until long after the commencement of this action. There is no averment that any tender was made, nor any specified amount offered. Assuming that the decree was binding upon the treasurer, all that was to be done or could have been done was to deduct the $200 from the assessed valuation and compute the tax on the $5,000 basis, add the interest imposed by law, and tender or offer

to pay the amount due. The testimony of Mr. Connell is that he made no actual tender; that he stated that "he wanted to fix it to pay the taxes on the property in controversy"; that he never made any actual tender of the taxes on this particular property. "I merely made the request that the decree be complied with so as to enable me to make the payment of the taxes which I could not do until that was done"—That he knew what the decree was. He further testified what was done was that the treasurer took the decree and said he would see the county attorney about it. There is no evidence that Mr. Connell ever returned to the treasurer's office to ascertain what the county attorney advised, nor what the treasurer had concluded to accept, nor that it was in Mr. Connell's mind to pay interest on the valid taxes from the date they accrued. When we remember that a great number of other tracts and parcels of land were included in said decree of the total value of $46,710, it becomes apparent that there was no such tender or offer made as would stop the running of interest.

It follows that the decree of the district court must be reversed and the cause remanded to that court, with directions to enter a decree of foreclosure for the taxes of 1892, $239.75, with interest as provided by law from the 1st day of May, 1893, and of 1893, $216.88, with like interest from the 1st day of May, 1894, and of 1894, $234.38, with like interest from the 1st day of May, 1895, to the 1st day of October, 1904, and with interest on the amount then due at the rate of 1 per cent. a month, and for costs of suit.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

ISAAC DOUGLAS, APPELLANT, V. HAYES COUNTY ET AL., APPELLEES.

FILED NOVEMBER 6, 1908. No. 15,304.

1. **Tax Sale:** REDEMPTION. In redeeming from a judicial sale of land made for delinquent taxes, the purchaser is entitled to receive the amount bid at the sale with interest.

2. ———: ———: TENDER. Redemption from such a sale must be made or offered within two years from the sale. If the purchaser refuses to allow redemption to be made, the party wishing to redeem should tender the purchaser the amount necessary therefor, unless the purchaser by his conduct waives a formal tender.

3. ———: ———: ———: WAIVER. A formal tender is waived by the refusal of the purchaser to receive anything less than an amount which is larger than that to which he is entitled.

4. ———: ———: LIMITATIONS. If the purchaser refuses to allow redemption to be made on legal terms, a cause of action for that purpose arises in favor of the owner or party interested, which may be brought and prosecuted at any time before being barred by the general statute of limitations.

5. ———: ———. The owner of real estate who conveys the same by deed of general warranty after a sale thereof for delinquent taxes has such an interest in the land as entitles him to redeem from the tax sale.

APPEAL from the district court for Hayes county: LESLIE G. HURD, JUDGE. *Reversed.*

*W. S. Morlan,* for appellant.

*M. F. Harrington* and *C. A. Ready, contra.*

DUFFIE, C.

On the 18th day of December, 1901, the county of Hayes commenced an action in the district court against Eunice M. Cowles and others to foreclose a tax lien on the south half of the northwest quarter and the north half of the southwest quarter of section 13, township 6 north, of

range 33, in said county. Such proceedings were had in that action that a decree was entered finding due the county for delinquent taxes and interest the sum of $63.76, and directing that an order of sale issue and the land be sold to satisfy the amount of the decree, with interest and costs. June 3, 1902, the sheriff returned the order of sale, reciting that after due notice a sale of the land had been made to Jane Hudson for the sum of $152. This sale was confirmed by an order of the district court entered on the 22d day of September, 1902, and on the 10th day of March, 1903, the sheriff executed and delivered to Jane Hudson, the purchaser, a deed to the land, which has been recorded in the recorder's office of Hayes county.

The petition in the present action, after reciting the foregoing facts, further alleges that Eunice M. Cowles was on the 18th of December, 1901, the owner in fee of the land above described, and that on January 2, 1903, she conveyed the same by deed of general warranty to the plaintiff in this action; that on March 31, 1903, the said Eunice M. Cowles made an attempt to redeem from the sale, which was refused by Mrs. Hudson. The prayer of the petition was for an accounting and that the plaintiff be allowed to redeem from the sale. The defendants, Jane Hudson and the county of Hayes, interposed a demurrer to the petition, which was sustained by the district court, and, the plaintiff refusing to amend, his petition was dismissed and judgment for costs entered against him. Plaintiff has appealed.

The sheriff sold the land June 2, 1902, and confirmation of the sale was made September 22, 1902. Whether we accept the date of the bid received by the sheriff or the date of the confirmation entered by the court as the consummated sale, the attempt to redeem made by Mrs. Cowles March 31, 1903, was within the two years given by the constitution to redeem from tax sales, and was effective as a redemption, provided Mrs. Cowles made sufficient tender and had a sufficient interest in the land at that date to entitle her to redeem. It is insisted that Mrs.

Cowles had no right of redemption after parting with her title to the plaintiff in January, 1903. Defendants evidently overlooked the allegations of the petition, which alleges that Mrs. Cowles conveyed to the plaintiff by deed of general warranty. Under these circumstances she was still interested in the title. She was liable to the plaintiff on her warranty, and this liability undoubtedly gave her the right to protect the title and to redeem from an outstanding tax sale. *Jackson Milling Co. v. Scott,* 130 Wis. 267. The constitution (sec. 3, art. IX) gives not only the owner, but any person interested in real estate, the right to redeem within two years from a sale made for delinquent taxes. The former owner who has conveyed real estate by deed of general warranty is interested in the title, and may redeem from a sale made for taxes to protect himself from liability on his warranty of title.

The sheriff's return shows that he sold the land to Mrs. Hudson for $152. The amount of taxes and interest due on the land, as found by the decree, was $63.76, the costs of sale were $23.50, as shown by the return, but the court costs made on the foreclosure proceedings nowhere appear. Defendants assert with much confidence that the offer to redeem was ineffectual for the reason that the petition does not show that Mrs. Cowles tendered the amount to which Mrs. Hudson was entitled. The petition contains two allegations relating to an attempted redemption from the sale. It is first alleged: "On the 31st day of March, 1903, the said Eunice M. Cowles tendered to the said Jane Hudson, and offered to pay, all the taxes, penalties, interest and costs to which the said Jane Hudson was entitled by reason of the supposed tax foreclosure proceedings, which the said Jane Hudson refused to accept, claiming, among other things, that she should be reimbursed, in addition to the amount of taxes levied and assessed against said land, interest, penalties and all costs, the attorney's fee in foreclosing said claimed tax lien and sale thereunder." We have heretofore held that the purchaser of real estate at a judicial sale had for taxes is entitled on

redemption to receive the amount for which the land was sold, with interest thereon. *Wood v. Speck*, 78 Neb. 435; *Butler v. Libe*, 81 Neb. 740. As this plea shows a tender of the amount of "the taxes, penalties, interest and costs" only, and the land was sold for an amount largely in excess of the delinquent taxes thereon, it is clear that the tender was ineffectual, unless the action of Mrs. Hudson in relation thereto must be held to be a waiver of a technical tender by the plaintiff, and this question will presently receive attention.

The second allegation is in the following language: "On the 31st day of March, 1903, a tender of all legal demands and claims on account of said tax sale was made to the said Jane Hudson, and this plaintiff is now willing to pay, or bring into court and pay to the person or persons entitled thereto, all legal claims and demands which the said county of Hayes has or had against said land, or that the said Jane Hudson has or had against said premises for taxes, interest and proper charges, and said tender this plaintiff has continued to make and has been anxious and ready to pay." Whether these several statements in the petition relate to two attempts made to redeem on March 31, 1903, we are not advised by any allegation in the petition, and the question arises whether either or both contain a sufficient plea of tender. We cannot say that the allegations relating to a tender are wholly a legal conclusion; but, even if they are, no objection to this form of the plea of tender is made by the defendants. It would have been better had the pleader set forth in his petition the amount which he tendered by way of redemption; but, the form of the plea not being attacked, we must consider any informality relating thereto waived. Had objection been made that the plea of tender was insufficient in form, the plaintiff could have amended by setting out the amount which he offered in redemption, and this he undoubtedly would have done. He should not be foreclosed on a question not raised or considered.

There is another reason which moves us to disregard

any objections which might be made to the sufficiency of the plea of the tender. The district court evidently sustained the demurrer interposed to the petition upon the ground that Eunice M. Cowles had no redeemable interest in the land, having parted with her title previous to the tender. This we gather from the briefs of counsel, where, as before stated, no objection to the form of the plea is made; the sole objection being to the sufficiency of the amount tendered. There are numerous cases to the effect that "a tender is waived by the refusal of the creditor to receive anything less than an amount which is larger than that to which he is entitled." 28 Am. & Eng. Ency. Law (2d ed.), p. 7; *Allen v. Corby,* 69 N. Y. Supp. 7.

It is entirely clear that Mrs. Hudson was not entitled to ask or demand an attorney fee for the foreclosure of the tax lien, by way of redemption from the sale, and, as said in *Allen v. Corby, supra:* "If the defendant undertook to demand of the plaintiff a sum which he had no lawful right to exact, refusing to deliver the property except upon condition of the payment of this sum, it was not necessary to make an actual physical tender of the amount of the lien."

If as we must conclude from the allegations of the petition, a sufficient tender was made to Mrs. Hudson to entitle the plaintiff to redeem, or if Mrs. Hudson, by making an unfounded demand in addition to what she was justly entitled to receive, waived a strict tender of the amount due her by way of redemption, then a cause of action arose in favor of the plaintiff, entitling him to seek the aid of the court to enforce his right of redemption. This right of action arose in favor of the plaintiff when his tender was refused or the circumstances of the case made a strict tender unnecessary, and the statute of limitations would not run against such action until four years from the time within which it might be brought. We are of the opinion that the facts stated in the petition entitle the plaintiff to redeem, and that, if these facts are established by the evidence, the decree should go in his favor.

We recommend a reversal of the judgment appealed from and remanding the cause for further proceedings.

GOOD, C., concurs.

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

REVERSED.

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MARY E. CARLON, APPELLANT, V. CITY SAVINGS BANK, APPELLEE.

FILED NOVEMBER 6, 1908. No. 15,335.

1. Corporations: REORGANIZATION. The Omaha Loan & Trust Company Savings Bank by an amendment to its articles of incorporation changed its name to the "City Savings Bank." The then stockholders sold their stock to other parties, who surrendered the same and obtained new certificates of stock. The business was thereafter continued under a newly appointed set of officers; the management of the institution being entirely changed. *Held*, That such change did not change the legal entity of the corporation.

2. Landlord and Tenant: POSSESSION: QUESTION FOR JURY. A mortgagor of certain real estate executed an assignment of the rents and profits arising therefrom to the mortgagee, a corporation. The writing evidencing such assignment contained the clause following: "Giving and granting to the Omaha Loan & Trust Company Savings Bank full and complete authority and control of said premises as I could or would have if personally present, with full authority to enter into and take full possession thereof, and to rent and lease the same to such person or persons and on such terms, either in my name or in his name as to it shall seem proper, to the following end and purpose, to wit: Said Omaha Loan & Trust Company Savings Bank shall apply all sums collected under and by virtue hereof, first, to the payment of all legal taxes and assessments levied upon said real estate; second, to the payment of all sums necessary to keep improvements in proper condition for successful renting; third, to the payment of the interest on the two mortgages above described; and fourth, to the payment of the principal debts secured by said mortgages."

The evidence tends to show that the assignee through an agent rented the premises to the plaintiff in the action. *Held*, That there was evidence sufficient to submit to the jury the question whether or not the assignee had taken control and possession of the premises.

3. ———: REPAIRS: LIABILITY FOR INJURIES. While the landlord, in the absence of an agreement so to do, is not usually required to keep rented premises in repair, still if he volunteers to make repairs he will be liable for damages sustained by the tenant, who, without fault on his part, is injured in consequence of the negligent manner in which the repairs are made.

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

*E. C. Hodder* and *H. H. Bowes*, for appellant.

*William Baird & Sons, contra.*

DUFFIE, C.

The petition in this case charges that the defendant was the owner of a certain lot in the city of Omaha, and that her husband had rented the premises and was in possession of same as a tenant. It further charges that there was a cistern on the lot, located between the dwelling-house and an outhouse; that a board sidewalk extending from the rear of the dwelling to the outhouse covered the cistern; that the existence of the cistern was unknown to the plaintiff until some time in March, 1903; that she immediately notified the bank, and it caused the cistern to be filled with frozen dirt and manure; that after the dirt thawed and the manure rotted the filling settled about four feet; that afterwards, and in the month of September, 1903, while going from the house to the outhouse on the walk which had been replaced over the cistern after the same was filled, one of the boards, because of its rotten condition, broke and precipitated her into the cistern, breaking the bones of one of her legs near the ankle. After the plaintiff had presented her evidence and rested, the district court directed a verdict for the defendant, and from a judgment entered thereon plaintiff has appealed.

While not fully advised as to the ground upon which the trial court directed a verdict, we understand it was upon the theory that the defendant did not own the lot at the time of the accident complained of, and was not in possession or control thereof. That the defendant was not the owner of the lot is plainly established; but whether it had possession and control thereof is, we think, a question for the jury. Some time previous to September, 1904, James A. Handy purchased the lot, assuming a $1,400 mortgage given by the former owner to the Omaha Loan & Trust Company Savings Bank. In September, 1894, Handy executed a second mortgage to the Omaha Loan & Trust Company Savings Bank for $240, and on the 26th of December, 1895, executed to that bank an instrument assigning to the bank the rents of said property. After reciting the existence of two mortgages in favor of the bank, and assigning to it the rents of the property, the instrument continues as follows: "Giving and granting to said Omaha Loan & Trust Company Savings Bank full and complete authority and control of said premises as I could or would have if personally present, with full authority to enter into and take full possession thereof, and to rent and lease the same to such person or persons and on such terms, either in my name or in his name as to it shall seem proper, to the following end and purpose, to wit: Said Omaha Loan & Trust Company Savings Bank shall apply all sums collected under and by virtue hereof, first, to the payment of all legal taxes and assessments levied upon said real estate; second, to the payment of all sums necessary to keep improvements in proper condition for successful renting; third, to the payment of the interest on the two mortgages above described; and, fourth, to the payment of the principal debts secured by said mortgage." It is conceded that there were two corporations in the city of Omaha, one known as the Omaha Loan & Trust Company, and one as the Omaha Loan & Trust Company Savings Bank, and the evidence establishes that the majority of the stock of the savings

bank was owned by the Omaha Loan & Trust Company. It was further shown by one of the former employees of the Omaha Loan & Trust Company that that company had charge of all the real estate of the savings bank. It further appears from the evidence of this witness that the instrument by which Handy assigned to the bank the rents of the property was delivered to the bank, but the renting of the property was in charge of the trust company. It further appears from the evidence of the plaintiff that the lot was rented from one O'Neil, who had charge of the rental department of the trust company in 1902.

Defendant claimed on the oral argument that the defendant, the City Savings Bank, is a corporation entirely separate and apart from the Omaha Loan & Trust Company Savings Bank; that it was organized to purchase the last named corporation, and did so, and took over its assets, but that its officers and stockholders are parties who had no connection with the Omaha Loan & Trust Company Savings Bank. Whether this, if established, would relieve the defendant from liability in this action, provided the Omaha Loan & Trust Company Savings Bank, if continued under its original name, would be liable, we are not required to determine as we do not think the evidence in the record supports the claim made. A former secretary and present director of the defendant testified that the City Savings Bank was formerly known as the Omaha Loan & Trust Company Savings Bank; that the defendant company took the business of the Omaha Loan & Trust Company Savings Bank and carried it on in the name of the City Savings Bank; that the change was made in 1901. On cross-examination he testified that the articles of incorporation of the old bank were amended, and its management was different; that the new stockholders bought the stock of the old bank, and that new stock was issued in lieu thereof. This testimony is supported by paragraph 8 of a petition filed by the defendant bank in an action to foreclose the Handy mortgage. It is in the following language: "That the stockholders of plaintiff

amended its articles of incorporation on the 30th day of November, 1901, whereby plaintiff's name was changed from Omaha Loan & Trust Company Savings Bank to City Savings Bank, notice of which action was published as required by law, and a copy of said amendment filed in the office of the county clerk of Douglas county." From the evidence before us, we can come to no other conclusion than that the defendant, the City Savings Bank, is in fact the old Omaha Loan & Trust Company Savings Bank acting under a different name authorized by an amendment to its articles of incorporation. That its officers and stockholders have changed does not change its corporate character or existence.

It is also urged on behalf of the defendant that the landlord is under no obligations to keep rented premises in repair, in the absence of an express stipulation binding him to do so. That this is the general rule will not be controverted, and, without giving any force whatever to that clause of the instrument assigning rents, which requires the Omaha Loan & Trust Company Savings Bank to apply a portion of the rents to keep the improvements in a proper condition, we think it evident that a landlord who volunteers to make repairs upon his rented premises should be held to the exercise of such care in that regard as will not endanger the tenant. One cannot escape liability for negligence in making repairs, from which another suffers, by showing that he was under no legal obligation to do the work.

We conclude, on the whole case, that there was sufficient evidence to submit to the jury the question whether or not the City Savings Bank had possession of the leased premises in 1903, when the accident occurred, and whether the filling of the cistern and replacing the walk over the same was so negligently done as to cause the accident from which the plaintiff suffered.

We recommend a reversal of the judgment and remanding the cause for further proceedings.

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.

REVERSED.

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IN RE SARAH A. HADSALL.
SARAH A. HADSALL, ADMINISTRATRIX, APPELLANT, V. CHARLES HADSALL, APPELLEE.

FILED NOVEMBER 6. 1908. No. 15,343.

Executors and Administrators: ALLOWANCE TO WIDOW. The allowance made by the probate court to the widow of her deceased husband is a debt against the estate which must be paid from the assets thereof. The allowance cannot be satisfied or made out of the homestead left by the deceased.

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

*T. W. Blackburn,* for appellant.

*L. E. Gruver, contra.*

DUFFIE, C.

From the pleadings and agreed statement of facts upon which the case was tried the following appears: Henry B. Hadsall died intestate April 16, 1903, seized of lots 18, 19 and 20, in block 4, in the village of Weston, Saunders county, Nebraska. Sarah A. Hadsall is his widow, and prior to his death the parties resided upon the lots above described; the same being their homestead. Decedent had no other real estate, and was possessed of no personal property. The value of the lots and the building thereon is $900, and each lot without building or improvements is of the value of $50. In October, 1906, Mrs. Hadsall was appointed administratrix of the estate, and shortly there-

after the probate court of Saunders county entered an order allowing her the sum of $25 a month for her support, commencing on the 16th day of April, 1903. It is agreed that, as administratrix of the estate, she has no funds from which to pay the same or any debts of the estate or expense of the administration; that there is no property of any kind from which the allowance can be made unless the lots above described can be sold for that purpose. It is further stipulated that no income is derived from said lots nor has there been since the death of Hadsall, but the administratrix and widow has resided thereon and used the same as her home since the death of her husband. It is further agreed that application in due form had been made to the district court for Saunders county, and that notice of said application had been duly published. The application was resisted by Charles Hadsall, a son of the deceased, and who had purchased the interest of part of his co-heirs in the above described lots. It is further shown that the deceased left no minor children, and that his only heirs at law are Sarah A. Hadsall, his widow and administratrix of his estate, and nine children, the youngest of whom is 40 years of age. The district court made a finding that the property, with the exception of one vacant lot, was the homestead of the deceased at the time of his death, that the same is not subject to the payment of the widow's allowance as a debt or claim against decedent's estate, and, as the applicant did not desire to sell the one lot not embraced in the homestead separate and apart from the other lots, on account of its small value, the application was denied and the petition dismissed. From this order the administratrix had appealed.

The statute in force at the death of Henry B. Hadsall makes the following provision for the benefit of the widow and children of a decedent: "The widow and children constituting the family of the deceased shall have such reasonable allowance out of the personal estate, or out of the income of the real estate, as the county court may

judge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances, which in case of an insolvent estate shall not be longer than one year after granting administration, nor for any time after the dower and personal estate shall be assigned to the widow. And when the personal estate and the income from the real estate shall be insufficient to meet the allowance made as provided by law, such an allowance shall be deemed a debt against the estate, to be paid out of the proceeds of the sale of any real estate, and to take its preference for payment next after debts due this state, and before the claims of general creditors." Comp. St. 1903, ch. 23, sec. 176. It will, we think, be conceded that all debts and claims of every character approved or allowed by the probate court against the estate of a deceased person must be paid from the assets of the estate. Certainly the property of strangers cannot be used for that purpose, nor can property which the legislature has exempted from the payment of the decedent's debts, and which it has declared shall descend to his heirs freed therefrom. Our homestead law in force at the time of Hadsall's decease contains the following provisions: "If the homestead was selected from the separate property of either husband or wife it vests, on the death of the person from whose property it was selected, in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." Comp. St. 1905, ch. 36, sec. 17. The title to the lots in question was in Henry B. Hadsall at the time of his decease. It was his homestead. On his death a life estate therein vested in his widow, the applicant herein, and the fee vested in his heirs subject to the widow's life

estate. This homestead was not an asset of the decedent's estate or subject to administration, and we are unanimous in the opinion that all claims against the estate of whatever kind or nature must be paid out of the assets belonging to the estate.

In discussing homestead statutes much like our own, Thompson, Homesteads and Exemptions, sec. 546, says: "By force of these statutes the homestead of a deceased person forms no part of his estate to be administered in the probate court. It is not assets in the hands of the administrator, but the use of it as a homestead is reserved to the family during the period of administration. The authority of the probate court over it is limited to segregating it from that part of the decedent's estate which is subject to administration. When that is done, its jurisdiction ceases." Woerner, American Law of Administration (2d ed.), sec. 102, says: "It follows from the absolute nature of homestead rights that the homestead can in no view constitute assets in the hands of the administrator, since it vests in the widow and children free from the husband's debts, differing in this respect even from the property allowed for the provisional support of the family." We are firmly committed to this doctrine by our decisions. In *Tindall v. Peterson,* 71 Neb. 160, it is said: "A homestead of less value than $2,000 cannot be disposed of at administrator's sale either for the discharge of incumbrances thereon, or for the payment of debts against the estate of the decedent, and a license granted by the district court, purporting to authorize such a sale, is absolutely void." This holding was followed in *Bixby v. Jewell,* 72 Neb. 755, and has become the settled law of the state. Under our statutes the homestead cannot be taken into account in administering the estate of a deceased person. So far as administration of a decedent's estate is concerned, it is as though the homestead property never belonged to the decedent, as it vests in the widow and heirs immediately upon his death, divested of all claims of whatever nature (except the liens mentioned in

the homestead law) which may be allowed against the estate. We have been unable, after considerable research, to find but one case in which the homestead was held liable for the allowance made the widow. The homestead referred to was one selected by the court under the California statute after the death of the head of the family, and the statute of California, as construed by the court, makes a broad distinction between a homestead selected by the head of the family, and occupied as such at the time of his death, and a homestead set apart by the court after the death of the head of the family. It is plainly intimated in the opinion that a homestead selected and occupied as such prior to death is not subject to sale to satisfy an allowance made the widow; but, as a homestead for the family selected by the court may be sold by the heirs, the court concludes that such homestead is subject to the payment of debts due from the estate, including the widow's allowance. *Estate of Tittel,* 139 Cal. 149, 72 Pac. 909. We call attention to this case for the reason that the court, while upholding the widow's claim, very clearly intimates that her claim would not be allowed out of a homestead selected by her husband and occupied by the family prior to her husband's death.

The district court was not in error in dismissing the application of the administratrix, and 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.

LINCOLN UPHOLSTERING COMPANY, APPELLEE, V. LEON BAKER ET AL., APPELLANTS.

FILED NOVEMBER 6, 1908. No. 15,355.

1. **Dormant Judgment:** ATTACHMENT LIEN: MERGER. In an action aided by attachment, upon the entry of judgment the attachment lien is merged in that of the judgment, and thereafter the lien is a mere incident to the judgment and ceases to exist when the judgment becomes dormant. *Harvey v. Godding*, 77 Neb. 289.

2. ———: EXECUTION: INJUNCTION. A proposed sale of real estate under an execution issued on a dormant judgment will be enjoined at the suit of one who acquired title to the property during the life of the judgment lien.

3. **Judgment:** INTERVENTION: DISMISSAL. One who intervenes in an action between third parties may dismiss his intervention without prejudice, and after such dismissal a judgment entered in the action will not affect his interest in the matter in litigation.

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

*Samuel J. Tuttle, J. B. Strode* and *O. B. Polk*, for appellants.

*John M. Stewart, D. H. McClenahan* and *E. F. Pettis*, *contra.*

DUFFIE, C.

The action is for an injunction and to quiet title. Prior to the year 1890, Victoria L. Harford was the owner of a part of lot 1, township 10, of range 6, in the city of Lincoln, and while such owner she mortgaged the same to the New Hampshire Trust Company or Hiram D. Upton, its president, to secure a loan of $8,000. One Holland, an attorney residing at Seward, Nebraska, had charge of the Nebraska business of the New Hampshire Trust Company, and from his testimony it appears that most, if not all, mortgages securing loans made by that company were taken in the name of Upton. In the early part of 1901

the Harford mortgage was sold to the Newport Savings Bank, and, default in payment being made, it was foreclosed and the property bid in by Upton for an amount less than the amount of the decree. The deed was made to Hiram D. Upton, in whose name the mortgage had been foreclosed, but there is no dispute in the evidence that at that time the Newport Savings Bank was the owner of the note and mortgage, and the equitable owner of the decree entered in the foreclosure proceeding. Upon discovering that Upton had bid in the property, the Newport Savings Bank insisted that the property be conveyed to that institution, and thereupon Upton conveyed the property to the New Hampshire Trust Company, and that company conveyed to the Newport Savings Bank. These deeds are dated October 23, 1893.

In September, 1894, the several parties, defendants in the several actions above entitled, commenced separate actions in the district court for Lancaster county against Hiram D. Upton and the New Hampshire Trust Company, and caused writs of attachment to issue and to be levied upon the real estate in controversy herein. Thereafter, and before these cases proceeded to trial, C. E. Holland, the attorney above referred to, appeared in the actions, and asked and obtained leave to file a petition of intervention on behalf of the Newport Savings Bank. He afterwards filed an answer, alleging title to the attached property in the intervener, but before final judgment he obtained leave to dismiss his intervention proceeding, and judgment in these several cases went in favor of the plaintiffs in said actions and against the New Hampshire Trust Company only, and an order was entered directing the sale of the attached property. These judgments were entered on October 1, 1895. The Brown Lumber Company procured an execution on its judgment May 5, 1900, which was returned *nulla bona*. No other executions were issued until December 15, 1905, when all the parties plaintiff secured executions on their several judgments, under which the

sheriff was proceeding to sell the property when the plaintiff herein commenced these actions to enjoin the sale and to quiet its title to the premises. The plaintiff claims title through a deed from the Newport Savings Bank of date of April 13, 1904, and it has been in actual possession of the premises since about that date. As the matters in dispute and the evidence on the issues made are common to all the cases, they were consolidated and tried together, and by stipulation of the parties the appeal to this court is to be heard upon one record. The district court entered a decree enjoining the defendants from enforcing their judgments against the land in controversy and quieting the plaintiff's title thereto.

It will be observed from the statement above made that the attaching plaintiff obtained judgment against the New Hampshire Trust Company more than ten years prior to the taking out the executions sought to be enjoined in this action. The Brown Lumber Company alone took out an execution May 5, 1900, but as this was more than five years prior to the issue of the execution issued December 15, 1905, it is evident that all of the attachment judgments were dormant and had ceased to be a lien upon the attached property when these later executions were issued. It is argued by the defendant that the attachment lien did not become merged in the judgment lien, and that it is immaterial whether their judgment became dormant or not; that the attachment lien still exists and may be enforced against the attached property. In 4 Cyc. 625, it is said: "An attachment lien on real estate continues until judgment in the suit has been entered and docketed, when it merges in the judgment lien." The authorities cited in support of the above quotation make it apparent that this is the general rule. In Drake, Attachment (7th ed.), sec. 224*a*, it is said: "If the plaintiff neglects, within the lawful period of his judgment lien, to subject the property to execution, the lien of the attachment does not revive on the expiration of the judgment lien." This question was thoroughly considered by this court in *Harvey v. Godding*,

77 Neb. 289. Two of the propositions established in that case are applicable herein. Relating to the attachment lien, it is said: "In an action aided by attachment, upon the entry of judgment the attachment lien is merged in that of the judgment, and thereafter the lien is a mere incident to the judgment and ceases to exist when the judgment becomes dormant." Relating to the rights of a purchaser of real estate during the existence of a judgment lien, it is said: "A sale of real estate under an execution issued on a dormant judgment is void as to one who acquired title to the property from the judgment debtor during the life of the judgment lien." We are still satisfied with the holding in that case, and see no reason why a different rule should be applied here. It results, therefore, that the judgment and attachment lien of the defendants had ceased to exist when they took out executions to enforce their judgments against the property in controversy, and that they have no foundation upon which to base their claim; the property in the meantime having been purchased by the plaintiff.

It is asserted with much confidence that the deed of the Newport Savings Bank to the plaintiff, the Lincoln Upholstering Company, was not properly executed and did not pass title. The deed in question was executed on behalf of the bank by its treasurer and secretary. Section 4129, Ann. St. 1907, is as follows: "It shall be lawful for any corporation to convey lands by deed, sealed by the common seal of said corporation, and signed by the president or presiding officer of the board of directors of the corporation; and such deed, when acknowledged by such officer to be an act of the corporation, or proved in the usual form prescribed for other conveyances for lands, shall be recorded in the clerk's office of the county in which the lands lie, in like manner as other deeds." Invoking the well-known rule that each state has the right to prescribe the manner in which lands lying within the state may be conveyed, it is argued that the statute above quoted prescribes an absolute and exclusive manner in

which lands of a corporation may be transferred. In support of the contention, we are referred to *Wheelock v. Moulton,* 15 Vt. 519, and *Isham v. Bennington Iron Co.,* 19 Vt. 230, in which Judge Redfield in construing a somewhat similar statute held that it provided an exclusive method for conveyance by a corporation. But, in *Morris v. Keil,* 20 Minn. 531, the supreme court of Minnesota had under consideration a statute in the following words: "Every corporation authorized to hold real estate may convey the same by an agent appointed by vote for that purpose." Replying to the claim that this statute excluded every other method of corporate conveyance, the court said: "We think that the purpose of this provision was to point out one way in which a corporation might properly make a conveyance of real estate; but there is no reason for supposing that the intention was to exclude the other and very common practice of a conveyance by the corporation through one or more of its regular officers, for instance, its president, secretary, or treasurer, instead of through an agent appointed by vote for that particular purpose." In the case we are considering, while the charter of the Newport Savings Bank is not in evidence, the treasurer testified as follows: "The officers are composed of a president, vice-president, secretary and treasurer, and board of trustees. The treasurer is the executive officer of the bank, and has the general oversight of its entire affairs and general management, and is the officer who executes all papers in behalf of the bank. The president, vice-president and trustees act as directors, and meet once a month usually to consult with the treasurer and approve loans." Under the issues presented here we are inclined to hold with the Minnesota court that the statute is not exclusive, but that a conveyance of real estate executed by a general officer of the bank, and especially by an executive officer with whom the secretary joins, is a valid conveyance and sufficient in law to convey title.

The defendants further urged that the right of these

savings banks were adjudicated in the attachment cases in which Holland intervened on behalf of that bank. This claim is based upon the fact that, in addition to the petition of intervention filed by the bank, it also filed an answer in each of these cases, and that before the final determination of the case it dismissed its petition of intervention only, allowing its answers to stand. The final order of the court relating to the intervention proceedings is as follows: "Now on this day came the parties hereto by their attorneys, and trial of this cause is now had to the court, and, after hearing the testimony of witnesses adduced, the same is submitted to the court for consideration, and the defendant Newport Savings Bank and Woonsocket Institution for Savings in open court dismiss their petition of intervention herein without prejudice to a new action." Section 50*b* of the code, relating to intervention, is as follows: "The court shall determine upon the intervention at the same time that the action is decided, and if the claim of the intervener is not sustained he shall pay all costs of the intervention." The final judgment entered in the attachment cases makes no reference whatever to the claim of the intervener, the Newport Savings Bank. On the question of its claim to the attached property the judgment is entirely silent. It is evident, therefore, that the court and the parties understood that the Newport Savings Bank was out of the case, and that its claim had been withdrawn from the consideration of the court and the right reserved to assert it in another action. This being the case, it would be a gross injustice for us to hold that it was bound by the judgment entered in cases in which it is not named, in which its claims were not considered, in actions from which the court and all parties in interest understood it had been dismissed.

A careful review of the record convinces us that the court was right in entering the judgment appealed from, and we recommend its affirmance.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

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WINFIELD S. HAYMAN, APPELLANT, V. ELIZABETH C. ROWND ET AL., APPELLEES.

FILED NOVEMBER 6, 1908. No. 15,342.

1. **Injunction:** WASTE. A court of equity will restrain the committing of waste threatened by a tenant for years, and his agents or employees.
2. **Waste** is a destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate.
3. **Waste.** A tenant is guilty of waste who drills holes into a brick wall, and drives wooden pegs therein for the purpose of attaching a sign, where such use would cause the brick in that part of the wall to become loose or misplaced.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Reversed with directions.*

*Charles G. Ryan,* for appellant.

*Harrison & Prince, W. H. Thompson* and *Bayard H. Paine, contra.*

EPPERSON, C.

Plaintiff is the owner of what is known as the "St. James Hotel Building" in the city of Grand Island. The defendants were in possession of the building under a five-year lease, terminating in November, 1907, and the defendant, Mrs. Hanrahan, had charge of the dining room and cafe, under a contract with the Rownds. In September, 1906, the Grand Island Electric Company, through arrangements made with its codefendants, was about to

attach an electric sign to the side of the building above the door of the dining room and extending out over the sidewalk. This sign was 7 feet long, 18 inches wide, and weighed 73 pounds. Plaintiff, as owner of said premises, had forbidden defendants to attach the sign to said building, and, upon their attempting to do so, instituted this action for injunction, alleging that defendants were threatening to cut into said front wall of said building, tear down and deface and damage the same, to cut out the bricks, and permanently injure said wall and building, destroy its symmetry, and impair its strength and durability, thereby committing waste. Upon the trial the lower court dissolved a temporary restraining order previously issued, and dismissed the action.

It is the defendants' contention, and their case was tried upon the theory that the sign was to be attached to a pipe inserted into the wooden lintel above the door, that guy wires were to be attached to the lintel and to the frames of windows in the upper story without injury to the brick wall. We think there can be no doubt but that a preponderance of the evidence supports the plaintiff's contention. The sign was ordered or prepared by one of the defendants in such a way that with projecting stay rods it could be attached to the wall of the building, and screw holes were arranged that to so attach it it would be necessary to drill holes into the brick wall and insert wooden plugs therein. The evidence is undisputed that the manager of the electric light company stated to the plaintiff one week or ten days before the trial that defendants intended to attach the sign by drilling holes into the brick wall, not only for the stay rods, but also for the guy wires. But the manager testified that they intended to insert a rod or pipe into a hole bored into the wooden lintel above the door, extend this rod nine feet out over the sidewalk, and upon this they would hang the sign; that two guy wires attached to the outer end of the sign would be fastened to the wooden lintel, and two others to the window frames above. Although the witnesses testi-

fied that this was the intention of the defendant at the time they attempted to attach the sign, yet early in the trial he did not know whether the lintel was of wood, brick or iron. Nor does it appear that he made any effort to ascertain the material of the lintel until requested to do so during the trial. The stay rods could not be used if the sign was attached in the manner contended for by defendants. The whole case is strongly suggestive that defendants' intention not to penetrate the brick wall was not formed until the injunction suit was instituted. In view of this testimony we are convinced that the plaintiff successfully carried the burden of proving that the defendants intended and threatened to attach the sign by the drilling of holes into the brick wall, and inserting wooden plugs therein. From other testimony, it appears that this brick wall would have been damaged by the threatened acts of the defendants. The evidence shows that the wall was out of plumb; that the mortar was crumbling away; and that it was not as durable as brick walls built with the use of cement in the mortar, which was lacking here; and that in other places, where holes had been previously drilled and filled with wooden plugs, the brick in the immediate vicinity had become loosened and the wall damaged thereby. Many masons testified in behalf of the plaintiff that the threatened use of the wall would be of considerable damage thereto; that although the damage might not show at once, it was reasonably certain to appear later. It is true one witness testified in behalf of the defendants that the attachment of the sign by the drilling of the holes and the use of wooden plugs would not damage the wall. But, as it was the defendants' theory that such use was not threatened, it is apparent, in the absence of special findings, that the district court decided the case upon the defendant's theory, which, as above stated, is clearly defeated by a preponderance of the evidence.

Under the facts proved, we think there can be no doubt but that the defendants were threatening a waste of the

plaintiff's property, which the court may restrain. In 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1348, we find the following: "Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate as, for example, a tenant for life or for years. The rightful possession of the wrongdoer is essential, and constitutes a material distinction between waste and trespass. The remedy by injunction is fully established, and has not only virtually superseded the old common law 'action of waste,' but has to a great extent taken the place of the 'action on the case' for damages. An injunction will be granted in all cases where a legal action would lie to recover possession of the land wasted, or to recover damages. It will also be granted in many instances where no legal action can be maintained, although the interest of the injured party is legal; and where the estate of the injured party is wholly equitable; and where the waste itself is entirely 'equitable'; that is, where by the terms of the will, deed, settlement, or lease, the tenant holds the land 'without impeachment of waste.' An injunction will also be granted to restrain threatened waste, although none has actually been committed." In 8 Words & Phrases, 7406, 7407, we find the following definitions: "'Waste' is defined to be any unlawful act or omission of duty on the part of the tenant which results in permanent injury to the inheritance. *Whitney v. Huntington,* 34 Minn. 458, 57 Am. Rep. 68 (citing Whart. Law Dict.; Abb. Law Dict.; Bouv. Law Dict.)" "Waste is an improper destruction or material alteration or deterioration of the freehold, or of things forming an essential part of it, done or suffered by a person rightfully in possession as tenant, or having but a partial estate, like a mortgagor." *Hamilton v. Austin,* 36 Hun (N. Y.), 138,

We recommend that the judgment of the district court be reversed and this cause remanded, with directions to enter a restraining order as prayed.

DUFFIE and GOOD, CC., concur.

By the Court: For reasons given in the above opinion, the judgment of the district court is reversed and this cause remanded, with instructions to the lower court to enter a restraining order as prayed.

REVERSED.

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STATE, EX REL. E. MABIN, APPELLANT, V. GEORGE W. LOER, APPELLEE.

FILED NOVEMBER 6, 1908. No. 15,222.

1. **Quo Warranto: TITLE TO OFFICE: PLEADING.** In an action of *quo warranto*, brought to determine the respective rights of the relator and respondent to an elective public office, it is not necessary that relator should state in the information that he received the highest number of votes cast for any candidate for the office. It is sufficient in that respect if facts are alleged in the information from which such conclusion may be drawn. Nor is it necessary in such an action that the relator should allege that the votes were canvassed and returned as required by law.

2. ———: ———: ———. In an action of *quo warranto*, where relator's right to a public office is grounded upon the proposition that a legislative act is unconstitutional, it is not necessary to allege that the act is unconstitutional, where the supreme court has previously determined that such act is in conflict with the constitution.

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

*B. F. Gilman,* for appellant.

*William Mitchell, contra.*

GOOD, C.

This is an action of *quo warranto* instituted in the district court for Box Butte county by E. Mabin, as relator, to determine the right of the relator and respondent respectively to the office of county commissioner of the

second district in Box Butte county. A general demurrer to the information was sustained, and, the relator refusing to further plead, the action was dismissed. Relator has appealed to this court.

Relator alleged that prior to the general election in November, 1905, he and one Christy were duly nominated for the office of county commissioner for the second commissioner's district in said county; that relator and Christy were the only persons nominated and voted for for said office at said election, and at said general election the relator received 469 votes, and Christy received 419 votes, and that relator was thereby duly elected to the office. He also alleged the issuance by the county clerk of a certificate of election to him, and that he had taken the oath of office and given bond for the faithful performance of the duties of the office, which bond was duly approved by the county judge of said county; that, nothwithstanding the election of the relator to said office, the respondent, the former incumbent of said office, and whose term expired on the 4th of January, 1906, had from the 9th day of January, thence continuously to the filing of the information, without legal warrant, claim, or right, used and exercised the said office. Relator prayed judgment that respondent be declared not entitled to said office, and that he be ousted therefrom, and that the relator be entitled to said office and installed therein.

We are unable to ascertain from the record what reason prompted the trial court to hold the information insufficient. The relator states in his brief that the district court took the view at the time of the ruling that the biennial election law, or rather that part of it relating to county commissioners, had not as yet been declared unconstitutional by this court, and that it was in full force and effect, and that there was no office of county commissioner to be filled at the election of 1905. The respondent contends, however, that the information is insufficient in several respects: First, because it does not allege that the relator received a majority of the votes at the election,

and does not state facts sufficient to show that he was elected to said office. In this, we think that respondent is in error. Under the law in this state a majority vote is not necessary. The law in this state does not require a majority vote to elect to a public office. Where there are two or more eligible candidates for an office, the one who receives the highest number of legal votes is elected. It is immaterial whether such number is a majority or only a plurality. In this instance the relator received a majority. The criticism, if it goes to the point that the statement or conclusion that the relator received a majority of the votes cast for commissioner is not contained in the information, is devoid of merit. Pleading the mere conclusion would be insufficient. The facts from which the conclusion may be drawn are pleaded. This is all that the law requires.

Respondent criticises the information because it fails to state that the votes cast at said election were canvassed and return thereof made. We are cited to no authority, nor do we know of any, which requires that such an allegation should appear in the information. The information contains averments which show that the relator was eligible to the office; that he was duly nominated, and received the highest number of votes of any candidate for that office; that a certificate of election was issued to him; that he took the oath of office and filed a bond for the faithful performance of his duty, which was duly approved. This was sufficient to show that relator was elected to and entitled to the office.

Under the law, as it existed prior to 1905, it is conceded that there would have been a commissioner to elect in said district at said election in 1905. The legislature of that year attempted to amend the law, so as to require the election of commissioners in the even-numbered years. This attempted legislation is known as chapter 65, laws 1905, otherwise known as the "Biennial Election Law." If that act was valid, there was no office of commissioner in said district to be filled at said election. Relator's

right to the office is founded upon the proposition that the biennial election law is unconstitutional. Respondent contends that, as relator failed to plead that said act was unconstitutional, his information failed to state facts entitling him to the office. The presumption obtains in the first instance that all legislative enactments are valid and constitutional. Respondent contends that under this rule the presumption obtained that the biennial election law was valid, and, as relator did not plead that it was unconstitutional, the question of its unconstitutionality was not presented, and could not be determined. It is not necessary to consider or determine that question in the instant case. After a legislative act has once been declared void because in conflict with the constitution, there no longer remains the presumption in favor of its validity, and there can be no necessity in litigation subsequent to such decision to plead the unconstitutionality of the act. In *State v. Galusha,* 74 Neb. 188, this court held the biennial election law to be void, because in conflict with the constitution of this state. The opinion in that case was filed June 22, 1905. This was several months previous to the general election in 1905, and more than one year before the commencement of this action. The biennial election act was no longer clothed with the presumption of constitutionality. There was therefore no need to plead that it was unconstitutional. That had already been judicially determined. The people of the state have generally accepted that decision as disposing of the act, and have acted in accordance with the ruling of the court. The district court should have recognized this rule as binding upon it, and recognized the fact that the biennial election act was void and of no force and effect.

The information was invulnerable to the objections made. There appears to have been sufficient in the information to entitle the relator to the relief demanded. It follows that the judgment of the district court is erroneous, and it should be reversed and the cause remanded for further proceedings according to law.

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.

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ELLEN DOYLE, APPELLANT, V. JOHN FRANEK, APPELLEE.

FILED NOVEMBER 6, 1908. No. 15,295.

1. **Trial:** DIRECTING VERDICT. In a law action it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination.
2. **Landlord and Tenant:** INJURY: LIABILITY OF LANDLORD. As a general rule a landlord is liable in damages for personal injuries sustained by his tenant in consequence of the leased premises being rendered dangerous and unsafe by an independent contractor in the performance of a contract with the landlord.

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

*Wells & Riley,* for appellant.

*James W. Hamilton* and *Henry E. Maxwell, contra.*

GOOD, C.

Plaintiff brought this action to recover damages for personal injuries alleged by her to have been sustained by reason of defendant's negligence. The material allegations of plaintiff's petition are, in substance, that on August 7, 1905, and for several months immediately prior thereto, she was a tenant of defendant and in peaceable possession of a certain dwelling-house situated in the city of South Omaha, which was owned by the defendant; that defendant, without plaintiff's consent, undertook to remove the said dwelling-house to another location, and in preparing the house for removal took away the front

steps to the house, which were used by the plaintiff in passing in and out of the house, and that defendant immediately after replaced the steps, but negligently and carelessly neglected and failed to fasten the steps as they had been theretofore, and left them unfastened and insecure, and in an unsafe and dangerous condition; and that plaintiff, without any knowledge of the unsafe condition of the steps, and supposing them safe as they had been theretofore, while passing from the house and over said steps, did, by reason of the negligence of the defendant, sustain the injuries complained of. The defendant answered by a general denial. After the evidence was taken the trial court directed a verdict for defendant. Plaintiff has appealed.

This action was brought and based upon the theory that the relation of landlord and tenant existed between the parties, and the verdict for defendant seemed to have been directed upon the theory that there was not sufficient evidence to sustain plaintiff's contention in that regard. It appears from the record that in 1904 the plaintiff and her husband, Edward Doyle, and their minor children lived together as one family. Plaintiff's husband at that time was in the employ of a packing-house, earning wages with which he supported his family. The premises in controversy were then owned by one McDonald. Mrs. Doyle made arrangements with McDonald's agent for the occupancy of the house. She testified that she rented the premises from McDonald's agent. It is conceded that she paid rent to the agent. Receipts for the rent were issued by McDonald's agent and delivered to Mrs. Doyle. The receipts recited that the rent was paid by Edward Doyle. McDonald, the owner of the premises, having died, an agent acting for his estate collected the rent for a time. This agent testified to the fact of collecting the rent, but is uncertain whether it was paid by Mr. Doyle or Mrs. Doyle. He had the property listed on his books as rented to Edward Doyle. Defendant purchased the property at administra-

tor's sale, and thereafter his agent collected rent from Mrs. Doyle. It appears that no new lease or arrangement was made for the occupancy of the premises either by Mr. or Mrs. Doyle after they entered pursuant to the arrangement made with the agent of McDonald. The rent was not kept promptly paid, and defendant instituted an action of forcible detainer against Edward Doyle to recover possession of the premises. In this action he had judgment for restitution. After this judgment was entered, but before any attempt was made to execute it, Doyle died. Mrs. Doyle received the injuries of which she complained subsequently to Doyle's death. The record also discloses that the defendant had let a contract to a third party to remove several buildings, including the one in controversy, and that defendant personally had no knowledge of and nothing to do with the removal and replacing of the steps. It appears that they were removed and replaced by one of the employees of the contractor.

The defendant contends that the premises were originally leased to Mr. Doyle, and not to Mrs. Doyle, and that the judgment in the action for forcible detainer was conclusive upon the rights of Mrs. Doyle to occupy the premises, and also contends that, even had she been the tenant of the defendant at the time she received the injury, the defendant was not liable because the negligence which caused her injury was that of an independent contractor, and not that of defendant. It will be conceded that, if the premises were originally leased to Mr. Doyle, then the judgment in the action for forcible detainer was conclusive upon the rights of Mrs. Doyle, and that she was thereafter a trespasser while she remained in the dwelling-house. Upon the other hand, if Mrs. Doyle was the original tenant, then it seems clear that the action of forcible detainer against her husband could have no effect upon her rights to occupy the premises. She was not a party to that action, and as to her the judgment was a nullity. It becomes important, therefore, to determine whether or not the premises were originally leased to Mr.

Doyle or to Mrs. Doyle. The evidence on this point is meager, and not at all satisfactory. However, Mrs. Doyle testified that she rented the premises and paid the rent. In this she is corroborated by the agent of McDonald, who owned the property when the lease was made. She is also corroborated to some extent by other testimony. There is other evidence in the record which would indicate that the premises had been leased to Mr. Doyle. But this evidence is not so clear or so overwhelming as to compel a finding to that effect. It was a question of fact as to whether the lease was made to Mrs. Doyle or to her husband. On this question the evidence was in conflict, and there was, in our opinion, sufficient evidence that the premises were originally leased to Mrs. Doyle to require that question to be submitted to the jury for its determination.

The defendant argues that because the steps were removed and replaced by an independent contractor, without any direction from or knowledge of the defendant, he is thereby relieved from liability. It is urged that the negligence complained of was not the neglect of the defendant, but that of an independent contractor. We do not think this contention is sound. Conceding that the relation of landlord and tenant existed between the parties to this action, we think it is clear that the landlord is not relieved of liability for injury to his tenant by the fact that he employed an independent contractor to perform the work of moving the house. So long as the relation of landlord and tenant existed between the parties, the landlord owed a duty to the defendant not to do, or cause to be done, anything which would render the premises dangerous and unsafe for his tenant. Where one owes an absolute duty to another, he cannot acquit himself of liability by delegating that duty to an independent contractor. *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 522, 60 L. R. A. 116; 16 Am. & Eng. Ency. Law (2d ed.), 200. In *Peerless Mfg. Co. v. Bagley*, 126 Mich. 225, 53 L. R. A. 285, it was held: "Where a landlord

undertakes to make repairs or improvements for his tenant, he cannot relieve himself of the consequences of neglect in the performance of his agreement by employing an independent contractor." In *Lambert v. Hamlin*, 73 N. H. 138, it was held that a landlord is liable for the removal of door steps while repairing underpinning without notice to tenants. It is no defense to the action that the steps were removed and replaced by an independent contractor employed by defendant. He cannot thus avoid liability.

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

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.

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F. E. CLARK ET AL., APPELLANTS, V. JOHN FOLTYN ET AL., APPELLEES.

FILED NOVEMBER 6, 1908. No. 15,692.

1. **Intoxicating Liquors: LICENSE: APPEAL.** In an appeal by remonstrators from the decision of a licensing board granting a liquor license, jurisdiction is conferred upon the district court by giving notice of the intended appeal, and filing within a reasonable time in said court a transcript of the proceedings had upon the hearing before the licensing board.

2. ———: ———: ———. That a certified transcript of the evidence taken before a licensing board upon a hearing on an application for liquor license is not filed with the transcript of the proceedings of the board upon such hearing is not a ground for dismissing the appeal.

3. ———: ———: ———: DEFECTIVE TRANSCRIPT. On an appeal to the district court from the decision of a licensing board granting

a liquor license, it is not a ground for the dismissal of such appeal that the transcript of the proceedings had before the licensing board upon the hearing is defective either in substance or in certification.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Reversed.*

*Albert & Wagner* and *R. P. Drake,* for appellants.

*John J. Sullivan, Louis Lightner* and *James G. Reeder, contra.*

GOOD, C.

John Foltyn and W. J. Lueschen each made application to the board of trustees of the village of Creston in Platte county for license to sell intoxicating liquors. Against these applications remonstrances were duly filed by F. E. Clark and others. It was agreed between the applicants and remonstrators that both cases should be heard together, and the evidence taken should be considered in each case. The hearing on the applications and remonstrances was concluded on the 2d day of May, 1908, and resulted in the overruling of the remonstrances, and an order granting the licenses. Remonstrators gave notice of appeal, and on the 7th day of May filed in the district court for said county a transcript of the proceedings had before the village board. On the 9th day of May the applicants for license filed a motion to dismiss the appeals on the grounds: "(1) The court has no jurisdiction of the subject matter. (2) No transcript of the evidence taken on the hearing of said applications before the village board of the village of Creston has been filed in this court as required by law." This motion was sustained, and a judgment entered dismissing the appeals. The remonstrators have appealed to this court.

In the transcript of the proceedings of the village board there appears a record of the examination of a number of witnessses, but in the certificate of the village clerk

attached to the transcript no reference is made to any evidence. The appellees contend that as the law requires the district court to decide such cases upon the evidence taken before the licensing board, and because the evidence was not taken and filed in the district court, or rather because the certificates make no mention of the evidence taken on the hearing, the court was without jurisdiction, and the appeals should have been dismissed. They also contend that the appeals should have been dismissed because the transcript filed does not contain the petitions of the applicants for licenses and the transcript does not show what the real contention was between the applicants and the remonstrators as heard before the village board. In *State v. McGuire*, 74 Neb. 769, where this question was under consideration, the court said: "Such evidence is not essential to give the district court jurisdiction of an appeal from an order granting a license; the filing of a certified transcript of the proceedings containing such order being sufficient for that purpose. Where the district court has acquired jurisdiction of such appeal by the filing of a certified transcript of the proceedings, and the license board fails to transmit the evidence taken before it at the hearing, the district court may enter a rule requiring the board to supply the omission." In *State v. Board of Fire & Police Commissioners*, 76 Neb. 741, it was held: "An appeal from the decision of the board in granting a liquor license is taken by giving notice of the intended appeal, and procuring a transcript of the record of the proceedings before the board, and filing the same in the appellate court. When such appeal has been taken, the court may compel the board to furnish a duly certified transcript of the evidence taken before the board upon the hearing." Under the rules in these cases, it appears clear that the district court for Platte county was vested with jurisdiction of the cases upon the filing of the transcript. So far as the question of jurisdiction is concerned, it was immaterial whether or not the evidence taken before the village board

was contained in the transcript, and it was also immaterial as to whether or not any mention of the evidence was made in the certificates attached to the transcript.

Appellees contend that appellants had ample time and opportunity to procure a transcript of the evidence and a proper certificate thereto, and that, as the record does not show that appellants asked permission so to do, the district court should not on its own motion direct the village authorities to furnish and file a transcript of the evidence. No one would contend that it was the duty of the district court to take the initiative and on its own motion require the village board to furnish and file a transcript of the evidence. But that is not the question for determination. Was the district court justified in dismissing the appeals because the appellants had not asked permission to supply the transcript of the evidence? To so hold would be to assume that the appellants had been guilty of laches either in filing the transcript of the proceedings without a transcript of the evidence or in failing to cause a transcript of the evidence, properly certified, to be filed in the district court within two days after filing the transcript of the proceedings and within seven days from the hearing. This, too, in the face of the fact that it was the duty of village authorities, rather than of appellants, to furnish and transmit the transcript of the evidence to the district court. In our opinion such a holding would be drastic in the extreme and exceedingly summary. The contention does not meet with favor. The ruling is not entitled to judicial sanction.

If the transcript of the proceedings had before the licensing board was defective either in certification or in its contents, such defect could have been reached and considered either by motion to strike from the files or upon a hearing upon the merits, but could not properly be considered upon a motion to dismiss the appeal.

From what has been said, it follows that the judgment

of the district court should be reversed and the cause remanded for further proceedings according to law.

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 according to law.

REVERSED.

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CITY OF CHADRON, APPELLEE, V. DAWES COUNTY, APPELLANT.

FILED NOVEMBER 6, 1908. No. 15,248.

1. **Highways**: ROAD DISTRICTS: DISTRIBUTION OF TAXES. Cities of the second class and villages were road districts within the meaning of section 76 of the road law (Comp. St. 1899, ch. 78) as it existed prior to the amendment of 1901, and as such were, except where otherwise provided, entitled to one-half of the moneys arising from the road tax levied by the county commissioners upon the property situated within their limits.

2. ———: ———: TAXES: COUNTY A TRUSTEE. And where a county has collected a road tax levied upon property within the limits of such city or village, it holds one-half of the amount so collected as a public trust, and is charged with the continuing duty to pay the same over to such city or village.

3. ———: ———: ———: ———. In such a case, as between the county and city or village, the county does not hold such collections in its own right, but the possession of the one is the possession of the other. The possession of the county is precarious, and not *animo domini;* and being trustee it cannot acquire the trust fund by lapse of time.

4. ———: ———: ———: LIABILITY OF COUNTY. And in such a case, where the county appropriates that portion of the road tax which should be paid to said city or village, by transferring it to its general fund, it thereby becomes liable to such city or village for the amount so appropriated, and may be proceeded against directly; and the fact that the county treasurer and his bondsmen may also be liable therefor is immaterial.

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

*Justin E. Porter,* for appellant.

*D. B. Jenckes* and *A. W. Crites, contra.*

FAWCETT, C.

Plaintiff is chartered under the provisions of the statute for the organization of cities and villages, and is situate within the territorial boundaries of the defendant, the county of Dawes. Defendant levied a road tax upon the property situated within the boundaries of plaintiff city, in common with all the other property in said county, for the years 1886 to 1895 and 1897 to 1904, both inclusive, under which it collected the sum of $7,514.98, no part of which was paid over to the city by the county. On the 1st day of June, 1906, plaintiff filed a claim with the county board of defendant county for one-half the amount so collected. This claim was afterwards, and on the 29th day of June, allowed for the sum of $571.75, which was one-half of the amount of the road taxes collected from the property within the boundaries of said city during the four years next preceding the filing of the claim. The remainder of the claim was disallowed. From this decision of the county board the city appealed to the district court, where a trial resulted in a judgment in favor of the plaintiff city for $3,757.49, being one-half of the entire amount of road taxes collected from property within the city limits since 1886. Defendant appeals.

1. Defendant's first contention is that no statute required the payment of one-half, or any other portion, of said road tax to the city. Plaintiff relies upon our construction of the statute in *Libby v. State,* 59 Neb. 264. In that case the city of Tecumseh sought a peremptory writ of mandamus requiring the treasurer of Johnson county to pay to the city treasurer the proceeds of road

taxes levied by the county commissioners against property situated within the corporate limits of the city. It was contended by the plaintiff that section 84, art. I, ch. 14, Comp. St. 1907, which provides that the county treasurer "shall pay over on demand, to the treasurer of any city or village, all money received by him arising from taxes levied belonging to such city or village," was applicable to moneys arising from the levy of a road tax on property situated within the limits of such city or village. This construction of the statute was not adopted. It was held that that section did not apply to moneys arising from the levy of a road tax by the county authorities upon property situated within the limits of the city or village. It was, however, held that incorporated municipalities are road districts within the meaning of section 76 of the road law (Comp. St. 1899, ch. 78) and as such are, except where otherwise provided, entitled to one-half the moneys arising from the road tax levied by the county commissioners upon the property within their limits. This part of the decision is vigorously assailed by the defendant upon the ground that it was not necessary to a decision of the case then before the court, and is not therefore to be regarded as authority. It is true that in that case the city had received one-half of the road tax, which had been voluntarily paid over by the county treasurer, and its right thereto does not seem to have been contested. Under these circumstances we should not feel ourselves compelled to follow the opinion upon this point in the case, if unconvinced by its argument or dissatisfied with its conclusion. But, considering the question as a new one, we are constrained to reach the same determination. Cities and villages are invested with jurisdiction over their streets, and are charged with the duty of maintaining their own highways, and are therefore road districts by the just and reasonable construction of section 76 of the road law. Any other interpretation would leave one-half of the road tax collected in cities and villages undisposed of in the county treasury,

and would violate the principle that all laws should be so construed, if possible, as to avoid an unjust or absurd conclusion. We are therefore satisfied that the plaintiff was entitled to one-half of the road tax collected within its boundaries.

2. The statute of limitations is interposed as a defense. It is conceded that, if this defense can be made in a case of this kind, the defendant has allowed plaintiff all that it was legally entitled to demand. Under the law in force at the times set out, the county collected all of the road taxes. All of the taxes collected outside of an incorporated city and one-half of the tax levied and collected upon property within the corporate limits of a city could properly be held and disbursed by the county, but the other one-half of the taxes collected upon property within the corporate limits of a city belonged to the city, and it would be the duty of the county to pay such money over to the city. Plaintiff and defendant were therefore jointly interested in that portion of the fund derived from the levy upon property within the corporate limits of the plaintiff; and, being so jointly interested, when the fund came into the possession of the county, it held one-half of it in trust for the city. The fund had been raised in the exercise of a governmental function, for governmental purposes, and, we think, was held in a governmental capacity. But whether so or not, it seems clear to us that the county held that portion belonging to the city as a public trust; that it was the continuing duty of the county to faithfully execute the trust by paying over the money, and that the statute of limitations does not apply.

The opinion by Mr. Chief Justice Fuller, in *New Orleans v. Fisher,* 180 U. S. 185, very clearly states the law on this point. In that case Mrs. Fisher and others had obtained judgments against the board of school directors, a corporation created by the state of Louisiana, within the city of New Orleans, which judgments were payable out of the school taxes levied and collected by

the city of New Orleans. The bill, which was filed May 11, 1896, recited: "That the board of school directors to whom the city of New Orleans should account have refused to demand such an account and will continue so to do and your oratrix would be left without a remedy." The prayer was that the city school board and the city answer, and give a full, fair and perfect account of all the school taxes collected by the city of New Orleans for the years 1873 to 1878, inclusive. One of the defenses interposed was the statute of limitations. The case was referred to a master, who reported that "the city of New Orleans owes the school board for the principal of school taxes collected and not paid over from the years 1871 to 1878, both inclusive, the amount of $23,180.03," and that the city was liable for interest upon said amount. The circuit court decreed: "That the city of New Orleans, trustee of the special school taxes levied and collected for the years 1871 to 1878, inclusive, be condemned to pay plaintiff and interveners the said taxes, received and collected by her, as follows: $71,938.78," being the full amount of the collections as found by the master, with interest. The judgment of the circuit court was, with some modifications as to interest, affirmed. In the opinion the chief justice says: "The school taxes collected were held in trust by the city, and, as the school board declined to require an accounting, these creditors, whose claims were payable out of the taxes, were entitled to the interposition of a court of equity to reach the fund. The suggestion of want of privity between complainants and the city, as defeating the jurisdiction, is without merit. Nor is the defense of the statute of limitations well founded. * * * As between the city and the school board, the city did not hold these collections in her own right. The possession of the one was the possession of the other. The possession of the city was precarious, and not *animo domini;* and being trustee she could not acquire the trust fund by lapse of time. There was no adverse possession in repudiation of the fiduciary relation."

The supreme court of Kansas, during the present year, had under consideration a very similar case. *City of Osawatomie v. Board of Commissioners,* 96 Pac. (Kan.) 670. In that case the city brought an action against Miami county, alleging that for a period of some 15 years the county had retained for its own benefit a part of the money collected upon taxes levied by the city, especially with respect to that portion paid as interest by delinquents. The petition asked an accounting and judgment for the amount found due. The county moved to require the plaintiff to state separately its causes of action, upon the theory that an independent right of recovery accrued upon the failure to pay the amount due at each quarterly distribution. The motion was sustained, and an amended petition filed containing 28 distinct counts. A demurrer was then sustained as to all of the counts based upon transactions that took place more than three years before the commencement of the action, upon the ground that the statute of limitations was a bar. The city prosecuted error. The judgment was reversed and the case remanded, with instructions to overrule the demurrer. The court very fully discusses the statute of limitations as applied to actions of the character under consideration, and in the course of the opinion say: "Here the tax has been paid by the property owners, but its proper distribution is prevented by the misconduct of one of the agencies which the law has provided for that purpose. True mandamus would doubtless lie against the county treasurer to compel a proper application of the funds on hand, but, if the money collected for the city has been diverted to the use of the county, the present action, which is in effect for an accounting, seems to be an appropriate, if not the only adequate, remedy. *Board of Education v. Spencer,* 52 Kan. 574. The distribution is not required or expected to be made in the very moneys received. The matter is largely one of bookkeeping. Although the county may have misappropriated the city's money and thereby obliged the latter

to sue for its recovery, the action is essentially to compel the performance of a public duty, and not to enforce a private contract. * * * The present controversy involves no element of private contract. It does not concern the vindication of any private right. It is between public officers or public bodies with respect to the performance of a public duty, in which the people of the state at large have at least an indirect interest. It is not affected by mere general provisions of the statute, and no statutory limitation is made to apply to it either in express terms or by necessary implication." The opinion also quotes from *State v. City of Columbia,* 52 S. W. (Tenn. Ch. App.) 511, as follows: "These statutes have reference only to suits or proceedings to collect taxes from the taxpayer, and do not apply to suits against persons who may get the revenue of the state in their possession, and who are by such suit called upon to restore the same to the state. And it is immaterial whether we view the city of Columbia as one who has converted the state's funds to its own use, or as one who holds a fund on which the state has a lien for its taxes, and refuses to surrender it to the state, or as a person charged by law with collecting the state's funds of the character here involved, and who, having collected, refuses to account for and pay over the fund to the state. The result is the same in either view, so far as concerns the statute of limitations. They do not apply in either event." While it is true that in the Tennessee case the state was a party, the reasoning of the court is entirely applicable to the case at bar.

3. It is contended by defendant that there has been a misjoinder of parties; that under section 76 of the road law it was made the duty of the county treasurer to pay the one-half of the road fund collected to the overseer of the road district from which it was collected; but we think this contention is without merit. The plaintiff and defendant in this suit are the real parties in interest. The moneys payable to the city as a road district would prop-

erly go into plaintiff's treasury, and not to the street commissioner, and would be expended under the direction of the city council. There was no necessity for joining the county treasurer in this action, for the reason that the pleadings admit that the moneys collected by the county upon the property within the limits of plaintiff city had been transferred by the county to its general fund. The county having appropriated the money to its own use by transferring it to its general fund thereby became liable to the plaintiff for the amount so appropriated, and could be proceeded against directly, regardless of the fact that the county treasurer and his bondsmen may also have been liable therefor.

4. A further contention is made that the judgment is not sustained by the evidence. This contention must also fail. While the answer denies that the county had collected the amounts alleged by plaintiff in its petition, it admits that none of the moneys which were collected was ever paid over to the plaintiff, and that all of the moneys which had not been expended by the county upon the county roads had been transferred to the general fund. The evidence introduced by plaintiff as to the amount which the county had collected was entirely satisfactory to the district court, and fully satisfies us that the county had collected the amounts for which the district court gave judgment.

We find no error in the record, and 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.

STATE LIFE INSURANCE COMPANY, APPELLEE, V. HENRY BOLTON, APPELLANT.

FILED NOVEMBER 6, 1908. No. 15,329.

**Insurance:** ACTION ON NOTE: DEFENSE OF FRAUD. In an action upon a note executed at the maturity of the second premium on a life insurance policy in payment of such premium, the defense that such note was obtained by fraud is not sustained by evidence that the policy issued and accepted by defendant is less favorable to him than the agent taking the application represented it would be.

APPEAL from the dstrict court for Colfax county: JAMES G. REEDER, JUDGE. *Affirmed.*

*C. J. Phelps* and *H. P. Peterson,* for appellant.

*Morley Cain* and *W. I. Allen, contra.*

CALKINS, C.

The plaintiff on the 31st day of March, 1904, issued to defendant a policy upon what was denominated in the application for the same the "20 payment life commuted premium dated back deferred divided plan." The policy provided for 20 annual payments of $498.01 each from its date of March 31, 1897. To enable the defendant to pay the commuted premium which was demanded for dating back the policy, the company was to loan the assured $2,140 upon the maturity of the policy, upon which loan he was to pay interest at the rate of 5 per cent. per annum in advance. In this transaction no actual funds passed between the parties, but the plan was effected by the execution of a policy loan agreement, which recited that the plaintiff had loaned the defendant the above sum, and pledged the policy for its payment. The defendant executed his note due ten months after date in payment of the first premium and advance interest upon said loan, which note he afterwards paid. When

the annual premium of March 31, 1905, became due upon the policy, he executed a note for the amount of such premium due in six months from said date. This note recited that the same was for a premium due March 31, 1905, upon said policy, and that, in case there should be a failure to pay the same when due, the policy should thereupon *ipso facto* become void, and that the note should remain valid for the proportion of its face and interest that the time the insurance so thereby extended should bear to the whole time covered by the premium. This note the defendant failed to pay when due. The policy was kept in force by means of the note for six months, during which time one-half of the annual premium was earned; and for this sum, less $61.60 credited by the plaintiff from the reserve, it brought this action. The defense attempted to be interposed was for fraud in obtaining the application for insurance and the note sued upon. There was a trial to a jury, at the close of which the court directed a verdict for the plaintiff for $203.33. From a judgment rendered upon this verdict the defendant appeals.

The answer charged that the note sued upon and the policy, the premium upon which it was executed to pay, were obtained by false and fraudulent representations made by one Crane, an agent for the plaintiff. There was no pleading of any fact showing what representations, if any, were made to secure the execution of the note, and no evidence whatever to support the legal conclusion contained in the answer that the note sued upon was obtained by means of any representations, false or otherwise, made by Crane or any other person on behalf of the company. The only evidence as to the conditions is that of the defendant, who, being asked under what circumstances he executed the note, answered: "I executed the note for the reason that I had——I did not want to lose a $10,000 policy, if everything was all right, but I suspicioned I had been defrauded, and I wanted to gain time to investigate to be sure whether I should continue payments or

not, and I issued that note. Otherwise my policy would, of course, have lapsed at once." This, perhaps, should dispose of this defense. But it is argued that, if the defendant was induced by plaintiff's fraud to enter into the contract of insurance in the first instance, then notes afterwards given by him to pay his premiums are really obtained by the same fraud. Without determining this question, we have therefore carefully examined the allegations of the answer and the evidence to ascertain if there is any testimony which might properly have sustained a verdict for defendant upon this issue. The answer is too voluminous to be quoted at large; but carefully analyzed, and reduced to its simplest terms, it charges that the agent represented, first, that defendant was to obtain a rate charged for a person seven years younger than he was; second, that the contract of insurance was an especially advantageous one which was issued by standard companies to a favored few in special instances; and, third, that defendant could obtain a loan of plaintiff for $2,140 to be applied on future premiums

The evidence wholly fails to support the first charge. It clearly shows that the rate was made known to the defendant in dollars and cents; but whether it was a rate properly chargeable to him at his age or to a person seven years younger does not anywhere appear.

Whether the second representation, that the contract of insurance was an especially advantageous one is a statement of fact or is in the nature of an expression of opinion, and therefore not a subject of false representation, need not be considered. There is absolutely no proof as to whether these representations were true or false.

In reference to the third charge, the plaintiff testifies that the agent said he was to have a loan of $2,140, which was to be secured by the policy and paid at the maturity thereof, and that the proceeds of the loan were to be applied upon future premiums. He states that he executed the note for the $2,140, and that he understood that

that amount was to be applied upon future premiums. He admits, however, having received on about April 19, 1904, the receipt of the insurance company, which plainly states that the $2,140 was in payment of the commuted premium for the period from the date of the policy to the actual time of the transaction. If we assume the fact to be established that the agent Crane told the defendant that this $2,140 was to be applied on future premiums, we have then a case where the contract executed by the principal does not conform to the promise and agreement of the agent, and not a case of fraud. Fraud cannot be predicated on a promise not performed. *Perkins v. Lougee,* 6 Neb. 220. If the company failed to give the contract which had been agreed upon, it was a breach of contract, and not a fraud.

There being no evidence sufficient to have sustained a verdict for the defendant, it was proper for the district court to direct the jury to find for the plaintiff. 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.

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WILLIAM G. CLARKE, APPELLANT, V. MARY E. LYON ET AL., APPELLEES.

FILED NOVEMBER 6, 1908. No. 15,354.

1. **Divorce: CUSTODY OF CHILDREN: JURISDICTION.** Where the court of a sister state has granted a divorce and awarded the temporary custody of the children to the mother, who becomes a resident of this state and dies here, leaving such children in the hands of relatives who are appointed guardians by the county court, the fact that the court rendering such divorce retained jurisdic-

tion for the purpose of making further orders does not deprive the courts of this state of jurisdiction to determine the merits of a controversy between the divorced father and such guardians for the custody of such children, especially where the court rendering the divorce has expressly refused to itself determine the material question in issue.

2. ———: ———: DECREE: CONCLUSIVENESS. Where a court granting a divorce, without finding the father unfit, temporarily awards the custody of minor children to the mother, such decree does not deprive the father of the natural right to the custody of such children against any person except the mother; and, upon her death, such right ceases to be affected by such award.

3. **Guardian and Ward:** DECREE: CONCLUSIVENESS. The appointment of a guardian by a county court is not conclusive as against a parent's right to the custody of his children, unless it appears that he had notice of the proceeding, and that the question of his competency and suitability was adjudicated.

4. **Parent and Child:** CUSTODY. The unfitness which deprives a parent of the right to the custody of his children must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive the parent of his right to their custody.

5. ———: ———. While the unfitness which deprives a parent of his natural right to the custody of his children must be positive, and not comparative, the degree thereof must be considered in relation to the attending circumstances, such as the concern he has shown for them in the past, the suitability of his domestic surroundings to receive them, and the question of their general welfare.

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

*Halleck F. Rose* and *Carlos J. Ward,* for appellant.

*F. A. Bochmer, I. P. Hewitt, G. A. Adams* and *L. F. Mason, contra.*

CALKINS, C.

This was a petition for a writ of habeas corpus by William G. Clarke to obtain possession of his two minor children. The petitioner was married to Anna Carpenter Lyon in 1885, in the state of Illinois, where they lived to-

gether as husband and wife until the year 1899, when they separated. In 1901 the petitioner began a suit in the circuit court for Cook county, Illinois, against his wife, Anna, for a divorce on the ground of desertion. In this suit the wife filed an answer and cross-bill, praying for a divorce from her husband on the ground of desertion on his part. A decree was entered granting her a divorce upon such cross-bill, and she was awarded, until the further order of the court, the custody of the two surviving children of said marriage, both boys, Holly L., born March 17, 1887, and Caryl C., born May 18, 1898.

It seems that the wife, Anna, was possessed of an estate in her own right sufficient for the support of herself and children; and, beyond the husband's releasing any marital claims to which he was entitled in her lands, no adjudication of property rights was made between the parties. The wife, with the two boys, removed to Lincoln, in this state, where she resided until her death, December 21, 1906. From the time of the divorce until her death she supported herself and the two boys without any assistance from their father. The petitioner very soon after the rendition of the decree of divorce married a second wife, Adelaide, with whom he lived until about six months before the commencement of this proceeding, and by whom he had a son, Myron, who was at the time of the taking of the evidence in this case about four years old. The respondent Lyon and the wife of the respondent Wood were half sisters of Anna Carpenter Clarke; and, while the latter left no will, she upon her death bed expressed the wish that Mr. and Mrs. Wood should have the custody of the children. The respondent Lyon, who, it is claimed, resided in Waukegan, Illinois, came to Lincoln about the time of the death of the mother, and, together with Mr. and Mrs. Wood, took charge of the children. On the 4th day of January, 1907, the petitioner obtained an order in the original divorce suit from the circuit court for Cook county, Illinois, awarding him the permanent custody and care of said children. Upon the intervention of certain

relatives of the children to set aside this order, the court on the 11th day of February, 1907, entered an order in said case vacating the order awarding the custody of the children to their mother, and granting the father leave to take any proper steps in any court of competent jurisdiction to obtain their custody; the court expressly declining to determine whether the petitioner was or was not a fit person to have the custody of said children as against the persons with whom they were then domiciled. Upon obtaining the order of January 4, 1907, the petitioner immediately notified the respondents by letter of the making thereof, and they on January 7 filed a petition in the county court of Lancaster county, and obtained an order appointing themselves guardians of the person and estate of the said children. No notice of the proceedings before the county judge was given the father.

On February 20, 1907, the petitioner began this proceeding, his application setting forth his relationship to the children, the rendition of the decree of divorce, the subsequent modification thereof, and alleging that the said children were unlawfully restrained of their liberty. For answer to this application the respondents alleged their appointment as guardians, asserted their competency to properly discharge such trust, and charged that the petitioner "is not a suitable person to take care of and have the custody of said children, and that the welfare of said children would be better preserved if they were not placed in his care and custody." They added, as special reasons for his unfitness, that he was "possessed of a quarrelsome character and violent temper, and that he was addicted to the excessive use of intoxicating liquors." There was a trial to the court upon the issues so tendered, and the writ was denied, from which finding and judgment of the court the petitioner appeals.

1. The petitioner contends that the court where the divorce suit was tried maintains jurisdiction of the parties for the purpose of changing the decree as to the custody of the children, and that they remain the wards

of the court, so that, upon the death of the party to whom their custody was awarded, that court may grant custody to the surviving parent. This may be true where the parties interested remain within the jurisdiction of the court granting the divorce, but it is not applicable to the facts in this case. The mother lawfully brought the children to this state, and lawfully acquired a residence here. Upon her death, the children remain within this jurisdiction, whose courts alone have power to enforce an order as to their custody; and, while such courts should give full faith and credit to the judgment of the circuit court for Cook county, we do not think they are required to enforce the order of January 4, 1907. This order was made after the death of the mother, and without any notice to the persons with whom the children were then domiciled. It is apparent that the court regarded the order as made without jurisdiction and void; for, when on February 11 its attention was called to the fact that the mother was dead and the children were not within its jurisdiction, it, acting as though the order of January 4 had never been made, proceeded to set aside the order awarding the custody of the children to the mother, and gave the father leave to take proper legal steps in any court of competent jurisdiction to obtain their custody and control, expressly declining to pass upon the question of his fitness for such custody. It is plain that the court did not regard the order of January 4 as in force; and, if it were in force up to that time, it was modified by the order of February 11.

2. The respondents contend that the award of the custody of the children to the mother gave her control of them not only during her life, but invested her with a power to dispose of them at her death. This contention cannot be maintained. There was no finding that the father was unfit to have the custody of these children; and the award of such custody to the mother until the further order of the court was only a finding that, as between the father and mother, the interests of the chil-

dren would be best served by committing them to the care of the mother for the time being. Her death not only removes the reason for this award of custody, but renders its execution impossible, so that the right of the father to the custody of the children is no longer affected by such decree.

3. It is claimed on behalf of the respondents that the order appointing them guardians of the minor children was an adjudication of the father's right to the custody of their persons. Whatever may be the effect of this order so far as the estate of the minor children is concerned, it would not of itself give the right of custody of the persons of the children against a parent who had no notice and whose rights were not adjudicated. The question of his competence and suitability would remain to be adjudicated. *In re Thomsen,* 1 Neb. (Unof.) 751.

4. Upon the question of the fitness of the father, the finding of the district court was that the petitioner could not "provide for said children or rear them in as proper and fitting a manner as can the respondents." The oldest boy having been born in March, 1887, has attained his majority, and this controversy no longer concerns him. It is conceded that the respondents are so situated as to give excellent care to the boy Caryl, now ten years old, and no criticism is made of the manner in which he is being nurtured and educated, nor of the environment in which he is placed. In fact it is tacitly admitted that his present surroundings are better than his father is able to offer; but it is earnestly insisted that the disqualification which deprives a parent of the custody of his child must be of a positive, and not of a comparative character. Upon this question we can do no better than to quote from the opinion of IRVINE, C., in the case of *Norval v. Zinsmaster,* 57 Neb. 158. He there says: "We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to

special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed by revolution, if necessary. In *Sturtevant v. State,* 15 Neb. 459, the child was only a few months old, and the custody was taken from the father because he was unable personally to discharge duties which the custody imposed. *Giles v. Giles*, 30 Neb. 624, was a controversy between father and mother, where the natural rights were equal. *State v. Schroeder,* 37 Neb. 571, and *Schroeder v. State,* 41 Neb. 745, presented a case of affirmative unfitness of the father and of abandonment of the child."

5. The respondents insist that the petitioner is an unsuitable and unfit person to have the care of this child, and that the evidence not only would have justified the district court in so finding, but that the same is of such a character as to sustain no other conclusion. It appears that at the time of the petitioner's marriage with his wife, Anna, he was a clergyman of the Presbyterian church. He afterwards served for several years as pastor of the Campbell Park Presbyterian church in Chicago, and from there went to the People's Institute, which at that time seems to have been the nucleus of a social settlement under the patronage of Bishop Fallows. This enterprise did not long sustain its benevolent character, and the petitioner in some way became the owner of the property in which it was carried on, and thereafter devoted the same to secular uses. The building contained a theater, a hotel, a dance hall, and several stores which

were rented for various purposes, including a saloon and restaurant. The petitioner occupied rooms in the hotel part of this building, and his business consisted in managing the property. He still resided there at the time of the beginning of this proceeding; but about the 20th of March, 1907, he rented a house on Irving avenue, and installed his married sister, whom he brought from Louisiana for that purpose, as housekeeper. At this time he was separated from his wife, Adelaide, and there was pending a suit by her to obtain a divorce on the ground of habitual drunkenness. On the whole, it may be conceded that the petitioner had a suitable residence and was of sufficient financial ability to undertake the support of his children.

Upon the question of his intemperance, without citing the evidence at large, it fully sustains the charge that the petitioner became so addicted to the use of intoxicating liquors as to greatly shock and distress his friends who had known him while officiating as a clergyman; and, after making due allowance for the special aversion which such conduct in an ex-clergyman would inspire, we are constrained to say that it went so far that it would have compromised the character of one who had always been engaged in secular pursuits. The petitioner did not himself testify as a witness, but there is found in the record his answer to the bill of his wife, Adelaide, for a divorce on the ground of habitual drunkenness. In that answer, verified by him on the 29th day of October, 1906, he made the old plea that "he was tempted of the woman." He says that before he associated with her he was personally and professionally opposed on principle to the use of intoxicating liquors; that after coming under her influence he indulged in their moderate use; that he never drank to the extent of being unfit to attend to business; and that, when he drank on rare occasions more liquor "than was wise, it was almost invariably under the sting of her abuse." This answer, read in the light of the positive evidence of witnesses as to his drinking

habits, though perhaps insufficient to establish the existence of habitual drunkenness in the strictest of all the varying shades of interpretation applied by the courts to that term, yet indicates a considerable deterioration in the moral force and character of the petitioner, which to a degree unfits him for the care and nurture of his child.

During the time the children were in the custody of the mother he does not appear to have contributed to their maintenance, nor to have given them any parental attention. He was compelled to surrender their custody, and, the mother being able to support them, the fact that he did not voluntarily assist her should not of itself be taken as evidence of a want of affection on his part; but there are many attentions which a loving father may and usually does render to children beyond his custody and control, and these appear to have been entirely lacking in this case, which indicates a slight degree of affection and a want of parental care for these children on the part of the petitioner. As we have already seen, the unfitness of the parent which deprives him of the absolute right of the custody of children must be positive, and not comparative; but this does not mean that the degree of unfitness may not be considered in connection with all the other circumstances of the case. And, so considering the present situation of the child, the father's former indifference to him, his intemperate habits, and the unsettled state of his domestic affairs, we cannot say the district court erred in denying the writ prayed for.

As this conclusion is partially based upon the petitioner's intemperate habits and the disturbed state of his domestic atmosphere, both of which are susceptible of amendment and improvement, it is proper to say that the dismissal of the writ is not a bar to a future application of like character, should changed conditions justify a different conclusion.

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.

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PETER THOMSEN V. STATE OF NEBRASKA.

FILED NOVEMBER 6, 1908. No. 15,703.

1. **Criminal Law:** RECOGNIZANCE. While a recognizance given under section 324 of the criminal code may be entered into in writing, it must be executed or acknowledged by the principal and surety in the presence of the magistrate taking the same.

2. ———: APPEAL: TRANSCRIPT. In an appeal to the district court from the judgment of a magistrate imposing fine or imprisonment, a rule to compel the magistrate to make a further or amended transcript is properly denied where the application for such rule fails to allege additional facts which would affect the determination of the question before the court.

ERROR to the district court for Wayne county: ANSON A. WELCH, JUDGE. *Affirmed.*

*A. S. Ritchie, Charles L. Fritscher* and *Frank A. Berry*, for plaintiff in error.

*William T. Thompson, Attorney General, Grant G. Martin* and *George R. Wilbur, contra.*

CALKINS, C.

In a prosecution had before the police judge of the city of Wayne, the plaintiff in error, hereinafter called the defendant, was convicted of the offense of selling intoxicating liquors to minors. He gave timely notice of appeal, and the magistrate fixed the amount of his recognizance at $200. Afterwards, and on the same day, he left in the office of the magistrate a writing in the words and figures following: "The State of Nebraska, County of Wayne, ss. Be it remembered that on the 1st day of June, 1907, Harry M. Ramsey, of Wayne county, and state of Ne-

braska, and H. F. Wilson, of Wayne county, state aforesaid, appeared personally before the undersigned I. W. Alter, police judge in and for the city of Wayne, county of Wayne, and jointly and severally acknowledged themselves to be indebted to the state of Nebraska in the sum of two hundred dollars to be made and levied on their respective goods, chattels, lands and tenements; to be void, however, if the said Harry M. Ramsey shall personally be and appear before the district court for Wayne county, Nebraska, on the 9th day of December, 1907, at 9 o'clock A. M. of said day, to answer the charge preferred against him for the crime of selling liquors to minors, and to do and receive what shall be enjoined by said court upon him, and shall not depart the said court without leave. Witness our hands this 1st day of June, 1907. Harry M. Ramsey, H. F. Wilson." The magistrate did not indorse upon this paper his formal approval, but marked it "Filed," and treated it as a recognizance to perfect an appeal, by making out a transcript and filing the same with the original papers in the case in the district court.

In the transcript, after the entry of the judgment of conviction, there follows this entry: "Whereupon the defendant's attorneys state in open court that the defendant would appeal said action to district court. Therefore I ordered the defendant to enter into a recognizance in the sum of $200 conditioned for his appearance in the district court, and afterwards, to wit, on said day, at 5 o'clock P. M., there was left in my office by F. A. Berry a paper which I thereupon filed, being the paper entitled 'Appearance Bond,' and which is certified to the district court with the complaint and warrant herein, but said appearance bond was not signed by the surety thereon in my presence, nor did the defendant or said surety appear before me at any time and enter into a recognizance or acknowledge the execution of said appearance bond or acknowledge themselves recognizers. Whereupon I prepared a transcript of my docket of this case and filed the same in the district court."

In the district court, the prosecution having moved to dismiss the appeal on the ground that the defendant had failed to comply with the provisions of the statute in reference to giving a recognizance, the defendant made a showing to the court, properly verified, that he executed the recognizance in the presence of the magistrate, who permitted him to take the same away to be signed by his surety; that, after the signing of the same by the surety, the recognizance was filed in the office of the magistrate, who informed the defendant's attorney that he was satisfied with the surety and recognizance, and would accept and approve the same. Upon this showing the defendant asked the court for an order requiring the magistrate to certify to the court a full, true and correct transcript of the proceedings, and to evidence his approval of the recognizance by attaching his signature thereto. This application was denied, and judgment was rendered dismissing the defendant's appeal, from which he prosecutes this proceeding in error.

1. The right of the defendant to appeal from the judgment of a magistrate imposing fine or imprisonment is upon condition that he 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, with sureties to be fixed and approved by the magistrate, conditioned for his appearance at the district court of the county at the next term thereof to answer the complaint against him. Criminal code, sec. 324. At common law a recognizance was entered into by the obligor and his sureties personally appearing in court and orally entering into the obligation, the proceeding being entered in the records of the court by the proper officer. In this state the distinction between a recognizance and a bond has largely been lost in actual practice, and it has been customary for many years for a defendant and sureties to sign a printed blank similar to the one used in this case. It is essential that the defendant and his sureties should in some manner acknowledge the obligation in the pres-

ence of the court; but this may be done in writing, as well as orally, and there is no longer any doubt that an obligation like the one given in this case, executed in the presence of the court, is a recognizance within the meaning of the statute. *King v. State,* 18 Neb. 375. The provisions of section 324 of the criminal code are mandatory, and must be strictly complied with to entitle the defendant to an appeal. *Zobel v. State,* 72 Neb. 427. Where the defendant and his sureties sign a paper like the one under consideration in presence of the magistrate, he can truthfully certify that they have made the requisite acknowledgment to him and in his presence; but, where the paper has not been signed in his presence, we do not see how the magistrate can truthfully certify that the obligors made the required acknowledgment, or even that their signatures are genuine. It is suggested that the magistrate by receiving the paper without objections waived the requirement that a recognizance be entered into in his presence. As to those matters confided to the discretion of the magistrate, his acts may be determined from his conduct. It is entrusted to him to fix the amount of the recognizance required in excess of $100, and he may be held to have fixed the amount of a bond by receiving it without objections. Again, he is required to approve of the sufficiency of the sureties, and his conduct in taking a recognizance and acting upon it might be regarded as equivalent to an approval. But the magistrate can waive nothing. He cannot dispense with any essential requirement of the statute. We think it essential that the recognizance, whether oral or in writing, should be entered into or acknowledged in the presence of the magistrate, and that this essential requirement cannot be dispensed with.

2. The question whether the district court had power by rule to require a further transcript from the magistrate in the appeal proceeding is elaborately argued in the briefs upon which this case is submitted. The showing made by the defendant was that he himself signed in the presence of the magistrate; but he fails to allege that the

surety was ever present in court to either sign or acknowledge the obligation in question. Assuming that the district court may by rule summarily require an amended or supplementary transcript from the magistrate, the application was properly denied in this case, for the reason that it would have availed the defendant nothing to show that he signed or acknowledged the obligation in the presence of the court, without also showing that his surety executed it in the same manner.

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.

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## HARRY M. RAMSEY V. STATE OF NEBRASKA.

FILED NOVEMBER 6, 1908. No. 15,701.

ERROR to the district court for Wayne county: ANSON A. WELCH, JUDGE. *Affirmed.*

*A. S. Ritchie, Charles L. Fritscher* and *F. A. Berry,* for plaintiff in error.

*William T. Thompson, Attorney General, Grant G. Martin* and *George R. Wilbur, contra.*

CALKINS, C.

The facts in this case are the same as in *Thomsen v. State, ante,* p. 634, except that in this case no effort was made to secure an additional or amended transcript.

It follows that, for the reasons stated in the opinion in

that case, the judgment of the district court should be affirmed, and we so recommend.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons above stated, the judgment of the district court is

AFFIRMED.

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JOHN REIMERS ET AL., APPELLANTS, V. MERRICK COUNTY, APPELLEE.

FILED NOVEMBER 6, 1908. No. 15,288.

**Taxation**: EQUALIZATION: APPEAL. On an appeal to the district court from the decision of a county board of equalization, said court is without jurisdiction to consider any questions other than those presented to said board.

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

*O. A. Abbott* and *Patterson & Patterson,* for appellants.

*Elmer E. Ross* and *John C. Martin, contra.*

ROOT, C.

Plaintiffs buy, feed and sell live stock, and were engaged in that business in Merrick county in 1906. April 14th of that year they purchased 162 steers in Colorado, and received said stock on their farm in said county on the 19th of said month. Five days thereafter the county assessor, while listing and assessing plaintiffs' personal property, insisted that said steers be included in said assessment. Plaintiffs acceded to said demand, with the oral reservation that they might appeal to the county board of equalization for relief. Thereafter plaintiffs filed with said board a written protest objecting to the assessment of said property upon the sole ground that it

had been purchased by them subsequently to April 1, and that said stock had been "duly assessed and returned for taxation for the current year in the state of Colorado." Said objections were overruled, and plaintiffs prosecuted an appeal to the district court, wherein, for the first time, they claimed that the statute relating to the assessment of property brought within the state subsequent to April 1 of any one year was, for various reasons, unconstitutional and void. The county attorney joined issue, the court held for defendant, and plaintiffs appeal.

In this court the county attorney insists that the inquiry should be restricted to the complaint made before the board of equalization, to wit, that the property had been assessed in Colorado for the current year of 1906, and claims that the district court was without jurisdiction to pass upon the constitutionality of the law because that question was not presented to said board of equalization. Although the claim is belated, and does not seem to have been presented to the district court, we are of opinion that it is well taken. The board of equalization is vested with power to consider and determine, not only the valuation of property listed for or subject to taxation, but also whether any particular property is exempt from taxation. *State v. Drexel,* 75 Neb. 751. From the decision of said board upon any question before it, an appeal may be prosecuted to the district court. Ann. St. 1907, sec. 11023. Whenever the legislature provides for an appeal to a court from a decision of a board of equalization, that court, no matter what may be its grade, is one of limited jurisdiction for said purpose, and must keep strictly within the letter of the statute defining its power. 2 Cooley, Taxation (3d ed.), p. 1394. The legislature, in the section of the revenue law referred to, has seen fit to restrict the district court on such appeal to a consideration of the questions raised before said board, and the court is without power to adjudicate any other issue in that proceeding. *Nebraska Telephone Co. v. Hall County,* 75 Neb. 405; *Keokuk & H. B. Co. v. People,* 185 Ill. 276.

We will not presume that the district court considered questions that it was without jurisdiction to determine, but conclude that it confined its inquiry to ascertaining whether or not said stock was assessed in Colorado for the current year of 1906. The county attorney could have cleared up the record by requesting the district court to strike from the petition the allegations relating to the unconstitutionality of the statute, but his acquiescence would not avail to invest that court with jurisdiction contrary to the plain language of the statute. There was not a scintilla of evidence received or offered to show that said stock or any part thereof had been assessed in Colorado for 1906. Plaintiffs, before the board of equalization and the district court, demanded relief under the very statute they now ask to have adjudged null and void, and it may well be doubted, although we do not determine the point, whether a litigant may ask for relief by virtue of the terms of a statute, and in the same proceeding also demand redress because of the law's alleged invalidity. *Eustis v. Bolles,* 146 Mass. 413, 4 Am. St. Rep. 327; *Vose v. Cockcroft,* 44 N. Y. 415.

The record is without error, and we 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.

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GEORGE LOPEMAN, APPELLANT, V. GEORGE W. COLBURN ET AL., APPELLEES.

FILED NOVEMBER 6, 1908. No. 15,338.

1. **Vendor and Purchaser:** CONTRACT: ACCEPTANCE. **In order to convert an offer into a contract to sell real estate, the vendee must accept the offer as made.**

2. ———: ———: ———. Acceptance of an offer to sell land, but fixing a place other than the residence of the vendor, or the place named in the offer, for the payment of the consideration and delivery of the deed, is not an unconditional acceptance so as to bind the vendor.

3. **Specific Performance:** DISCRETION OF COURT. "Courts of equity will not always enforce a specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case." *Morgan v. Hardy*, 16 Neb. 427.

APPEAL from the district court for Merrick county: JAMES G. REEDER, JUDGE. *Affirmed.*

*Harrison & Prince* and *Patterson & Patterson,* for appellant.

*Martin & Ayres, contra.*

ROOT, C.

Suit for specific performance of an alleged contract for the sale of 200 acres of land situated in Merrick county. Decree for defendants, and plaintiff appeals.

Although, pending the negotiations between plaintiff and George W. Colburn, an attempt was made to vest title to the real estate in controversy in Lyde Colburn, wife of George W. Colburn, we shall treat the subject matter as if George W. Colburn had not conveyed the land, and shall refer to him as the defendant. The land is not described by section in the correspondence of the parties, but the evidence discloses that defendant owned no other land in Nebraska. Defendant had resided many years on the farm; but, because of failing health, had removed to California. Plaintiff had written him concerning the land, but received no definite offer till September 18, 1904, upon which date defendant wrote, signed and mailed to plaintiff a letter containing the following statements: "I have concluded to let you have the place if I can obtain possession the 1st of March. You ask my

terms. The amount you offer to pay the 1st of March is all right. There are a few other things there that I didn't mention. There is a Singer sewing machine that cost me $60, nearly new, that also goes in. Now, about the terms. Now, will make you an offer if you want my place at $42 an acre (2,000) down, two thousand dollars down. I will make the yearly payments to suit; also let you have all the implements stuff mentioned in that letter for the small sum of $150, $300 worth of stuff." Plaintiff's letters to this date were not offered in evidence, nor their contents disclosed, but he evidently wrote suggesting some change in the terms of any contract he might make for the purchase of the land. January 15, 1905, defendant again wrote, signed and mailed plaintiff a letter as follows: "The reason I haven't answered your letter was I didn't like to wait two years for second payment. I have two other parties who want the place. They will make a payment each year. If you can pay $2,000 down, and $500 on the second and third, and the 4th year $1,000, the 5th year $500, the 6th year $1,000, the 7th year $500, the 8th year $1,000, the 9th year $500, the 10th year $1,000, making in ten years time. Of course, you take the place as it is, things and all, and if Johnson stays there he can pay the rent to you. Make arrangements with Johnson and take the place on these terms with interest at 6." Plaintiff testified that he wrote two or three letters to defendant unequivocally accepting said proposition, but that he received no answer thereto. Defendant denies having received the letters. Plaintiff's wife testified that she saw the letters, and that they stated, in substance, that defendant should come at once and close up the deal; that his $2,000 was ready and the payments were all right. We think it proper to eliminate those letters from a consideration of this case, because, if sent, they required defendant to come to Nebraska to close up the deal and receive his consideration. June 24, 1905, plaintiff wrote, signed and sent to defendant a letter, which was duly received, and is as follows: "Will write you again as this is the 3

letter that I have written to you since I got your letter and the terms and interest is all right and Johnson and me can arrange the other matters between him and me. I wrote you after receiving your letter and also wrote to John Colburn (defendant's brother and agent) that I would be up the next week expecting that John would look after your business and have not heard from you since. * * * The place and things on the place and terms of payment and interest is all right and want the privilege of paying more if I can each year." Defendant did not answer this letter till August 6, upon which date he wrote, signed and sent to plaintiff a communication as follows: "I ask to be excused for not answering your letter sooner. You say you have written two letters before this one and wonder why I have not answered them. Something must have happened them, for I never got them. * * * Now in regard to the place I have a copy of the proposition I sent you. It seems hard to close up a deal. Some way my folks are kicking about my selling it. Now I want to know if you are willing to pay my fare back there. I will pay the return trip if the deal is closed up or in other words if the deal is made. I think you understand how it is, so let me know right away, would say if in any way it should be my fault that the deal is not made in according with the proposed plan, I will pay my expenses. If it be your fault then you are to pay fare both ways." To this letter plaintiff wrote, signed and sent through the mails to defendant the following under date September 23, 1905: "Your letter at hand some days ago and will answer $8,500 hundred dollars for place things and all, you give me those things that you throw in tools and machinery and things that belong to the place. Send contract to me that you hold against Johnson and you make out the deed and send it to Central City as that will be the place to make out the papers and $2,000 two thousand is ready for you and these notes yearly; First, 1906, $500; 2 year, 1907, 1,000; 3 year, 1908, 500; 4, 1,000; 5, 500; 6, 1,000; 7, 500; 8, 1,000; 9, 500. (The fig-

ures are tabulated in the letter.) Total 85 hundred. I want the notes drawn on or before. You can have some man do the business for us. Justice of the peace or judge at Central City. You can come if you wish. Would like to meet you very much but can't afford to pay you." January 12, 1906, defendant again wrote to plaintiff, which letter was received by him, as follows: "It has been some time since I got your letter, but my wife has been sick so it was uncertain when I would come, and I also understood you that I would get notice from the bank at Wood River in regard to the deposit you made there for me, but if you want to close up the deal at once you see my brother John. He has the power of attorney to do any business for me. You pay him the $2,000 and my fare $45 and the place is yours according to contract, and I will come back when the weather gets warm and woman gets better. Would say to you if you want the place you better go down and see Bro. John right away and have him draw or get contracts drawn up and have the matter settled as there are other parties that will pay me a $1,000 more than you are paying me on the same terms but we have talked so long about it I wouldn't feel right to sell it to anybody else without your consent it wouldn't be long before you would get possession. Now I feel a little ashamed that this has dragged so long, but one thing I hated to give up the place. * * * P. S. Please don't wait as long as I have but let me know right away. I just got a letter from a man at Central City, Neb., he wants me to let him know right away." February 7, 1906, plaintiff deposited with the First National Bank of Wood River $45 to the credit of defendant, "subject to close of sale of land near Palmer, Neb.; above money being to pay Colburn's expenses from Cal. to Wood River, Neb." On the same day the bank's written memorandum evidencing said deposit was inclosed with a letter written by plaintiff and sent to defendant. The letter is as follows: "As I am at home and will say that your money 45 dollars to pay your fare one way is deposited in bank and you will find a note in

my letter with the banker's name on it and I am ready to close up the deal. Come at once, come to Wood River, and I will meet you there with a team. Say Colburn can't you send me a short telegram to Wood River ahead and then I can meet you and also write me. Please come at once. I will register this to you so you will be sure and get it. The telegram you just send it to Wood River and I will make arrangements with the agent here to send it to me so you can just give me date when you will be here."

Plaintiff claims that he offered John Colburn $2,045 on the 12th of February, 1906, but that Colburn refused to accept, and disclaimed any authority to take it. John Colburn and his brother Hiram testified that plaintiff merely stated that he had deposited $45 in the Wood River Bank to pay defendant's fare, and requested John Colburn to execute the contract, which he refused to do. The testimony on this point seems to preponderate in defendant's favor, and we find this issue of fact against plaintiff. March 15, 1906, plaintiff commenced this suit. What then were the rights of the parties? Plaintiff insists that his letter of June 24, 1905, was an acceptance of defendant's former offer, and, in connection therewith, constituted a contract, but we do not so understand the record. Plaintiff expressed himself as satisfied with defendant's terms, but did not say that he would take the place, but requested a change in the terms of payment. The subsequent conduct of the parties clearly indicates that they considered negotiations incomplete. Defendant then suggested in the letter of August 6, 1905, that plaintiff ought to pay car fare from California to Nebraska, and that, if the deal should not be closed because of defendant's fault, plaintiff would retain his money, but, if plaintiff was in fault, that defendant's fare should be paid coming from and returning to California. In the letter of September 23, plaintiff offers $8,500 for the farm if certain tools and machinery are included in the deal, and offers to make the third payment $1,000, instead of $500, as stated in defendant's letter, requests that the

notes for deferred payments be drawn "on or before," indicates that the deal must be closed and money paid in Central City, and refuses to pay plaintiff's fare. It is clear that to this point the parties had not agreed upon the terms of a contract. It is also clear that it was not the province of the vendee to compel the vendor to deliver the deed and receive the consideration in Central City. *Veith v. McMurtry,* 26 Neb. 341; *Northwestern Iron Co. v. Meade,* 21 Wis. 474, 94 Am. Dec. 557; *Egger v. Nesbitt,* 122 Mo. 667, 43 Am. St. Rep. 597. Defendant in the communication of January 12, 1906, explains that his wife has been sick, and that he has been waiting to learn whether the railway fare has been deposited in the bank at Wood River, and then finally instructs plaintiff that, if he will pay $2,045 to John Colburn for defendant, the farm will be plaintiff's "according to contract"; that John has a power of attorney to act for him, and that he will come in person as soon as the weather becomes warm, and will then make the deed. The correspondence seems to point to other letters not in evidence, but we cannot speculate as to their contents. The fact is that plaintiff did not pay or offer to pay this money to John Colburn for defendant, nor did he ever notify defendant that he would do so. His telegram and letter merely notified defendant that the railway fare was in the bank, and requested him to come at once and close the deal. The last letter from defendant sufficiently informed plaintiff that he must be prompt, and that other persons had offered to pay more for the farm. Nothing has been paid to defendant, nor has plaintiff had possession of the land. We cannot say from the evidence before us that the minds of the parties ever met with a common intention, and for that reason the district court did not err in finding for the defendants. *Morgan v. Hardy,* 16 Neb. 427; *Krum v. Chamberlain,* 57 Neb. 220.

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.

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MAGIC CITY REALTY COMPANY, APPELLEE, V. MATT SCHENECKENBERGER, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,956.

1. **Forcible Entry and Detainer:** JUDGMENT: WRIT OF RESTITUTION. The provisions of "An act to provide for the enforcement of judgments in forcible entry and detention, and forcible detention proceedings" (laws 1907, ch. 163; code, sec. 1032c) were intended to extend a similar remedy to actions for forcible entry and detention to that provided by section 591 of the code for actions upon contracts for the payment of money only.

2. ———: ———: ———. Under this act, the court which renders the final judgment is the proper court in which to make the application for the issuance of the writ.

3. ———: APPEAL: ENFORCEMENT OF JUDGMENT. The filing of an appeal bond and the perfecting of an appeal in the higher court do not oust the court which rendered the judgment of jurisdiction to allow the filing of a bond and the issuance of a writ of restitution under the statute.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Motion for restraining order dismissed.*

*John O. Yeiser,* for appellant.

*T. J. Nolan, contra.*

LETTON, J.

This is an application in this court for a supersedeas to stay the execution of a writ of restitution in a forcible entry and detention case, issued after appeal taken from the judgment of the justice court to the district court for Douglas county. After the transcript had been filed in

the district court the plaintiff filed an application in that court for the issuance of a writ of restitution notwithstanding the appeal. A hearing was had upon the motion, and evidence taken, and an order made permitting the filing of a bond and the issuance of the writ. From this order an appeal has been taken to this court, and we are now asked for a supersedeas to stay the execution of the order pending the determination of the appeal in this court.

The application was made and order granted under the provisions of the act approved March 23, 1907 (laws 1907, ch. 163), which provides: "Section 1. In all actions of forcibly entry and detention as well as of forcible detention only, notwithstanding the execution of an undertaking for supersedeas or appeal, the judgment for restitution of the premises may be enforced, in the discretion of the court, or a judge thereof in vacation, upon the execution of a bond with sufficient surety, to defendant, in such sum as the court shall fix, conditioned that in case the plaintiff shall finally be defeated he will pay said defendant his costs and all damages he may have suffered by reason of the execution of said judgment, said bond to be approved by the court or judge." The question before us is as to the jurisdiction of the district court to make such order before a judgment in that court. Appellee contends that, since the act provides that the judgment may be enforced in the discretion of "the court or a judge thereof in vacation," the district court alone had the power to make the order, and that this language necessarily excludes the idea of a justice of the peace having such power. If we construe the words "the court or a judge thereof" with literal exactness, and without regard to the purpose and intention of the law, we might be constrained to take this view, but to do so would render fruitless the very end for which the law was enacted. When considered in connection with the other provisions of the statute referring to the action of forcible entry, it is plain that the language of the law is confusing and

ambiguous. This being the case, it must be construed by the recognized canons of statutory construction. The evil sought to be remedied was the wrongful holding of property by a tenant after a judgment of ouster, by means of taking an appeal, whereby, on account of the necessary delay occasioned by appellate procedure, injuries and wrongs were in many cases suffered by the owners of the property which could not be recompensed by an action on an appeal bond. The object was to oust the man against whom the judgment had been obtained, leaving him to his remedy upon the bond, if his possession was finally adjudged to be lawful.

A similar law was already on the statute books with reference to the enforcement of judgments upon contracts for the payment of money only, and it was as an amendment to this section that the bill for the act was introduced into the legislature. The bill was introduced by Mr. Dodge as "A bill for an act to amend section 1600 of Cobbey's Annotated Statutes, 1903, and to repeal said section as the same now stands." That portion of the proposed act referring to forcible entry judgments appeared as the second section of the bill. During consideration by the legislature, it was evidently thought to be an enactment upon a separate subject, and not germane to the section sought to be amended, being section 591 of the code. All reference to that section was eliminated in committee of the whole, and the title was amended to "An act to provide for the enforcement of judgments in forcible entry and detention, and forcible detention proceedings," and the bill was passed as thus amended. The act was evidently intended to extend a remedy similar to that provided by section 591 of the code to actions for forcible entry and detention; and, since the justice court and county judges exercising the jurisdiction of a justice of the peace are the only courts having original jurisdiction of such causes, the act would be ineffective and useless unless its provisions are applicable to justice courts. In *Bodewig v. Standard Cattle Co.*, 56 Neb. 217, it was

held, in substance, as to the effect of section 591, that, when the plaintiff had obtained leave from the lower court and filed his bond as provided therein, he might proceed to enforce his judgment, notwithstanding the filing of a supersedeas bond for appeal, and that the defendant was not entitled to an order restraining the enforcement of the judgment during the pendency of error proceedings to review such judgment, or to a supersedeas issued from this court.

We are of the opinion that the court which renders the judgment of ouster is the court which should act upon the application. It is the only court which has sufficient knowledge of the case upon which to found a legal discretion. There is no provision in the statute for any other court to acquire such knowledge before a trial of the issues. The proceedings are analogous to those under section 591, except that the application in a forcible entry case may be made to the justice of the peace after judgment, or to the district court or a judge thereof in vacation after a judgment rendered on appeal in that court.

We think there was no authority in the district court before trial and judgment in that court to enter the order sought to be restrained; and, since that court had no jurisdiction to make the order, this court has acquired none by appeal. The motion for a restraining order is therefore

DISMISSED.

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## JOY ROBERTS V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1908. No. 15,769.

1. **Criminal Law:** COMPLAINT: PLEA IN BAR. Plaintiff in error was arrested and tried in the county court. The complaint failed to charge the commission of an offense. Pending the trial, and after witnesses had been called, sworn and examined, the defect in the complaint was observed by the county attorney, who dismissed the prosecution and filed a new complaint. When the case was called for trial, plaintiff in error filed a plea in bar, setting up

the proceedings under the first complaint as a bar to the prosecution. The plea was not sustained, and upon trial the county judge found plaintiff in error guilty, and committed him to the state industrial school at Kearney. Plaintiff in error appealed to the district court, where the plea in bar was again presented, demurred to by the state, and the demurrer sustained. *Held*, No error, the complaint first filed having failed to allege facts sufficient to constitute a crime.

2. **Infants:** COMMITMENT TO INDUSTRIAL SCHOOL. Section 5, ch. 75, art. I, Comp. St. 1907, authorizes the commitment of a boy of sane mind under the age of 18 years to the state industrial school when found guilty of any crime, except murder or manslaughter, whether the same be a felony or misdemeanor.

3. ———: ———. Such commitment is in no sense a punishment, nor is the industrial school a prison in the ordinary acceptation of that term.

4. **Criminal Law:** EVIDENCE: ADMISSIBILITY. Where a demand is made upon a third person for the payment of damages resulting from an injury to a church building, and plaintiff in error indulged in language forbidden by law, upon the ground that the demand was for an excessive amount of money as a compensation for the damage inflicted, the question as to the actual extent of the injury or damage caused by such third party would be an immaterial one on the trial of the accused for using the forbidden language, as the fact, if true, would neither justify nor excuse the use of same.

ERROR to the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*J. L. McPheely,* for plaintiff in error.

*William T. Thompson, Attorney General, Grant G. Martin* and *C. P. Anderbery, contra.*

REESE, J.

On the 20th day of November, 1907, a complaint was filed in the county court of Kearney county charging plaintiff in error with profane swearing. On the next day he was put on trial. Pending the trial the county attorney dismissed the prosecution, and on the same day filed an amended or new complaint charging the same

acts, but alleging that the accused was "over the age of fourteen years." The change in the complaint was rendered necessary owing to the language of the statute (criminal code, sec. 242) limiting its application to persons over that age. It was apparent that the complaint first filed, having omitted this essential averment, did not charge an offense. When the case was called for trial under the new complaint, plaintiff in error filed his plea in bar of the prosecution, setting up the prior proceedings as a former jeopardy. Just how the plea was disposed of is not shown by the record, except that it was not sustained. A plea of not guilty was interposed, a trial had, and plaintiff in error was found guilty, followed by a finding that he was a fit subject for commitment to the state industrial school at Kearney, and an order to that effect was duly entered. An appeal was taken to the district court, where the plea in bar was again presented. To this plea the county attorney demurred. The demurrer was sustained, and plaintiff in error entered his plea of not guilty. A jury trial was had, and the jury returned a verdict of guilty as charged. A motion for a new trial was filed, which was overruled, and the order and judgment of the court was entered finding that at the date of the commission of the offense the accused was of the age of 16 years and 10 days; that he was a proper person to be committed to the industrial school at Kearney, and that it would be for his best interest to be so committed, and thereupon he was ordered committed to said school. He brings the case to this court by proceedings in error.

1. The first contention of plaintiff in error is that the court erred in sustaining the demurrer of the state to his plea in bar. This plea was founded upon the contention that, as plaintiff in error had been arrested under the complaint first filed in the county court, and witnesses had been called and sworn before the dismissal of the complaint by the county attorney, he was placed in jeopardy, and could not be again prosecuted for the same offense. It must be conceded that, when an accused is

placed on trial, as in this case, upon a complaint charging him with an offense, the dismissal of the case would be a bar to a new prosecution for the same crime; but, if the complaint does not contain the necessary averments to constitute a criminal charge, there could be no jeopardy. *Steinkuhler v. State,* 77 Neb. 331; 12 Cyc. 261, and cases cited. By section 242 of the criminal code of this state it is provided: "If any person of the age of fourteen years and upwards shall profanely curse or damn, or profanely swear by the name of God, Jesus Christ, or the Holy Ghost, each and every person so offending shall be fined in a sum not exceeding one dollar nor less than twenty-five cents for each offense." It will be observed that the statute is limited in its application to persons "of the age of fourteen years and upwards." The complaint first filed contained no averment that the accused was of that age; therefore it did not charge the commission of an offense for which plaintiff in error could have been punished. The conclusion must be that he was not, and could not have been, placed in jeopardy under that complaint. But it is urged that, since the statute permits the amendment of complaints, the amendment could have been made and the complaint have thus been rendered sufficient. We do not deem the question whether an amendment could or could not have been made a material one, as no attempt appears to have been made to make such amendment, the county attorney preferring to formulate a new complaint. This was proper practice, as we know of no rule of law requiring the amendment instead of filing the new complaint. Therefore the district court did not err in sustaining the demurrer.

2. The next contention is that the district court had no jurisdiction or power, after the verdict finding plaintiff in error guilty of the offense charged, to commit him to the industrial school. This contention is based upon two propositions, which we will notice in the order in which they are presented. It is said in the brief of plaintiff in error: "In the first place, the only justification for the

making of the order was that the plaintiff in error had been convicted of being profane, the penalty for which is fixed by section 242 of the criminal code, and the fact that he had been convicted of carrying a concealed weapon. The statute making the use of profane language a misdemeanor provides that one may be fined not more than $1 nor less than 25 cents." As plaintiff in error was found to have been ten days more than 16 years of age at the time of the commission of the offense charged in the complaint upon which he was tried, it must be apparent that the provisions of section 6, ch. 75, art. I, Comp. St. 1907, cannot be applied to this case, as that section limits the powers of courts to cases where the accused is "a boy of sane mind, under the age of 16 years." If the court possessed jurisdiction to make the order, that jurisdiction is to be found in section 5 of the same chapter. The section is as follows: "When a boy of sane mind under the age of eighteen years shall in any court of record in this state be found guilty of any crime, except murder or manslaughter, or who for want of proper parental care or other cause is growing up in mendicancy or crime and complaint is made therefor and properly sustained, the court may, if in its opinion the accused if (is) a proper subject therefor, instead of entering judgment or sentencing said boy to the penitentiary, cause an order to be entered that said boy be committed to the state industrial school, in pursuance of the provisions of this act, and a copy of said order under the usual seal of said court shall be sufficient warrant for carrying said boy to the said school, and for his commitment to the custody of the superintendent thereof."

It is contended that the clause providing for the commitment to the industrial school, "instead of entering judgment or sentencing said boy to the penitentiary," clearly implies that the order cannot be legally made unless the crime of which he is convicted is a felony, and therefore, as the charge and conviction in this case was of a low grade of misdemeanor, the case does not fall

within the provisions of the section, and all that the court had authority to do was to render judgment for the fine prescribed for the commission of that offense. While the section cannot be considered a model in lucidity and clearness of expression, yet we are unable to adopt the view contended for. The section clearly contemplates the commitment to the industrial school of boys other than those found guilty of felonies. It is thought that a proper construction of the section would be that, where a party within the specified age is convicted of any crime, except murder or manslaughter, the order may be made. To construe the section as contended for would be to deprive all boys between the ages of 16 and 18 years of the benefits of the industrial school, unless they were first convicted of a felony. Such a construction would be harsh in the extreme and prevent the application of the law to many cases to which it was the evident purpose of the legislature it should be applied.

3. It is next contended that it is a rule of criminal procedure that, where one of two or more punishments may be imposed, the court should inflict the one which would be the less severe and result in the less disgrace, and therefore the imposition of the fine should have been preferred to that of the commitment to the industrial school. Assuming that the rule of law is as contended for, we cannot agree with counsel as to its application to this case. As said by the present chief justice in *Leiby v. State,* 79 Neb. 485, "Our industrial school is not a place of punishment," nor is it in any sense a prison, no more so than our public schools upon which the law requires and enforces an attendance. It is place of education, reformation, refinement and culture. It is a beneficent provision for the uplift of boys who by reason of their surroundings and condition are deprived of an education and moral training which are so essential to their well-being and good citizenship. This is conceded by all courts and writers upon the subject. The action of the court in sending them to the school is to avoid a "con-

viction," and change the prospective punishment into a blessing. Any other conclusion does violence to the avowed purpose of the law. Such being the case, the error of the argument is apparent.

4. The circumstances and occasion which preceded the filing of the complaint against plaintiff in error were that a third party, with plaintiff and many others, was at a church service on a Sabbath evening, and the said third party committed a slight injury to a portion of the church building, and for which the officers of the church asked reparation in the way of payment of damages. Plaintiff in error joined in the discussion, and made use of the language imputed to him in the presence of a number of persons, both ladies and gentlemen. On the trial he sought to prove the extent of the injury and damage to the church, for the purpose, no doubt, of showing that the payment asked was excessive. Upon objection by the state this evidence was excluded. Of this ruling plaintiff in error complains. We are unable to see that the ruling was erroneous, and, if it were, it could result in no possible prejudice to plaintiff in error. The fact, if true, could afford no justification or excuse for his conduct on that occasion. It was not a matter that concerned him, but, even if it had been, it could not excuse the language used.

We find no error in the proceedings, and the judgment of the district court must be, and is,

AFFIRMED.

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ALICE SULLIVAN ET AL., APPELLEES, V. A. RADZUWEIT ET AL., APPELLANTS.

FILED NOVEMBER 19, 1908. No. 15,370.

1. **Parties:** JOINDER. In a suit brought against a licensed saloonkeeper and the surety on his bond, one not a party to the bond cannot properly be joined as a party defendant.

2. **Surety Companies:** ACTIONS: VENUE. A surety company organized under the provisions of chapter 23, Comp. St. 1873, is to all intent and purpose an insurance company, and may under our code, sec. 55, be sued in the county where the cause of action or some part thereof arose, or in the county where any contract or portion of a contract entered into by such company has been violated or is to be performed.

3. **Intoxicating Liquors:** ACTION: EVIDENCE. The sale of intoxicating liquors, as well as injury or accident claimed as the result of such sale, may be established by circumstances.

APPEAL from the district court for Platte county: JAMES G. REEDER, JUDGE. *Affirmed in part.*

*A. S. Ritchie* and *W. M. Cornelius,* for appellants.

*John J. Sullivan* and *Louis Lightner, contra.*

DUFFIE, C.

The defendant A. Radzuweit is proprietor of a licensed saloon at Platte Center, Nebraska. The defendant the Metropolitan Mutual Bond & Surety Company is surety upon his bond, and the defendant Louis Stone is the clerk and manager of said saloon. Radzuweit resides at South Omaha, Douglas county, Nebraska, and the principal place of business of the Metropolitan Mutual Bond & Surety Company is Omaha, Douglas county, Nebraska. The plaintiff Alice Sullivan, suing for herself and her three minor children, brought this action in the district court for Platte county, Nebraska, against all of the above named parties to recover damages claimed to have been suffered on account of the sale of intoxicating liquors to her husband, Dennis Sullivan, which, it is alleged, caused his intoxication, in consequence of which he lost control of himself and the team which he was driving, and was thrown from the wagon and instantly killed. The jury returned a verdict for the plaintiff, and from a judgment entered thereon the defendants have appealed and filed separate assignments of error.

The defendants A. Radzuweit and the Metropolitan

Mutual Bond & Surety Company, who were personally served in Douglas county, Nebraska, made a special appearance, and moved to quash the service of summons on them, for the reason that service on them was made in Douglas county, Nebraska; that neither of said defendants were found or served with summons in Platte county, where the action was commenced; and that the defendant Stone, impleaded with them and who was served in Platte county, was not a *bona fide* defendant, and was joined and made a party defendant for the purpose only of laying the venue of the case in Platte county instead of the county of the residence of said Radzuweit and his surety, the Metropolitan Mutual Bond & Surety Company. The court overruled this motion, and this is assigned as error.

The Metropolitan Mutual Bond & Surety Company was organized under chapter 23, Comp. St. 1873, being "An act regulating insurance companies." The purpose for which the corporation was formed and the general nature of the business to be conducted was "to do a general bond and surety business, to guarantee the fidelity of persons holding places of public and private trust, and to become surety on bonds and obligations of persons or corporations, and to become surety on any bond, recognizance or other writing in the nature of a bond, in the same manner that natural persons may do, subject to all the rights and liabilities of such persons, and to do and perform any other acts that are necessary for the promotion of the above described business, and not in violation of law." Section 55 of our code provides that an action against an insurance company "may be brought in the county where the cause of action or some part thereof arose, or in the county where any contract or portion of a contract entered into by such insurance company has been violated or is to be performed." If the bonding company is an insurance company within the meaning of this section of our code, then the action was properly brought against said company in Platte county, where the conditions of

the bond are alleged to have been violated. The defendant company was organized under the provisions of our statute for organizing insurance companies. Its declared business is to guarantee the fidelity of officers and other parties in the performance of their duties, and to be responsible for any violation of contract or statutory duty by the principal for whose conduct it becomes responsible. Such companies are insurance companies by the holding of many courts both state and federal.

*Shakman v. United States Credit Co.,* 92 Wis. 366, 32 L. R. A. 383; *People v. Rose,* 174 Ill. 310, 44 L. R. A. 124; *Tebbets v. Mercantile C. G. Co.,* 73 Fed. 95, 19 C. C. A. 281; *Guarantee Co. v. Mechanics Bank,* 183 U. S. 402; *American Bonding Co. v. Moran,* 80 Ark. 49, 117 Am. St. Rep. 72; *American Credit Co. v. Wood,* 73 Fed. 81, 19 C. C. A. 265, and authorities referred to in note to the opinion; *Van Buren County v. American Surety Co.,* 115 N. W. (Ia.) 24. We concur in the reasoning of the court in the cases above cited, and are satisfied that the business conducted by the defendant company is in its character that of an insurance company, and that an action brought against a company of that kind may be brought, under the provisions of section 55 of our code, in any county where its contract of insurance has been violated. The action being properly brought against the bonding company in Platte county, any party properly joined in said action could be served in any county of this state under the provisions of section 65 of the code. In this view of the case, we have no doubt that the defendants Radzuweit and the bonding company were properly sued in Platte county, but whether the defendant Stone was properly joined in this action must be determined from other considerations.

The action against Radzuweit and the bonding company was to recover on the bond which Radzuweit executed as principal, and the bonding company as surety. It was an action on contract. *Andresen v. Jetter,* 76 Neb. 520; *Carter v. Nicol,* 116 Ia. 519. Stone was not a party

to the bond or contract upon which the action was brought. While liable for the sale of liquors for which the plaintiffs were injured, his liability arose not from any contract which he had entered into or assumed, but on account of the statutes of the state. His was a statutory liability, and in no manner contractual. He could not, therefore, be properly joined with the other defendants in an action upon the bond. The judgment against him is not based on any issue made by the pleadings or upon any cause of action stated in the petition. He made proper and timely objection against being joined in the action, and should have been dismissed from the case. The judgment against Stone must be reversed.

The defendants Radzuweit and the bonding company insist that the verdict against them is not supported by the evidence, and they ask a reversal on that account. They did not introduce any evidence, and submitted the case upon the testimony offered by the plaintiff. Whatever facts this evidence tends to prove should be regarded as established; the jury having found for the plaintiff.

It is undisputed that Dennis Sullivan, the husband of the plaintiff and the father of the minors, drove his team to Platte Center in the forenoon of March 8, 1906. About noon he took a train on the Union Pacific Railroad and went to Columbus. At that time he was so intoxicated that a witness who saw him board the train was fearful that he would meet with an accident. Some time in the afternoon he employed a liveryman at Columbus to drive him back to Platte Center. At that time he had some whiskey in a bottle which he offered to parties in the livery barn, and the contents of the bottle were drank and the bottle thrown away. The young man who drove him to Platte Center testified that he drank nothing on the way, and that he had no liquors in his possession so far as he observed. On reaching Platte Center he visited the saloon of Radzuweit, and drank two glasses of beer. His brother was in the saloon at the time, and, on account of the intoxicated condition of Sullivan, requested Stone,

who was in charge, not to allow him to have anything to drink. The testimony is quite conclusive that at this time he was badly intoxicated. Some time in the evening he got his team and started for home, which was located southeast of Platte Center. Some two or three miles south of Platte Center is a bridge crossing a stream, known as the "Carrig" bridge. The public authorities had erected a new bridge across the stream, placing it some 25 or 30 feet west of the old bridge. The new bridge had been completed and opened for travel on the day of the accident. The timbers taken from the old bridge had been piled across the old road to prevent travelers from driving along the highway where the old bridge had been situated. The testimony shows that Sullivan drove his team along the old road, forced it over the obstruction placed therein, and up to the bank of the stream where the old bridge had been located; that, on arriving on the edge of the stream, presumably because the team refused to go further, he had turned around. The tracks in the old roadway show that he had made 15 different efforts to back up and turn his team, had finally succeeded, and then driven back north about 250 feet, entering the road approaching the new bridge, which he apparently crossed in safety. About 15 feet south of the new bridge his hat was found, and a short distance south of this tracks were found in the roadway, indicating that he had been dragged along the highway for some distance. When found, his team was standing in a cornfield east of the highway. One of his legs was caught in the doubletree, and shortly after being found he died. The evidence is sufficient to sustain a finding that he fell from his wagon; that his foot was caught in the doubletree; that he was dragged some distance with his head and shoulders upon the road; and that this accident caused his death. That he was intoxicated when he left Platte Center for home is beyond dispute. That he was seen to put a bottle of whiskey in his pocket when leaving Radzuweit's saloon is not controverted. That

broken glass and the necks of two pint bottles were found in the wagon box is undisputed.

We are satisfied that the evidence fully supports the verdict of the jury, and that the judgment against Radzuweit and the bond company should be affirmed, and that against Stone reversed, he not being proper party to the action, and we so recommend.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed as to Radzuweit and the bond company, but reversed as to Stone.

JUDGMENT ACCORDINGLY.

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## CORA ALLEN, APPELLEE, V. ARTHUR H. RUSHFORT, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,618.

1. Sales: PASSING OF TITLE. Plaintiff sold to defendant 40 acres of standing hay at the agreed price of $4.50 a ton, the hay to be weighed and paid for before taken from the farm. The defendant took possession, cut and stacked the hay, and baled and hauled away six loads thereof. *Held*, That title to the entire crop passed to the defendant.

2. ———: EVIDENCE. When the sixth load was being weighed, the defendant questioned the correctness of the scales, which it was agreed should be used, and refused to take away or pay for the hay remaining in the field, claiming that the plaintiff refused to allow the hay to be weighed elsewhere. *Held*, That the evidence sufficiently supported the plaintiff's contention that she offered to accept railroad weights or to have the scales, of which defendant complained, inspected and corrected, if out of order, by a party named by the defendant.

3. ———: DAMAGES: DUTY OF SELLER. If it be conceded that, because of the lien reserved on the hay for the purchase price thereof, a duty rested on the plaintiff to sell such part of the hay as the

defendant refused to take and pay for, and apply the proceeds in reduction of her damages, still she was relieved of any supposed duty in that respect by the defendant's refusal to allow her to make such sale.

4. ———: ACTION: VERDICT. There is evidence that the hay would average two to three tons an acre. Only $50 of the purchase price has been paid. *Held*, That a verdict for $351 in favor of the plaintiff is not excessive.

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

*Dan J. Riley* and *Martin & Ayres*, for appellant.

*Weaver & Giller, contra.*

DUFFIE, C.

This is the third appeal in this case. While the facts are very fully stated in the opinion written by Judge LETTON on the first appeal (72 Neb. 907), a brief summary of these facts will tend to convenience in discussing the legal questions involved. The plaintiff was the owner of 40 acres of land upon which there was a crop of timothy hay. This crop she sold to the defendant; the parties executing the following agreement: "This agreement, made this 30th day of June, 1902, between Cora Allen and A. H. Rushfort, of Omaha, witnesseth, that the first party has sold to the second party the crop of timothy hay now growing on the northwest quarter of the southeast quarter of section 17, town 16, range 10, for $4.50 per ton net to the first party; the hay to be paid for before taken from the farm. The first party has paid $50 cash to bind the bargain. (Signed.) Cora Allen, Arthur H. Rushfort. Witness, J. W. Kennedy." It was verbally agreed that the hay was to be weighed upon scales standing upon the premises of the plaintiff's mother. The defendant entered upon the land, cut and stacked the hay, and at a subsequent date took a hay press to the land and pressed and baled three of the stacks. Five loads of the baled hay were weighed upon the scales agreed on and

taken to Valley, a nearby railroad town, for shipment. When the sixth load was driven upon the scales to be weighed, the plaintiff found that the weight of the load was beyond their capacity, or rather that there were not sufficient weights to bring down the balance beam of the scales, and she sent to the field for the defendant, and on his arrival 14 bales were taken off the load, the remainder of the load weighed, after which the 14 bales were placed upon the scales and weighed separately. Up to this point there is no conflict in the evidence and no disagreement between the parties. At this time the defendant complained that the hay was not being correctly weighed, and because, as he insists, the plaintiff refused to allow the hay to be weighed on other scales, he abandoned his contract and refused to take away and pay for the hay still remaining in the field. This action was brought by the plaintiff to recover the full purchase price of the hay contracted for.

That the defendant had reason to believe the scales on which the hay was being weighed were out of order or being manipulated is shown by scale tickets received from the owner of scales in Valley, where, as he claims, two or more of the same loads were weighed, with results differing materially from that given by the scale of plaintiff's mother. If the scales agreed upon by the parties were out of order or so manipulated by the plaintiff as to work to the injury of the defendant, and the plaintiff refused to have the hay weighed elsewhere, or to have the scales on her mother's premises inspected and corrected so as to give the true weight, the law is clear that the defendant might then refuse to proceed with his contract, and the plaintiff could have no cause of action against him, except for the hay actually taken away. The material question is, therefore: Did the scales upon which the hay was being weighed give incorrect weights, and, if so, did the plaintiff refuse to have them inspected and corrected, or to have the hay weighed on other scales where correct weights might be obtained? The jury found these ques-

tions in favor of the plaintiff, and this was based upon testimony amply sufficient to support the findings.

Relating to the controversy which arose between the parties at the time of weighing the sixth load, the plaintiff testified as follows: "I insisted on getting legal weights. I insisted on having legal weights, either Whitmore's weights or railroad weights or getting the scales fixed. I said any way we could do to have it right. All I asked for was to have it right. Then he became angry and swore, and took his machinery right away." Relating to what took place between them about fixing the scales at the farm, she testified as follows: "I said I would have the scales fixed. I asked him if he knew any one that would fix the scales. He said, 'No.' But when he got down to Valley I saw him at the drug store. He said such a man at Omaha. He said Engleman. He wrote a message, and I had the telephone man send the message to Omaha. He wrote the words I could send to get the man to fix the scales." Again she testified: "I asked him to take the hay, and told him I would do anything so that it was legal. I insisted upon him putting money in the bank covering balance of the hay he had taken. I did not know how much it was at the time. He said he did not know. I said he could easily find out by getting railroad weights. Q. Well, what did you say about taking railroad weights? A. I said I would." Plaintiff's evidence above quoted, and the fact that she sent to Omaha for a scales inspector named by the defendant himself, is ample evidence upon which to base a finding that plaintiff did not refuse to allow the hay to be fairly weighed.

The defendant insists that it was the duty of the plaintiff, when he refused to take away the hay left in the field, to take possession of it and dispose of it to the best advantage and save the defendant from damage to the extent of her ability. In the first opinion filed we held that title to the hay vested in the defendant upon the making of the contract, and this holding was followed in *Baker v. McDonald,* 74 Neb. 595, where we said: "The general

rule is that, when the terms of sale of personal property have been agreed on and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer." That the defendant was vested with title to this hay was held on both former appeals, and we might now say that, were it not for a condition in the contract of sale that the hay should be paid for before taken from the farm, we doubt whether the plaintiff would have a lien thereon for the remainder of the purchase price. The hay was sold in bulk —a 40 acre tract. The contract contemplated that the defendant was to enter the field, cut and stack the hay, and change its character from growing grass to a marketable commodity.

In *Douglas v. Shumway,* 13 Gray (Mass.), 498, the court held that the owner of land who sells wood standing thereon, with authority to the vendee to cut it within a certain time, has no lien on the wood for the price in case of the vendee's insolvency after the wood is cut and before its removal. In the opinion it is said: "The contract of sale contemplated that the vendee should expend labor and money in felling the trees and preparing the wood for market; and the case finds that the wood had been cut by the vendee, and a portion thereof sold by him and hauled off the land. We think these facts are inconsistent with an existing right of lien in the vendor for the purchase money. We know of no case where such a right has been recognized, after the vendee has, at his own expense, in pursuance of the contract of sale, changed the character of the property, and by his own labor and money added to its value. By these acts the vendor must be deemed to have parted with his possession and control of the property. The vendee, by himself and his agents, had taken it into his actual possession, and incorporated with it the labor bestowed by him in preparing it for sale. There was therefore such a change of possession from the

vendor to the vendee as to defeat any right of lien in the vendor." The only difference between that case and the one we are considering is that here the plaintiff by her contract of sale provided that the hay should not be removed until paid for. But, if we concede that any duty rested upon the plaintiff to take possession of the hay which the defendant left in the field, still we think that the defendant's own action in the matter relieved her of such duty. Shortly after removing his hay press and machinery from the field, the plaintiff and her attorney called upon the defendant and demanded pay for the hay. This he refused. The plaintiff then asked him if he would release her from the contract so that she could dispose of the hay, and he replied that he would not. Mr. Weaver, the attorney, testified as follows: "I went down to South Omaha, and we went to Mr. Rushfort's office. Mr. Rushfort and Miss Allen did the talking. She said: 'Mr. Rushfort, I came down to see about the hay. I want to know what you are going to do about the hay?' 'I am not going to do anything about it,' he said. 'I want my money for it,' she said. He said: 'I am not going to pay you any money.' 'Well,' she said, 'I want you to release me from the contract so that I can go and sell the hay.' He said: 'I won't do that. I won't do anything about it. If you want to do anything about it, see my lawyer.' And then he turned on his heel, and we started out of the office. We went down to the lawyer's office, but he was not there, and we came back to Omaha." Under these circumstances there can be no doubt that the plaintiff was under no obligation to sell the hay or to interfere with it in any manner.

Complaint is further made that the verdict is excessive. The jury returned a verdict for $351.21. This included interest from January 3, 1903, to October 7, 1907, nearly five years. There was evidence from which the jury might have found that the hay would yield from two to three tons an acre. At the lowest estimate—two tons an acre—there would be 80 tons, which at the contract price

would amount to $360. Fifty dollars was paid in cash, leaving a balance of $310, upon which interest should be computed for nearly five years. A verdict of $400 would not be excessive.

The case has been tried four or five times, and that number of juries have found for the plaintiff in some amount. This is the third appeal to this court, and the case should be ended. After a careful examination of the record we are unable to discover any reversible error. 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.

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HAYES COUNTY, APPELLEE, V. EMERY R. WILEMAN ET AL., APPELLEES; FARM LAND COMPANY, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,385.

1. **Judgment:** PROCESS. 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. **Costs.** A judgment entered against the defendant for the costs made in an action, after the plaintiff has accepted payment in full of the claim on which the action was brought, is erroneous, if not void.

3. **Void Judgment:** VACATING. A void judgment is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it, are void. Such a judgment may be vacated at any time on motion made for that purpose by an interested party, and section 82 of our code has no reference to a void judgment.

APPEAL from the district court for Hayes county: LESLIE G. HURD, JUDGE. *Reversed.*

*W. S. Morlan,* for appellant.

*P. W. Scott* and *C. A. Ready, contra.*

DUFFIE, C.

This action involved the title to the northwest quarter of section 6, township 8, range 33, in Hayes county, Nebraska. Emery R. Wileman, the owner of the land, had mortgaged the same to Stull Brothers, and they sold and assigned the mortgage to the appellant, the Farm Land Company, but the assignment of the mortgage had not been placed of record in Hayes county. In May, 1901, the county of Hayes commenced an action against Wileman and wife, William and Louis Stull, the record owners of the mortgage, and other parties to foreclose a tax lien claimed by said county on the land for the delinquent taxes of 1895 to 1899, both inclusive. Personal service of summons was had upon Stull Brothers, and service by publication upon all the other defendants. No administrative sale of the land for these delinquent taxes was had previous to the commencement of this action. A decree was entered in October, 1901, which recites that at the time the action was commenced the sum of $69.20 was due the county for delinquent taxes and interest, but that said taxes had been paid since the commencement of the suit, and subsequent to the making of costs in the action to the amount of $22.88. Judgment was entered for these costs, and the land decreed to be sold to satisfy the same if not paid within 20 days from the entry of the decree. The costs not being paid, the land was sold to W. S. Liston for the sum of $120, and this sale was confirmed March 13, 1902. On May 29, 1902, the sheriff made a deed of the premises to Liston, and on the same day Liston and wife conveyed to John A. Dillon. In November, 1904, Emery R. Wileman served notice upon Liston, Dillon and the county that he would make application to have the decree entered in the case opened up and to be let in to defend. This application was heard by the court on the 25th day of November, 1904, the decree was opened, and Wileman allowed to file an answer. The appellant, the Farm Land Company, then obtained leave to intervene, and filed its

answer and cross-petition asking a foreclosure of its mortgage. Dillon answered the cross-petition of the Farm Land Company, denying the allegations thereof, and as a defense set up the former decree, the sale of the premises thereunder, the making of the sheriff's deed to Liston, and Liston's deed to himself, both of which had been placed of record. On the trial the court found that there was due the Farm Land Company, on its mortgage made by Wileman, the sum of $898.57, but dismissed its cross-petition so far as it affected Dillon's interest in the land. From this decree the Farm Land Company has appealed.

It is conceded that at the time this action was commenced Wileman was the owner of the land, and that he was a resident of Clay county, Nebraska. The owner of the equity of redemption is an indispensable party to the foreclosure of a tax or other lien. *Alexander v. Thacker*, 30 Neb. 614. Wileman being an indispensable party, and a resident of this state, a judgment foreclosing his interest in the land, entered against him on service by publication only, is void. *Payne v. Anderson,* 80 Neb. 216; *Wagner v. Lincoln County,* 80 Neb. 473. In the case last cited it is said: "A judgment rendered on service by publication against a resident of this state, on whom personal service might have been had, is absolutely void." In his affidavit to open up the decree in this case Wileman recites that he is a resident of this state; that at the time of entering the decree he was the owner of the premises; and that during the pendency of the action, and at all times since, he has been a resident of Nebraska; that he had no actual notice of the action in time to appear and make a defense, and no knowledge of the rendition of the decree until about August 25, 1904; that service could have been made upon him in Clay county, Nebraska, where he resided, and that five years had not elapsed since the rendition of the decree. It is evident from reading this affidavit that Wileman supposed that, in order to have the decree set aside, he should proceed under the provisions of section 82 of the code, which allows any person

served by publication only to have the judgment against him opened up at any time within five years, when he makes it appear to the satisfaction of the court that during the pendency of the action he had no notice thereof in time to appear and make his defense. The section further provides: "The title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment." Assuming that the court had no power to set aside the decree except under this section, the appellee Dillon insists that his title to the land in dispute cannot be affected by any proceedings which the court may take, and this was evidently the opinion of the trial court.

In this view we cannot concur. A void judgment is no judgment, and no rights can be acquired under it. A void judgment may be set aside at any time upon motion made to the court. *Foreman v. Carter,* 9 Kan. 674; *Hanson v. Wolcott,* 19 Kan. 207. The validity of the judgment may be shown by extrinsic proof. *Reynolds v. Fleming,* 30 Kan. 111; *Baldwin v. Burt,* 2 Neb. (Unof.) 383. "A court may at any time clear its records of unauthorized and illegal entries therein." *Feikert v. Wilson,* 38 Minn. 341. In *Heffner v. Gunz,* 29 Minn. 108, the supreme court of Minnesota said: "The judgment being void, and not merely irregular, the court was authorized to set it aside upon motion. *Lee v. O'Shaughnessy,* 20 Minn. 173; *Covert v. Clark,* 23 Minn. 539. In such a case the lapse of time is not a bar to the granting of the motion." Nor is it necessary that merits be shown on the part of the defendant. *Wendel v. Durbin,* 26 Wis. 390; *Mackubin v. Smith,* 5 Minn. 296. In that same case the court, speaking of the distinction between proceedings in equity to have a void judgment set aside or canceled and proceeding by motion for that purpose, said: "While, upon familiar principles of equity jurisprudence, an ac-

tion in the nature of a suit in equity for relief will not be entertained in such case merely upon the ground that the judgment was void, and without showing that by it substantial injustice was done, that rule is not applicable to motions of this kind. It is only when the motion is based upon irregularities merely, and not upon want of jurisdiction, or when the favor of the court is invoked, that merits must necessarily be disclosed." While not discussed in the opinion, the above is the view evidently taken by this court in *Baldwin v. Burt, supra.* From the above authorities it will be seen that it was the duty of the court to set aside the decree upon the showing made by Wileman that he was a resident of Clay county, Nebraska, and that he could have been served with summons there when the suit was commenced. Wileman had no need to appeal to the provisions of section 82 of the code to have the decree set aside, and, while the affidavit was apparently based thereon and made to conform thereto, we cannot see why he should be prejudiced by making a stronger showing than was necessary in order to obtain the relief demanded. The judgment was void on account of personal service not being made on Wileman. The decree on its face also shows that the taxes, on which the action was based, were paid previous to the trial of the case, and that the court retained the case for the purpose of entering judgment for the costs which had accrued in the action.

In an opinion showing great learning and research the supreme court of Wisconsin held that, where suit was commenced in an existing action, and where, during the pendency of the action, the defendant paid and the plaintiff accepted the full amount claimed and sued for, the court has no jurisdiction to enter judgment for costs. That the costs in an action are but an incident, which necessarily falls when the cause of action ceases to exist. Numerous cases are cited in support of this holding. *Two Rivers Mfg. Co. v. Beyer,* 74 Wis. 210. Our own court has

apparently adopted this rule. *Merrill v. Jones,* 39 Neb. 763. In every view which we take of the case the decree was a void decree, and, as said in Freeman, Void Judicial Sales, sec. 2: "A void judgment, order or decree, in whatever tribunal it may be entered, is, in legal effect, nothing. 'All acts performed under it, and all claims flowing out of it, are void.' Hence, a sale based on such a judgment has no foundation in law. It must certainly fall." In *Wagner v. Lincoln County,* 80 Neb. 473, we said: "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 are entirely satisfied with that holding. The taxes in this case were paid and accepted by the county prior to the entry of any decree. It is so recited in the decree itself. If the county desired to hold the parties for the costs made, it should have refused to accept the taxes upon which the suit was founded, unless the costs then made should also have been discharged. We know of no principle of law or equity that requires a party to pay the costs of a void proceeding in order to relieve his land from a cloud cast upon it by reason of a void judgment, where no cause of action existed against him when the judgment was entered.

We recommend a reversal of the decree 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.

THOMAS DENNISON, APPELLEE, V. DAILY NEWS PUBLISHING COMPANY, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,262.

1. Libel: EVIDENCE. In a civil action to recover damages for libel it is proper to produce evidence showing the relations existing between the plaintiff and the author of the alleged libel, for the purpose of proving that the plaintiff was the person referred to, when his name does not appear in the article, and defendant does not admit that he is the one referred to.

2. ———: ELEMENTS OF DAMAGE. Neither the grief experienced by the plaintiff's wife upon reading an alleged libelous article regarding plaintiff nor the influence of her grief upon the plaintiff's mind are elements of damage recoverable in action for libel.

3. ———: DAMAGES: EVIDENCE. In a civil action for libel in this state, wherein punitive damages are not recoverable, neither evidence of defendant's refusal to publish a retraction, nor evidence that others who had also published the alleged libel had published a retraction, is admissible for the purpose of enhancing the plaintiff's recovery.

4. ———: EVIDENCE. In such case the editor of defendant's paper, in which the alleged libel was published, should not be required upon objection to testify as to whom he "considered" and "supposed" the article referred.

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

*J. H. Van Dusen* and *Irving F. Baxter,* for appellant.

*W. J. Connell, contra.*

EPPERSON, C.

On the night of November 22, 1904, in the city of Omaha, the home of Elmer E. Thomas, attorney for the civic federation, while it was occupied by himself and his family, was partially wrecked by the explosion of a dynamite bomb, brought about by some person unknown, with the probable intention of murdering said Thomas. On November 26, 1904, the defendant herein published in the

Omaha Daily News an address delivered by Mr. Thomas at a mass meeting of citizens of Omaha, which, with unimportant matters omitted, is as follows: "When I began this fight as attorney for the civic federation, I saw at the outset a man who stood across the path of good government in this city. It was necessary that this man be driven out of the city. It is because of the fight made on that man that my family has been placed in jeopardy of their lives. When Richard L. Metcalf, editor of the World-Herald, opposed the selection of a certain chief of police, this man hired a slugger to dog his footsteps. Whenever Mr. Metcalf and his family went out at night this thug followed him for the purpose of intimidating his wife and family. A few years ago Walter Moise, a saloon-keeper, offended this same man, and a convict, Al Green, now in the Missouri penitentiary, says this person offered him $5,000 to kill Moise. County Attorney Shields offended this same individual, and a convict in the Iowa penitentiary says he offered $3,000 to dynamite Shield's house. It is important that the unholy alliance between the officials and this man be broken up. The police can scour the cornfields, run down the long and short man, or the glass-eyed man, search the cellars of respected citizens, but when we say, 'Here is the man who knows who did it,' we can get nothing done. Who threw the bomb? This man either threw that bomb, hired some one to throw it, or knows who did it. He has educated and sent out more thieves than any other man in the country. He has the reputation among great detective agencies of being one of the greatest criminals in the United States, and yet he is harbored here." This action was instituted by the plaintiff, who alleged that he is the individual referred to in the speech of Elmer E. Thomas, published as aforesaid, that said publication is libelous, and sought to recover general damages in the sum of $50,000. A judgment of seven thousand five hundred dollars was obtained in the court below, and defendant has appealed.

1. Upon trial the plaintiff was permitted over objec-

tion to testify that Elmer E. Thomas, who uttered the words reproduced in the alleged libelous article, had appeared as an attorney against the plaintiff in certain prosecutions pending against the latter in Iowa, and also in proceedings in this state for the extradition of plaintiff. Such actions were pending at the time the Thomas speech was made and published. We find no error in the admission of this testimony. Evidence showing the relations existing between the plaintiff and the author of the alleged libelous utterance is proper for the purpose of showing that the article referred to the plaintiff, when his name is not mentioned therein, and the pleadings do not admit that he is the party referred to. Some of the testimony in this regard, however, was otherwise incompetent. For instance, plaintiff testified: "He (meaning Thomas) had been over in Harrison county, Iowa, and had the assistance of a man out of the penitentiary; * * * had me indicted over there on two charges." These are but the conclusions of the witness, and probably would have been stricken from the record had defendant requested it.

2. The plaintiff testified that he had first read the libelous article while absent from his home. Over objections he was further permitted to testify as follows: "Where again do you say you saw it? A. At home. Q. Under what conditions as affecting your mental condition or causing you pain or anguish of mind? A. My wife had it, and was reading it and was crying." Defendant moved to strike out the last answer of the witness as incompetent, irrevelant and immaterial. The motion was overruled. "Q. And did that condition affect you as far as the pain and anguish of mind is concerned? A. That worried me all of the time. The worry was so I could not eat or sleep as I used to." A motion to strike out this last quoted answer was also overruled. It is not contended by the plaintiff that he is entitled to recover for the suffering endured by his wife, but it is urged that the testimony is admissible to show that his suffering was

greater because of the grief which the publication caused her. In actions for libel or slander plaintiff is entitled to prove that he has a family, and of whom it consists. Such evidence bears directly upon the question of damage. *Cahill v. Murphy,* 94 Cal. 29, 28 Am. St. Rep. 88; *Enos v. Enos,* 135 N. Y. 609; *Klumph v. Dunn,* 66 Pa. St. 141. *Enquirer Co. v. Johnston,* 72 Fed. 443. It shows, in part, his position in society. Such evidence is admissible for the purpose of proving that the plaintiff has a family, whose disgrace, shame, or humiliation by reason of the libel increases his mental suffering. In *Cahill v. Murphy, supra,* it was held: "Mental suffering is an element for which damages may be recovered in an action for slander, and such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family suffer by reason of the disgrace visited upon him or her by the slanderous charge." Evidence that plaintiff was a married man is admissible, as held in *Morey v. Morning Journal Ass'n,* 20 Am. St. Rep. 730 (123 N. Y. 207), "as bearing upon the hurtful tendency of the libel and the general damage to which he was exposed." There can be no doubt but that the fact that one libeled has a family is an important circumstance which bears upon the question of damages, and this is so because the members of the family suffer by reason of the disgrace visited upon the father and husband. For it is apparent that not only is the finger of scorn, ridicule, disgrace and shame pointed to the father, but also is directed toward the family; and, because of this fact, his damage is the greater and his mental suffering accordingly increased. But we do not understand that the mental suffering experienced by the members of his family, nor the effect thereof upon him, can be taken into consideration for the purpose of enhancing the damages which he is entitled to recover. The mental suffering for which one libeled may recover must be the direct, immediate and proximate effect of the publication. Such mental suffering, therefore, must be that which the plaintiff expe-

rienced because the libelous article exposed him to public hatred, contempt or ridicule. Upon thorough research we are unable to find where the competency of such evidence has ever been adjudicated. The above cited cases do not go to this extent. The only case bearing on the question considered which we have been able to find is *Flam v. Lee,* 116 Ia. 289, wherein it is held: "In an action for malicious prosecution it was not error to permit plaintiff to show that on his arrest at his home his mother fainted or was prostrated by the shock, and that plaintiff thereby suffered distress of mind." The reasons for the rule are given in the opinion as follows: "But the principal basis of recovery in most actions of this kind is mental suffering and anguish arising from the wrongful charge and arrest, and, if the arrest be made in the presence of one's family or friends, bringing him into shame and humiliation before them, it is a proper matter to be considered as bearing upon the pain inflicted upon him. If, then, in addition to the indignity of his arrest, he sees, as the effect of such act, his wife or mother fall in a faint, and he is forced to leave her in such prostrate and suffering condition, we see no reason why this increased pain, which naturally follows such a situation, shall not be an element in assessing his damages, if he is found entitled to recover at all." The nature of the action, the unwarranted removal of the plaintiff from his family upon a false accusation of murder, we think is sufficient to distinguish that case from this. There the plaintiff through the wrong inflicted was taken upon his arrest from his mother, who was in great distress. From the opinion it appears that the rule announced in the syllabus was followed, partly at least, because plaintiff was "forced to leave her in such a prostrate and suffering condition."

We have considered the harm and the benefits which would result from the adoption of a rule which would permit the admission of such evidence, and are apprehensive that its adoption and application would meet with considerable difficulty. Would the rule apply only when

the plaintiff had observed the demonstration of his wife's mental suffering, or would it also be extended to the litigant who had not observed the evidences of his wife's distress, although conscious that she suffered, and whereby he himself was distressed? Should the defendant in libel be permitted to prove that the plaintiff's wife experienced or demonstrated no grief? Yet, if the rule is adopted, the defendant would be permitted to refute the evidence, which the plaintiff would be permitted to introduce. Can it be considered that a man with a large family is entitled to recover greater damages under otherwise like circumstances than a man with a smaller family? In the event that some of plaintiff's family experienced grief and others did not, what rule then would apply? If the emotional feelings demonstrated by a plaintiff's wife are caused through love and sympathy, is that not a benefit to him instead of a damage? If the libelous article alienates her affections, his damages are thereby increased, according to a former decision of this court. *Case v. Case*, 45 Neb. 493. If some of plaintiff's family demonstrate hatred as a result of the publication and some sympathy, should he be allowed damages by reason of the effect either condition has upon his mind? If the wife remained indifferent, her husband might and probably would suffer by reason thereof. It is not our purpose to argue that the emotions experienced by a wife under such circumstances, no matter what form they may take, may not be distressing to the husband. Although her sympathy may be of value to him, yet the fact that it is required or made necessary by the illegal act of the defendant would naturally cause him distress. But it cannot be said as a matter of law, nor does it seem susceptible of proof, that a husband, under circumstances such as surrounded the plaintiff herein, was damaged more than he would have been had the conduct and emotions of his wife been different. Even if such damage could be considered the proximate result of the wrong done, it is so difficult of measurement that it seems necessary to exclude it en-

tirely. Mental distress caused by sympathy for another's suffering is not a recoverable element of damage. It is true that the publication complained of was the cause of the wife's grief, but to permit the plaintiff to recover because his mental suffering was thereby made the greater would be to permit him to recover because of his sympathy for her. We arrive at no satisfactory conclusion except that the plaintiff in an action to recover general damages for libel may only prove in this regard the fact that he has a wife and children and their position in society.

3. Two days after the publication of the article in controversy the plaintiff visited Mr. Polcar, the editor of the Daily News, and was permitted over objection to testify that in a conversation then had the plaintiff requested Mr. Polcar to publish a letter which plaintiff had written in answer to Thomas's speech; that the reason he wanted the letter published was because he understood that everybody up in Logan and Harrison counties, Iowa, where the criminal proceedings were pending against plaintiff, looked to the Daily News to get the inside facts in regard to plaintiff's case, and that the Bee and the World-Herald and other daily papers in which the alleged libelous article had also been published had agreed to publish the plaintiff's letter. He was also permitted to prove that the World-Herald had published the same. The admission of this testimony was error. The article was libelous *per se,* and the amount of plaintiff's recovery must be determined by the damages which flow from the acts of the defendant complained of, and not by reason of its omission to publish the article which the plaintiff requested. Defendant's refusal to publish the plaintiff's letter could be construed only as evidence of defendant's malice in publishing the alleged libelous article. But even then the evidence would be incompetent for the purpose of enhancing the plaintiff's recovery. *Bee Publishing Co. v. World Publishing Co.,* 59 Neb. 713. Again, it must be remembered that Thomas's speech was also published in

the Bee and the World-Herald, two daily newspapers of the city of Omaha of wide circulation. By the objectionable evidence the plaintiff proved that the editors of these two papers had agreed to publish the plaintiff's answer to the alleged libelous article in the other papers, and proof of defendant's refusal to publish the same would only tend to enhance the amount of plaintiff's recovery, for which purpose it was evidently intended. The conduct of other publishers, who also published the alleged libel, in their apparent attempts to lessen the evil results of their publications is laudable, but in no proper manner can such conduct be considered by the jury for the purpose of determining whether or not the defendant had committed a wrong, or for the purpose of measuring the damage, if a wrong had been done. Many courts of high standing have held that evidence of defendant's refusal to publish a retraction is admissible. But the purpose of such evidence is to prove malice; and, so far as the author of this opinion has observed, the rule is not followed except in jurisdictions permitting the recovery of punitive damages. The above evidence related to a part of a conversation which plaintiff contends was properly admitted for the purpose of showing to whom the article referred. The remainder of the conversation related to statements of Mr. Polcar that he knew that plaintiff was the person referred to. Mr. Polcar was not an officer of the defendant. It is not shown that he saw the article or knew of it before its publication. His admissions made two days subsequent to the publication do not form a part of the *res gestæ*. We do not say that the evidence of Polcar's admissions was prejudicial; but, if without prejudice, that fact would not justify evidence of the conversation, a part of which related to a refusal to publish plaintiff's answer to Thomas's speech.

4. Upon the cross-examination of the witness Polcar, he was required over objection to testify that at the time of the publication of Thomas's speech he considered and supposed that it related to the plaintiff. He had

previously testified that he did not know that it referred to the plaintiff. The evidence objected to should have been excluded. Whatever the witness supposed or considered in this regard is immaterial. Plaintiff, however, suggests that this evidence, as well as plaintiff's testimony above referred to regarding Polcar's admissions, is without prejudice, as it is otherwise well established that plaintiff is the person referred to in Thomas's speech. Plaintiff's competent evidence fairly establishes the fact that he is the person referred to by Mr. Thomas. No attempt was made to prove the contrary. Defendant tried the case upon the theory that plaintiff was the person whose character was assailed by the publication. If the case depended upon this assignment of error, we doubt that we could recommend a reversal. However, upon another trial this evidence should, and undoubtedly will, be omitted.

Defendant further urges that the judgment is excessive. It is unnecessary to consider this assignment. The errors above referred to as prejudicial are so because their tendency is to enhance the damages; and, as the case must be remanded for a new trial, the amount of recovery will be determined from the evidence then taken. Neither do we consider an assignment of error alleging misconduct on the part of plaintiff's counsel. This alleged misconduct pertained to statements made in open court, before the jury, relative to publications in the defendant's paper at about the time the jury were impaneled to try the case. Upon another trial it is not probable that such publications will be repeated, nor counsel animated to conduct similar to that complained of here.

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

CALKINS, C., concurs.

DUFFIE and FAWCETT, CC., not sitting.

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

REVERSED.

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ADAMS & BURKE COMPANY ET AL., APPELLANTS, V. JAMES E. COOK ET AL., APPELLEES.

FILED NOVEMBER 19, 1908. No. 15,378.

1. **Parent and Child:** EMANCIPATION: EVIDENCE. The emancipation of a child by his parent may be proved by circumstantial evidence, or by an express agreement, or implied from the conduct of the parties. It is insufficient for a litigant to testify to the conclusion that he had been emancipated when that question is directly in issue.

2. **Witnesses:** CROSS-EXAMINATION OF FRAUDULENT GRANTEE. On the cross-examination of an alleged fraudulent grantee of land purchased with the debtor's funds, the creditor is entitled to inquire with considerable latitude to ascertain whether or not the grantee was controlled by the debtor in making the purchase.

3. **Appeal:** EVIDENCE: HARMLESS ERROR. Errors in the admission of defendant's evidence in the trial of a creditor's bill is without prejudice as against a creditor who has failed to establish that his debt was in existence at the time of the alleged fraudulent transfer, or that the transfer was made in contemplation of the indebtedness.

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

*Flickinger Bros.* and *W. L. Smith,* for appellants.

*J. A. Douglass, contra.*

EPPERSON, C.

The plaintiffs, who are judgment creditors of the defendant James E. Cook, instituted this action for the purpose of reaching and subjecting to the payment of their

judgments several tracts of land in Rock county. The plaintiffs allege that said several tracts of land were purchased with the money of James E. Cook and the title thereto placed in the name of his son, Elton Cook, for the purpose of hindering and defrauding plaintiffs. The evidence shows that the defendant, Elton Cook, reached the age of 21 years March 28, 1900; that for about two years immediately preceding that date he was employed by Cook & Son, a firm composed of his father and brother, doing business in Onawa, Iowa. This firm suspended business in April, 1900, and at that time James E. Cook conveyed to Elton certain business property in Onawa of the value of $1,200 dollars; the consideration therefor, as claimed by defendants, was the cancelation of a debt of $964 owing to Elton by the firm in part for wages and in part for money loaned. Elton secured a loan of $750 by giving a mortgage upon the Onawa property, and with this fund purchased 160 acres of the land here in controversy. In addition to the $750, he gave a mortgage on the land for $250, the remainder of the purchase price. The defense relied upon was that Elton was emancipated when he earned the wages which entered into the consideration for the Onawa property transferred to him soon after he reached his majority. The father was insolvent at the time of this transfer, and was indebted to one of the plaintiffs herein. Under such circumstances, the burden is upon the defendants to prove by clear and satisfactory evidence the *bona fides* of the transfer. Defendants prevailed in the court below, and plaintiffs appealed. There are numerous assignments of error, which we have examined, none of which, however, we can sustain except as hereinafter indicated.

For the purpose of proving that defendant Elton Cook had been emancipated, he was permitted over objection to testify as follows: "Q. Had you been emancipated by your father; that is, you were to have your own time and your own wages prior to the time you became of age? A. Yes, sir. Q. You may state about when you received

your emancipation? A. Well, about 1895 or 1896." Continuing with similar questions, counsel assumed that the boy had been emancipated. The result of this suit depends upon whether or not he was emancipated. This fact must be proved by competent evidence, and it is insufficient for the witness to testify to the conclusion. An emancipation of a child by his parents may be proved by circumstantial evidence, or by an express agreement, or implied from the conduct of the parties. *Bristor v. Chicago & N. W. R. Co.,* 128 Ia. 479. It was held by this court that emancipation may be implied from circumstances. *Clemens v. Brillhart,* 17 Neb. 335. In *Taubert v. Taubert,* 103 Minn. 247, it was held that an issue as to the plaintiff's emancipation was a question of fact under the evidence, and in the opinion we find the following: "A mere waiver, however, by the parent of the right to the earnings of his minor child does not alone constitute such emancipation. There must be a surrender by the parent of the right to the services of his minor child, and also the right to the custody and control of his person." In the interrogatory first above quoted, it is true that some of the facts which go to show an emancipation were embodied in the question and answered in the affirmative by the witness. But that was a leading question and objected to as such. It was insufficient to prove the fact. It is also true that additional evidence was given showing that, upon the books of Cook & Son, Elton Cook was allowed wages, but this evidence under the circumstances of this case is consistent with the plaintiffs' theory that he had not been emancipated. His father, being a member of the firm, was entitled to credit for the value of his services, had he not been emancipated, as against the other member of the firm, who had no interest in the boy's earnings. It is not established to our satisfaction that Elton had been emancipated.

On cross-examination plaintiffs were refused an answer to the question: "Who suggested that you come out here (to Rock county) to buy land?" This also was error.

The plaintiffs had a right to inquire into the conduct of the defendants which led up to the purchase of the property in controversy, and to ascertain whether or not in the investment of the funds the alleged fraudulent grantee was acting upon his own judgment or was controlled by his father. As to the manner of inquiry on cross-examination, the plaintiffs should be allowed considerable latitude. The evidence clearly establishes that the land in controversy, other than the 160 acres first purchased and above specifically referred to, was procured by Elton either upon his credit or with his own funds which were not derived directly or indirectly from his father or brother. The evidence failed to show that at the time of the purchase of the 160 acres the indebtedness of plaintiff, Adams & Burke Co., was in existence. Nor is it shown that the transfer of the Iowa property or the purchase of the 160 acres was made in contemplation of such indebtedness. As to said plaintiff, there is no prejudicial error in the record, for the reason that it failed to show that it had a cause of action against the defendants, and as to it the judgment could not have been otherwise than as it was. As to the plaintiff, the Minneapolis Threshing Machine Company, the errors above indicated were prejudicial, and we recommend that the judgment of the district court be reversed and this cause remanded for further proceedings.

DUFFIE, C., concurs.

GOOD, C., not sitting.

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

REVERSED.

## MARY ELLEN HOON, APPELLEE, V. ULYSSES G. HOON, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,302.

1. **Husband and Wife:** SUIT FOR MAINTENANCE BY NONRESIDENT. A wife who is a nonresident of the state, and who is separated from her husband without fault on her part, may maintain in the courts of this state an action in equity against her husband for support and maintenance. The statute requiring a plaintiff in an action for divorce and alimony to be a resident of the state has no application.

2. ———: ———: DECREE. In this, an action by a wife against her husband for support and maintenance, it was not improper for the court to require the payments to be made in monthly instalments, instead of awarding a judgment for a gross sum.

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

*L. W. Billingsley, R. J. Greene* and *P. F. Greene,* for appellant.

*A. S. Tibbetts* and *W. L. Anderson, contra.*

GOOD, C.

The object of this action, which was brought by Mary Ellen Hoon against her husband, Ulysses G. Hoon, was to compel the latter to contribute toward the support of the plaintiff and the minor children of the parties to this action. A judgment was entered whereby the defendant was required to pay into court for the plaintiff for the support of the children of the parties the sum of $20 a month until the further order of the court. From this judgment defendant has appealed.

For several years prior to April, 1900, the parties to this action and their four minor children lived in Lincoln, Nebraska. On the 29th of April, 1900, the defendant, without just cause, left his family and home, and refused to pay the rent of the house in which they lived, and re-

fused to longer live with his wife and family. The wife and family were left without any means of support. The domestic difficulties of the parties was the subject of a consultation between the plaintiff's father and an attorney, on one side, and the defendant, on the other, in which it was arranged that the plaintiff and her children should go to the home of plaintiff's father in Sioux City, Iowa, and that defendant would contribute $15 a month toward their support. The wife, having no other place to go, accepted the proffered help of her father under the arrangement with her husband to contribute $15 a month for their support. By the aid of her labor and the $15 a month she supported herself and family, and sent the children to school. Since July, 1904, the defendant has contributed nothing toward the support of his family, and the entire support of the wife and children has devolved upon the plaintiff.

The first contention of defendant is that the plaintiff cannot maintain this action, for the reason that she is a non-resident of the state. Defendant's contention is that the action is brought under the provisions of the code relating to divorce and alimony. The divorce statute requires residence in the state upon the part of the plaintiff, but this court has several times held that, where a wife was separated from her husband without her fault, she might maintain a separate action for support and maintenance in a general action in equity, and without reference to the divorce statute. *Earle v. Earle,* 27 Neb. 277; *Eldred v. Eldred,* 62 Neb. 613; *Cochran v. Cochran,* 42 Neb. 612; *Rhoades v. Rhoades,* 78 Neb. 495. In this action no divorce or other relief than the support and maintenance of the plaintiff and her minor children was asked, and the evidence clearly shows that the separation from her husband was without fault on her part, and due solely to the fault and misconduct of the defendant. It is clear that it is a general action in equity, and is not based upon the divorce statute. The provisions of the divorce law re-

quiring residence on the part of the plaintiff, therefore, has no application to this action.

Defendant complains because the judgment entered provides for monthly payments, instead of for a payment of a gross sum, and because no time limit is fixed during which the payments shall continue. The evidence discloses that the defendant was receiving a salary of $50 a month, and does not show that he had any property out of which a gross judgment could have been enforced. The court doubtless took into consideration the ability of the defendant to pay, and, instead of placing upon him a burden with which he was unable to comply, required the payment of monthly instalments, so that it was within the power of the defendant to comply with the order of the court. The duty of the defendant to support his wife and children is a continuing one, and we do not think it a valid objection to the judgment that it provides for a monthly payment, rather than for the payment of a gross sum, nor do we think it a valid objection that no time limit is fixed during which the payments shall continue. As the duty is a continuing one, the payments should be continued so long as the plaintiff and her minor children are required to live apart from the husband and father by reason of his misconduct. In *McGechie v. McGechie,* 43 Neb. 523, this court disapproved the awarding of alimony to a wife in instalments during her life. The principal ground for disapproval in that case, however, rested upon the fact that a gross sum of $500 was allowed out of the husband's estate, which did not exceed $1,000, and that the amount of the monthly allowance in addition was excessive. In that case, however, a divorce was granted and the parties were separated. The instant case is not for divorce, but one for separate maintenance. In the case of *Price v. Price,* 75 Neb. 552, which was an action similar to the present one, this court ordered a judgment entered for support and maintenance which required the amount to be paid in quarterly instalments until defendant had provided a home for plaintiff. We think a clear distinction exists between

an action for divorce and alimony and one by a wife for separate support and maintenance. Where a divorce is awarded, the marital relation is dissolved. Other matrimonial alliances may be formed by the parties, and good reasons exist against requiring the payment of alimony in instalments for an indefinite time, but such reasons do not exist in an action by a wife for separate maintenance. The marital relation still exists. The husband is not relieved of his duty to support his wife and minor children; and a judgment for support and maintenance which requires monthly payments, instead of a gross sum, particularly where the defendant has little property, but does have a definite earning capacity and income, is founded upon sound reason as well as equity and justice.

Defendant contends that the judgment is not supported by the pleadings, and that the judgment is not in favor of the wife, but is in favor of the children, who are not parties to the action. The language of the judgment might be construed to indicate that plaintiff was allowed a recovery for the benefit of the minor children only. The object of the action was to compel the defendant to contribute toward the support of the plaintiff and the minor children. The pleadings and the evidence require the entry of a judgment in favor of the plaintiff. The judgment is in favor of the plaintiff, and the words "for the support of the children of the parties," immediately following the word "plaintiff," may be treated as surplusage. They do not add to nor detract from the liability of the defendant, and might be entirely omitted without affecting the rights of either of the parties to this action. The objection is without merit.

There is no apparent error in the record. The judgment of the district court is right, and we 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.

MINNESOTA THRESHER MANUFACTURING COMPANY, APPELLEE, V. EPHREM L'HEUREUX, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,334.

1. **Judgment:** PROCESS: JURISDICTION. In this state a court does not obtain jurisdiction over the person of a defendant by issuing a summons and leaving a copy thereof at his late place of residence, and a default judgment rendered upon such service is void.

2. **Void Judgment:** COLLATERAL ATTACK. A judgment void upon its face may be impeached collaterally.

3. ———: REVIVOR. An order of revivor does not impart any validity to a judgment void upon its face.

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

*R. A. Batty* and *H. F. Favinger,* for appellant.

*Dorsey & McGrew, contra.*

GOOD, C.

Plaintiff, claiming to have a judgment against defendant, on which an execution had been issued and returned unsatisfied, obtained from the district court, on an *ex parte* hearing, an order appointing a referee and requiring the defendant to appear before such referee to answer such questions concerning his property as might be propounded to him. Defendant filed a motion to set aside this order, upon the ground that the original judgment was void for want of jurisdiction over the person of defendant by the court rendering the judgment. In this motion the defendant set out a complete transcript of the judgment and the proceedings leading up to it, which disclosed that a default judgment for $706.61 had been entered against defendant in the county court in 1888. The transcript contained the return to the summons issued in that action and it showed the summons to have been served on the defendant "by leaving a true and certified

copy of the same with all the indorsements thereon at their late place of residence." To this motion plaintiff interposed what is styled, in the record, a general demurrer, whereby all the allegations and recitals of the motion were admitted to be true. The trial court sustained the so-called demurrer, and entered an order overruling the motion. From this order the defendant has appealed.

The first question presented for determination is whether the original judgment was void for want of jurisdiction of the county court over the person of the defendant. The statute requires a summons to be served by delivering a certified copy to the defendant or by leaving such copy at his usual place of residence. Plaintiff argues that service at the "late place of residence" should be held to mean usual place of residence. The terms "usual place of residence" or "usual place of abode," as used in statutes authorizing substituted service of summons on a defendant, mean the place of abode or place of residence at the time of the service. *Blodgett v. Utley,* 4 Neb. 25; *Seymour v. Street,* 5 Neb. 85; *Earle v. McVeigh,* 91 U. S. 503; *Capehart v. Cunningham,* 12 W. Va. 750; *Ruby v. Pierce,* 74 Neb. 754. In the last-mentioned case the return of the officer showed that the summons was served by leaving a copy at the *last* usual place of residence of the defendant, and in the opinion it is said: "It will be presumed that in making this qualification the officer acted advisedly. The return as thus qualified conveys the thought, not that a copy of the writ was left at the present residence of the defendant, but at some place at which the defendant had formerly resided or made his home. * * * It seems to us that the qualifying word as used in the return serves no purpose, save to distinguish between a past and present place of abode." The word "late," as used in the officer's return above, means formerly, recently, existing not long ago. 25 Cyc. 161. It is defined by Webster: "Existing or holding some position not long ago, but not now." The term late place of resi-

dence evidently means where the defendant had recently resided, but did not then reside. The return to the summons shows that it was not left at the usual place of residence, and indicates that it was served by leaving a copy at some other place than the usual place of residence. Plaintiff argues that there was an attempt at service, and that there was a mere defect or irregularity in the return, and that the presumption obtains that the court had jurisdiction. We think the general rule is well settled that, where the attempted service is so irregular as to amount to no service at all, there can be said to be a want of jurisdiction. In *Gandy v. Jolly,* 35 Neb. 711, it is held: "If there is any irregularity in the manner of service on the defendant of valid process, he must take advantage of such irregularity by motion or other proceeding in the court where the action is pending." But in that case, and in other cases holding to a like doctrine, it appears that there was an attempt at service which reached the defendant. The rule is that, if the attempted service does not reach the defendant at all, then there is a total want of service, and the court does not acquire any jurisdiction. *Griffin v. McGavin,* 117 Mich. 372. A judgment founded upon attempted service of summons which does not reach the defendant at all is absolutely void. *Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co.,* 50 Neb. 283; *Griffin v. McGavin, supra;* 23 Cyc. 1075, 1076.

The plaintiff further argues that the presumption is that proper service was made, and that such presumption obtains nothwithstanding the return of the officer shown in the record. Such presumption does obtain as to judgments of courts of record where the record is silent as to the manner of service, but, where the record discloses the kind of service that was made, no other service will be presumed. In determining whether a court had jurisdiction to render a judgment the whole record must be inspected, and, even if the judgment itself declares that the defendant was duly served with process, but the re-

turn found in the record shows a service which is insufficient and unauthorized by law, the judgment must be regarded as void, and, when it appears from the whole record that a court had no jurisdiction over the person of the defendant, the judgment is void, and it will be so treated even in collateral proceedings. *Laney v. Garbee,* 105 Mo. 355, 24 Am. St. Rep. 391; *Mickel v. Hicks,* 19 Kan. 578; *Hope v. Blair,* 105 Mo. 85; 23 Cyc. 1059, 1060, 1074. That a judgment void on its face may be collaterally impeached is a general rule of law which has been firmly established in this jurisdiction. *Johnson v. Parrotte,* 46 Neb. 57; *Kaufmann v. Drexel,* 56 Neb. 229; *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Neb. 722; *Fogg v. Ellis,* 61 Neb. 829; *Baldwin v. Burt,* 2 Neb. (Unof.) 377; *Aldrich v. Steen,* 71 Neb. 33. See, also, 23 Cyc. 1059, 1060, 1074.

It appears that about 15 years after the judgment was rendered in the county court an attempt was made to revive the same. A conditional order of revivor was served upon the defendant, but he made no appearance, and the conditional order of revivor was made absolute. Plaintiff contends that, because the defendant did not appear in the revivor proceedings and resist the order of revivor, the judgment must now be presumed to be valid. Speaking of void judgments, Black in his work on Judgments (vol. 1, sec. 170) says: "Now a 'void' judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever. It has no effect as a lien upon his property. It does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril." It should be borne in mind that a proceeding to revive a dormant judgment is not a proceeding

to breathe life into that which was dead. It is rather a proceeding to awaken that which is asleep. In the instant case the judgment was void. It never possessed any vitality, and it was impossible to impart any vitality to it by revivor proceedings. 18 Ency. Pl. & Pr. 1058, 1059; *Rice v. Allen,* 69 Neb. 349. Thus it appears that the original judgment was absolutely void for want of jurisdiction over the person of the defendant, and it remained void notwithstanding the attempt to revive it. Such being the case, the defendant was entitled to attack it when an attempt was made to enforce it. The district court should have sustained the motion and have vacated the order requiring the defendant to appear and answer concerning his property.

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

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 according to law.

REVERSED.

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JOHN WEAVER, APPELLEE, V. DAWSON COUNTY MUTUAL TELEPHONE COMPANY, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,382.

1. **Telephones:** ROAD CROSSINGS. The words "all road crossings," as used in the second proviso of section 11963, Ann. St. 1907, refers to private as well as public roads.

2. ———: INJURY: NEGLIGENCE. A telephone company is guilty of negligence when it places its telephone wires only 13 feet above a road crossing, and permits such wires to become slack and to sag until they interfere with legitimate travel, when the statute requires such wires to be placed 20 feet above the road crossing.

3. ———: ———: CONTRIBUTORY NEGLIGENCE. A person traveling along a road that is crossed by a telephone line is not bound to anticipate danger at such crossing, and is not required to examine or look to see if there is danger before passing under such wire.

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

*Warrington & Stewart,* for appellant.

*E. C. Cook, contra.*

GOOD, C.

This is an action to recover damages for personal injuries alleged to have been sustained by reason of the defendant's negligence. The defendant denied negligence upon its part, and pleaded contributory negligence on the part of the plaintiff. The plaintiff had judgment, and the defendant has appealed.

The question presented by this appeal is the sufficiency of the evidence to sustain the verdict. The defendant contends that the evidence does not justify a finding that it was guilty of negligence, and requires a finding that the plaintiff was guilty of contributory negligence. The negligence of which the plaintiff complains was that defendant constructed and maintained its telephone line over a road crossing at a height less than the statute requires, and that defendant permitted its telephone wire to become slack and to sag where it crossed a road, until the wire was so near the ground as to interfere with persons traveling along said road. From the evidence it appears that plaintiff had been engaged in hauling hay over the road in question. In this work he used a team and wagon with a hay-rack thereon. In the middle of the front end of the hay-rack there was a line pole constructed of a piece of scantling two inches by four inches in size. This was bolted to the front end of the hay-rack, and its top reached 10 feet from the ground. As plaintiff was traveling along the road in question, the upper portion of the line pole struck against

the wire. The line pole was broken off and struck the plaintiff on the head, fracturing his skull and inflicting severe injuries. It appears that defendant's telephone wire where it crossed the road was originally strung 12 or 13 feet above the ground, and that by reason of the wind and storms the wire had become slack and sagged until it was less than 10 feet at the place where plaintiff received his injuries. The telephone line was constructed along and over a public highway. Section 11963, Ann. St. 1907, reads as follows: "That any telegraph or telephone company incorporated or doing business in this state shall be and is hereby granted the right of way along any of the public roads of the state for the erection of poles and wires; provided, that poles shall be set at least six feet within the boundary line of said roadway, and not placed so as to interfere with road crossings; provided, that said wires shall be placed at the height of not less than twenty feet above all road crossings." The defendant's right to construct its telephone line along the highway is derived from this section, and the question as to whether or not the defendant was negligent depends upon the meaning of the latter portion of said section, which requires the wires to be placed at a height of not less than 20 feet above all road crossings. The defendant contends that this applies only to public roads or highways, while the plaintiff contends that it applies to all roads either public or private. It is stipulated that the road in question is not "a public laid out road." The evidence is overwhelming that the road was a well-defined track that had been used by the general public in that vicinity for many years, and the evidence is probably sufficient to justify a finding that a public road had been established by user, but it is not necessary to determine that question. It will be apparent that all the reasons which would require telephone and telegraph wires to be placed 20 feet above the ground where they crossed highways would exist for requiring the placing of wires the same distance above the

ground where they crossed private roads that were in general use. The only difference would be one of degree. The word "road" is a generic term, and when unqualified is sufficiently comprehensive to include highways, public roads, private roads, streets and lanes. It is sufficient to include both roads laid out by public authority and private roads used by the license or permission of the owners of the land over which they run. *Commonwealth v. Gammons*, 40 Mass. 201; *Jaquith v. Richardson*, 49 Mass. 213; *Stokes v. County of Scott*, 10 Ia. 166; *Inhabitants of Windham v. Cumberland County Commissioners*, 26 Me. 406; *People v. Commissioners of Buffalo County*, 4 Neb. 150. We think the legislature in using the language that said wire "shall be placed at a height of not less than twenty feet above all road crossings" used the word "road" in its generic sense, and did not intend thereby to limit it to public highways. A close inspection of the section of the statute quoted strengthens this view. The right of way is granted along any of the *public roads* of the state for the erection of poles and wires, while that part of the section relating to road crossings is not limited to public highways or public roads, but applies to *all road crossings*. It follows that the defendant was violating the statute in placing its telephone wires no more than 12 or 13 feet above the road crossings in question; and that it permitted its wires so placed to become slack and sag until they would interefere with persons using the road in an ordinary and proper manner was sufficient to justify the jury in finding that the defendant was negligent.

The defendant contends that it was the duty of the plaintiff, when approaching the place where the telephone line crossed the road, to have looked and examined the wires before attempting to drive under, and that his failure to do so constituted contributory negligence. This contention is not well founded. Driving along a road under a telephone or telegraph wire, properly constructed, is not attended by any danger. It is unlike crossing a railroad where a train is liable to pass at any time, and

the rule which would require a person about to cross a railroad to stop and look before so doing has no application to a person driving along either a public or private road which is crossed by telephone or telegraph wires. The plaintiff did not observe that the wire was down or that it was likely to strike his hay rack. Within a few days previous to the accident he had hauled a number of loads of hay over the same road, and he had experienced no interference or trouble with the defendant's wire. He was under no obligation to anticipate any danger or to stop and look and examine defendant's wires. The evidence was wholly insufficient to justify a finding of contributory negligence, much less requiring such a finding.

There is no apparent 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.

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JOHN S. LEWIS, APPELLANT, V. WATER AND LIGHT COMPANY OF NEBRASKA CITY, APPELLEE.

FILED NOVEMBER 19, 1908. No. 15,345.

**Appeal:** JUDGMENT: HARMLESS ERROR. "Where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. In such case, errors occurring at the trial could not have been prejudicial." *Vernon v. Union Life Ins. Co.*, 58 Neb. 494, and cases there cited.

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

*A. P. Moran* and *O. G. Leidigh,* for appellant.

*Pitzer & Hayward, contra.*

FAWCETT, C.

Plaintiff alleges that defendant is a corporation for the furnishing of electricity to the citizens of Nebraska City; that on August 22, 1905, plaintiff was employed as a day-laborer for the King Drill Roofing Company; that on said day, in company with one of the managers or foremen of said roofing company, he went to one of the buildings of defendant for the purpose of repairing the roof of said building; that defendant in wiring said building had carelessly and negligently strung uninsulated conduit wires over and a short distance above the roof; that while engaged in his employment, and without negligence on his part, he came in contact with said wires; that said wires were highly charged electric conduit wires, of which fact plaintiff had no knowledge or warning; that, as the result of such contact with said wires, he received a shock which rendered him unconscious for a number of hours, disabled him from work for a considerable period of time, and left him permanently injured. The answer admits the corporate capacity of the defendant, the business in which it was engaged, its ownership of the building, and that plaintiff was employed as a day-laborer for the King Drill Roofing Company, but denies each and every other allegation in plaintiff's petition; and for a further defense pleads contributory negligence and carelessness of plaintiff and his fellow employees, and denies that there was any negligence on the part of defendant. The reply is a general denial of the plea of contributory negligence. The cause was tried to a jury, resulting in a verdict for defendant, upon which, after overruling plaintiff's motion for new trial, the court entered judgment. Plaintiff appeals.

The principal errors complained of by plaintiff are that the court erred in admitting any testimony on the question of contributory negligence, and in submitting that question to the jury by its instructions; that the court gave too much prominence to the question of con-

tributory negligence in its instructions; that the court erred in submitting to the jury the question of assumption of risk, for the reason that the same had not been pleaded as a defense; that the court erred in admitting testimony as to the physical condition of plaintiff's brother; and that the verdict is not sustained by the evidence.

The undisputed evidence in the case shows that the two wires extending across one corner of the roof which plaintiff and his foreman were about to repair were not conduit wires, as alleged by plaintiff, but were simply wires used to operate a valve at the standpipe in case of fire, to open the valve or close it in case it was desired to get direct pressure for fire protection; that they had nothing to do with the power system of defendant; and that they carried about the same voltage as a door bell or telephone wire. This being true, there certainly was no negligence on defendants' part in not insulating those wires, nor was the defendant negligent in not cautioning plaintiff as to the wires when he was about to go upon their roof to repair the same. That defendant was not negligent in constructing the wires and stringing them across the roof in the manner shown must be conceded. When plaintiff and his foreman went to work that morning, they placed a ladder against the building, and the foreman climbed up the ladder onto the roof and passed under the wires in question. The wires at the point where the foreman went under them were about 2½ or 3 feet above the roof. After he had gone upon the roof, the foreman called to the plaintiff to follow him. When plaintiff got upon the roof he stooped to pass under the wires as the foreman had done. The height from the roof to the wires was sufficient to enable a man by stooping low to walk under the wires. The foreman had already done so with safety. It was not necessary to crawl. While attempting to pass under the wires, plaintiff raised up too soon, and came in contact with the wires and received a shock which rendered him unconscious for several hours, and to some extent dis-

abled him. It thus appears that the wires had in some manner become charged with a heavy voltage. Defendant attempted to explain the cause of this sudden change of conditions in the testimony by Mr. Egan, manager of defendant company. Mr. Egan testified that, as soon as he heard of the accident, "we knew that there could be no current in those wires to affect a man, and immediately I sent out a man to find out what the matter was, and I found that those wires had been grounded by a piece of baled hay wire with a piece of wood on it being thrown or blown over it." Again, in cross-examination he says: "I knew perfectly well there should be a ground if those wires were charged with electricity." On cross-examination the witness stated that his knowledge of how the "ground" occurred was from the report of the man that he sent out to find what was the matter, and not from his own knowledge. He admitted that he knew where this man was, viz., that he was working in a railroad camp in Kansas. All of this testimony was stricken out on plaintiff's motion, and the jury admonished to disregard it. In short, the case stands thus: Plaintiff based his action upon the charge of negligence on the part of defendant in stringing uninsulated conduit wires across the building. This allegation is denied, and the denial fully established by the uncontradicted testimony in the record. The burden was upon the plaintiff primarily to show that the injury he received was the result of negligence on the part of the defendant. This he has utterly failed to show. It is not shown, or attempted to be shown, that these harmless wires were strung in such close proximity to a heavy voltage wire that defendant ought reasonably to have anticipated the danger of their coming in contact, or of a "ground" occurring which might charge the wires with a heavy and dangerous voltage. This burden rested upon the plaintiff. Having failed in these particulars, we are compelled to hold that no negligence on the part of defendant has been shown. No error on the part of the court in excluding evidence offered by plaintiff is alleged. It

is clear, therefore, that the verdict returned by the jury was the only verdict which could properly be returned upon the evidence before it. The verdict is therefore right, whatever errors may have intervened at the trial. In such a case the rule in this state is settled: "Where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. In such case, errors occurring at the trial could not have been prejudicial." *Vernon v. Union Life Ins. Co.*, 58 Neb. 494, and cases there cited.

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.

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MARY A. SCHLEY, APPELLANT, V. MICHAEL HORAN ET AL., APPELLEES.

FILED NOVEMBER 19, 1908. No. 15,376.

1. Deeds: MENTAL CAPACITY: EVIDENCE. Where it appears that a son, for nine years prior to his majority, worked in iron mills, and turned his entire earnings over to his parents, and after reaching his majority faithfully worked for and upon the farm of his parents for a period of more than 20 years without other compensation than his support, and a few years prior to her death the mother, who is then the sole surviving parent, of her own volition deeds her entire estate, consisting of a farm of 120 acres, to such son for an express consideration of love and affection and $1, and it is sought by a sister of such son, who during substantially all of said years had been a married woman living with her husband separate and apart from her parents, to set aside said deed on the ground of want of mental capacity on the part of the mother to make the same, such want of mental capacity must be established by clear and satisfactory evidence. The fact that the mother at the time of executing said deed was

over 80 years of age, and the further fact that during the later years of her life she manifested some hallucinations of mind, are not alone sufficient to warrant the setting aside of such conveyance. In such a case it must be clearly established that the mind of the mother was so weak or unbalanced at the time of executing the deed that she could not understand and comprehend the purport and effect of what she was then doing.

2. ———: UNDUE INFLUENCE: EVIDENCE. Evidence examined and set out in the opinion *held* insufficient to show any fraud or undue influence on the part of the defendant in obtaining the deed to the property in controversy.

3. ———: SETTING ASIDE: EVIDENCE. Evidence examined and set out in the opinion *held* sufficient to sustain the finding and decree of the district court.

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

*William M. Cain,* for appellant.

*J. J. Sullivan* and *C. J. Phelps, contra.*

FAWCETT, C.

Plaintiff alleges that she and the defendant Michael Horan are the only children and heirs at law of Catherine Horan, deceased; that Catherine died intestate in March, 1904; that at the time of her death she was the owner of the property in controversy, consisting of 120 acres of land in Colfax county; that for a number of years prior to June 10, 1901, defendant Michael had lived with the mother upon the lands in controversy, during which time the said Catherine was aged, sickly, and weak and infirm in both mind and body; that the business was transacted by Michael, to whom the mother looked and upon whose suggestions, advice and judgment she relied and depended in all matters of a business or property nature; that the mother herself, by reason of her extreme age and physical and mental infirmities, was incapable of attending to her more important business affairs; that, on account of their long residence together and her habit of relying upon

Michael, an "extraordinary," confidential relation existed between them, and the mind of the mother was subject to and under the dominion of the son; that on said last mentioned date the son, taking advantage of the influence and dominion which he had acquired over the mind of his mother, by employing false and fraudulent promises and representations that he would comfortably support and provide for her a home on said lands in her declining years, induced and persuaded the mother to sign and deliver to him a warranty deed of said lands; that the only consideration for said deed was the said promise of comfortable support and a home; that Michael never intended to keep said promise and had not kept it; that, since the death of the mother, Michael had taken and received the rents, issues and profits of the lands under his claim of ownership, and prays that the deed be declared null and void, that the lands be partitioned, and one-half thereof be set off to plaintiff, and for an accounting of the rents and profits. Defendant admits that he and plaintiff are the only children of Catherine Horan, admits that on the 10th day of June, 1901, the legal title to the real estate in controversy was conveyed to him by their mother, denies all of the allegations of dominion over his mother or of bad faith or undue influence exercised over her, alleges that on the said 10th day of June, defendant and his wife were living at South Omaha, Nebraska, and had been continuously living there for some three or four months prior thereto; that when the father of plaintiff and defendant purchased the lands in controversy, about 1877, defendant was then a young man 21 years of age; that prior to that time, while living in the state of New Jersey, he had worked in the iron mills, and had given his entire earnings to his parents; that these earnings went into the family fund and were used in the purchase of the lands in controversy; that, after the land had been purchased, he continuously resided with his parents until his marriage in 1896 or 1897; that for a period of four years thereafter he and his wife continued

to live upon the farm with their parents; that during all of that time he worked for his parents upon the farm without other compensation than his support; that during the four years he and his wife lived upon the farm his wife also worked without other compensation than her support; that during the years he was living with his parents and working for them they repeatedly promised and assured him that when they died the farm should be his; that the execution of the deed to him by his mother on June 10, 1901, was in compliance with said promises, and denies each and every other allegation in plaintiff's amended petition. The reply was a general denial. There was a trial to the court and a decree in favor of defendants, from which plaintiff appeals. No motion for new trial was made in the court below, nor any assignment of errors filed in this court, so that the case stands for trial *de novo* in this court upon the record as made.

Plaintiff testified that her recollection goes back for 51 years, so that she must now be somewhere between 55 and 60 years of age. The defendant Michael is two years younger. Plaintiff seems to have been a widow at the time the family moved to Nebraska in 1876 or 1877. After coming to Nebraska she worked out for herself most of the time until her remarriage. While she made the home of her parents her home, she did not actually reside upon the farm and assist her parents to exceed one year all told. She was subsequently married to Fred Schley, and at the time of the trial, and for a number of years prior thereto, had been living with her husband upon a farm quite near to the lands in controversy. The undisputed evidence shows that defendant Michael had lived upon the farm with the parents and worked faithfully for them from the time they purchased the farm in 1877 until his marriage in 1896 or 1897, a period of 20 years, and, together with his wife, continued to work for his parents for 4 years thereafter. It is quite evident, therefore, that he had contributed in a large degree to the improvement and preservation of the property in controversy, while

plaintiff had contributed practically nothing thereto. The father died in 1898. Michael and his wife continued to live with the mother until January, 1901. It seems that the mother-in-law and daughter-in-law did not get along any too well together, so Michael removed to South Omaha and went to work in one of the packing houses. Thereafter the mother lived alone upon the farm. As might reasonably be expected, her life during that time seems to have been very lonely. On June 3, 1901, she wrote to Michael, at South Omaha, the following letter: "Dublin, June 3, 1901. My dear Son: I am sick and almost dying and I want you to come home and live in the house. I want to see you and I will make the place entirely over to you. If you do not come I will sell it for I cannot live here alone. You will not want for anything while I live. Bring Polly and come home and I will never put you out again.' If you will come I will go up to town and make the place over to you as soon as you come. Your loving mother, Kittie Horan." Within a few days after the receipt of this letter, Michael went to Schuyler and called upon Mr. C. J. Phelps, a prominent lawyer and old-time citizen of Schuyler, to whom he showed the letter. He then went out to the farm and spent the night with his mother. On the next day they went to Schuyler and called at the office of Mr. Phelps, where the matter was all talked over between Mr. Phelps, Mrs. Horan, and Michael, and a couple of old-time friends of the parties. Mr. Phelps testified that he read her the letter which Michael had received; that he also told the old lady that Michael had informed him that she and her husband had promised Michael that when they died the farm should be his, and that Mrs. Horan said that was true; that after matters were all talked over he prepared the deed from Mrs. Horan to Michael; that after the deed had been executed and delivered to Michael he drew up the following agreement, which was signed by Michael and given to his mother, viz.: "Know all men by these presents: That I Michael Horan, of Colfax county, Nebraska, for and in

consideration of my mother, Catherine Horan, deeding to me in fee simple her farm in Colfax county, Nebraska, described as follows: The southwest one-fourth of the northeast quarter, and the south half of the northwest quarter of section thirty-three, in township nineteen, range four, east of the sixth principal meridian, in Colfax county, Nebraska, I hereby agree to comfortably support my said mother, and give her a home in the house with me on said land. Witness my hand this 10th day of June, 1901. Michael Horan. In the presence of Chris Kroeger, C. J. Phelps."

At this time the land in controversy was being worked by plaintiff's husband under a one year lease; and the testimony of Michael is that he was advised that his brother-in-law would not consent for him to live upon the premises during the period of this lease. Michael did, however, go out and stay with his mother at that time for three days, when he returned to South Omaha, where he continued to live until the following fall. During that period of time, however, he made several visits to his mother, remaining with her at one time for about a month. In the fall of 1901 Michael and his wife removed from South Omaha to Schuyler. Michael did not undertake to reside with his mother on the farm until March 1, 1902, on the expiration of the brother-in-law's lease. While, on account of the disagreements between his mother and wife, Michael did not take his wife out to the farm, the evidence shows that he spent most of his time on the farm with the mother from March 1, 1902, until the time she went to the hospital, shortly before her death. During that time he spent every night except three with his mother upon the farm. After the mother's death his wife joined him on the farm, and they have been in possession of it ever since. The mother was a member of the Catholic church, and some three or four months prior to her death Michael, at her request, took her to a Catholic hospital in Columbus, where she remained until she died, Michael paying the hospital charges and doctors' bills. There is

an entire absence of any testimony in the record even tending to show that Michael did anything to induce his mother to write the letter of June 3, or to induce her to deed the lands to him. Michael's testimony that his father and mother had assured him that when they died the land should be his is corroborated by his wife, who testified that shortly before the father's death he made the same assurance to Michael in her presence, and also by the testimony of Mr. Phelps that, when he told Mrs. Horan what Michael had claimed in that regard, she said that was true. It would seem, therefore, that, aside from the desire of the mother to have Michael come and look after her in her declining years, which, together with his agreement for her support, would have been a good consideration, the deed was really executed in consummation of the oral promises which previously had been made both by herself and her husband. Conceding that, the property in controversy being the homestead, this oral agreement could not have been enforced, it cannot be doubted that a subsequent voluntary consummation of the oral agreement by Mrs. Horan would be valid.

The only evidence offered by plaintiff to in any manner impeach the deed is the evidence of plaintiff and her husband and two or three neighbors to the effect that for several years prior to her decease Mrs. Horan had been somewhat infirm in health, and during the time she was living alone had been the victim of some hallucinations. They testified that she claimed that boys were troubling her at nights, throwing stones and other missiles at her house, when such was not the fact; that on two or three occasions she claimed to have seen spooks running up and down the wall; and that she claimed to have seen two or three persons who at the time were dead. As to this latter claim, the evidence is somewhat uncertain as to whether she claimed to have actually seen these persons, or whether they had appeared to her in her sleep; but, be that as it may, the testimony of the neighbors does not go to the extent of showing that during any of these times Mrs. Horan

was so mentally unbalanced that she was not able to transact her business. As against that there is the testimony of Mr. Phelps, who had known Mrs. Horan for many years, Mr. Mick, a merchant in Schuyler with whom she had traded for many years, and who talked with her on the day she executed the deed, and Mr. Chaplan, who had known her from the time she came to Nebraska in 1877, who all three testified that in June, 1901, at the time she executed the deed, she was mentally all right and able to transact her businsess as she had previously done. The uncontradicted evidence also shows that Mrs. Horan handled the moneys of the family even during the lifetime of her husband, and during all of her life transacted the bulk of the business, so far as the payment of moneys was concerned. Without pursuing the matter further, an examination of the record has satisfied us that at the time she executed the deed to Michael she possessed ample mental capacity to execute it; that in making the deed she did exactly what she and her husband had agreed to do, and what in equity and good conscience she ought to have done; that the deed was executed voluntarily on her part, and without any undue influence on the part of Michael. We do not see how the district court could have reached any other conclusion than the one which it did reach in this case.

We therefore 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.

SAM L. WATT, APPELLANT, V. THEA R. DAVIDSON ET AL., APPELLEES.

FILED NOVEMBER 19, 1908. No. 15,333.

1. **Principal and Agent:** UNAUTHORIZED ACTS OF AGENT. Where an agent authorized to accept the unconditional delivery of notes receives the same upon conditions that he was not authorized to make, the principal does not ratify such conditions by accepting the notes without any knowledge of the fact that they were received by the agent upon condition.

2. ———: AUTHORITY OF AGENT. A vendor who has made a written contract for the sale of chattels, the price of which is to be paid in notes, does not, by sending blank notes to a bank for the purpose of securing the signatures of the purchasers to such notes in pursuance of such written contract, give the bank real or apparent authority to accept the notes in escrow, nor under any new or different conditions than those specified in the contract.

APPEAL from the district court for Wayne county: JOHN F. BOYD, JUDGE. *Reversed.*

*Shull, Farnsworth & Sammis* and *F. A. Berry,* for appellant.

*C. B. Willey* and *A. R. Davis, contra.*

CALKINS, C.

This is an action to recover on certain promissory notes made by defendants payable to the order of one Allen, who indorsed the same to the plaintiff. On the 31st day of August, 1903, the defendants Moats and Davidson gave to Allen an order for a threshing machine and separator, to be by him shipped to Sholes, a station near Randolph, Nebraska, at and for the price of $600, to be paid upon the delivery of the machine in three promissory notes of $200 each, secured by a chattel mortgage on the property sold. Allen prepared the notes and a chattel mortgage, and sent them to the State Bank of Randolph to be signed by the purchasers on the arrival of the machine. On the 28th

day of September, the machine having reached its destination, the defendants Davidson and Moats, together with the defendants Sellon and Jackson, whom the former had associated with themselves in the transaction, appeared at the said bank and signed the notes in suit. The plaintiff brought action on these notes, alleging that he purchased the same before the maturity thereof for a valuable consideration. The defendants admitted the execution, but denied the delivery of the notes, alleging that the same had been left in escrow with the bank, to be delivered only after the defendants had had an opportunity to give the machine a trial, and that the bank, in violation of such agreement, had wrongfully delivered said notes before the completion of such test, which resulted in a failure of the machine to fulfill the warranty made by the vendor.

1. The evidence relied upon to establish the allegation that the notes were placed in escrow is the testimony that defendants told the cashier of the bank that they would not sign such notes unless he would agree to hold the same until they should have a six days' trial of the machine; that the cashier and one Mills, who is alleged to have been a salesman in the employ of the vendor, agreed to such condition. Neither the cashier of the bank nor Mills is shown to have had any authority to make such an agreement, unless it was implied from the fact that Allen sent the notes to the bank with specific instructions to have them executed and returned to him. It appears that the fact of making such an agreement, if it was a fact, was not communicated to Allen, and that he had no knowledge thereof when he accepted the notes. Where an agent authorized to accept the unconditional delivery of notes received the same upon conditions that he was not authorized to make, the principal does not ratify such conditions by accepting the notes without any knowledge of the fact that they were received by the agent upon condition. *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685; *Bullard & Co. v. De Groff,* 59 Neb. 783; *Fitzgerald v. Kimball Bros. Co.,* 76 Neb. 236.

2. If we go further, and assume that the sending of the notes was authority to do any act or make any agreement consistent with carrying out the contract in pursuance of which the notes were given, we are met by the fact that the contract did not provide that the purchaser should have a six days' or any other field trial before settling for or accepting the machine. What it did provide was that the machinery sold was warranted to be "made of good materials, well constructed, and with proper use and management to do as good work as any other of the same size and rated capacity made for the same purpose, which warranty is subject to the following provisions: If within six days after the date of its first use it shall fail in any respect to fill this warranty, written notice shall be given immediately by the purchaser to R. H. Allen at his office in Sioux City, by registered letter, stating particularly in said letter and notice what parts and wherein it fails to fulfil the warranty, and a reasonable time be allowed said Allen to get skilled workmen to the machinery and remedy the defects, if there be any (if the defect be of such a nature that a remedy cannot be suggested by letter), the purchaser to render all necessary and friendly assistance and co-operation in making the machinery a practical success. If the machinery or any part thereof, or any of the separate attachments, cannot be made to fill the warranty, then the defective machine or part or attachment (as the case may be) shall be returned immediately by the undersigned to the place where it was received, with the option in said Allen either to furnish another machine or part or attachment in place of that so returned, or return the consideration or a proportionate share thereof and rescind the contract in whole or in part, as the case may be, and be released from any liability whatever herein; and, to ascertain the proportionate share of the consideration for any machine, part or attachment when its price is not specified separately, the gross consideration shall be apportioned to the latest list prices printed by R. H. Allen, and shall be refunded out

of the cash and credited on the several notes proportionately. If any metallic piece breaks during the first season by reason of any flaw therein, said Allen will furnish a new piece in its place free on board cars at the factory, upon said broken piece being returned to said Allen promptly, if it appears thereby to the satisfaction of said Allen that the break was caused by the flaw; it being understood that belting is not warranted. If a mechanical expert visits the machine and does not leave it working properly, the purchaser shall give immediate notice in writing or by prepaid telegram to R. H. Allen at Sioux City, Ia., and state in writing specifically any failure or neglect complained of; but, if such expert does put machinery in condition so that any one or all of the purchasers acknowledge that they have operated same satisfactorily, then all further warranty is waived, regardless of the six days provided above." An agent must act within the scope of his real or apparent authority, and a vendor who has made a written contract for the sale of chattels, the price of which is to be paid in notes, does not, by sending blank notes to a bank for the purpose of securing the signatures of the purchasers to said notes in pursuance of such written contract, give the bank real or apparent authority to accept the notes in escrow, nor under any new or different conditions than those specified in the contract.

The eighth paragraph of the instructions to the jury was: "The jury are instructed that, if you find that the notes in suit were left in escrow with the Randolph State Bank as alleged in defendant's answer and defined in instruction herein, and that said notes were delivered to said R. H. Allen without the consent of the defendants before the machine had been started in accordance with the terms of the written contract, then the plaintiff cannot recover in this case, and your finding should be for the defendants." This instruction ignored the question of the authority of the bank and Mr. Mills to make the alleged escrow agreement, and this defect was not rem-

edied in any of the other instructions given, nor was escrow defined elsewhere therein. It mistakenly assumed that the written contract provided for the starting of the machine before the delivery of the notes, and eliminated from the case the question whether the purchase of the notes by the plaintiff was *bona fide*. The giving of this instruction was highly prejudicial to the plaintiff, and constitutes error for which the case must be reversed.

As the other questions discussed will not necessarily arise upon a future trial, they will not be considered.

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

FAWCETT and ROOT, CC., concur.

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

REVERSED.

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RAAPKE & KATZ COMPANY, APPELLEE, V. SCHMOLLER & MUELLER PIANO COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 19, 1908. No. 15,366.

1. **Forcible Entry and Detainer:** RENTAL VALUE: EVIDENCE. Where the question before the jury is at what point between $100 and $250 a month the rental value of premises wrongfully detained by defendant should be fixed, and each of the parties has introduced expert testimony upon that question, the court does not err in excluding as too remote the amount of rent fixed in a lease made two years prior to the period of the wrongful holding.

2. ———: ———: ADMISSIONS. Where a lease for the term of two years provided that the tenant might at his option hold the premises for another year at an annual rental of $1,800 payable in instalments of $150 a month, the fact that the landlord at the expiration of the two years' term stated to the tenant that it could hold the premises for another year at $150 a month is a

mere statement that the tenant had such right under the lease, and not an admission of the rental value.

3. ———: ———: EXPERTS: CROSS-EXAMINATION. A witness testifying as an expert to the rental value of real estate may be cross-examined touching his knowledge of the rental value of other property in the vicinity; but it is not error to exclude on such cross-examination his estimate of the rental value of such other property. Such estimate is not a fact, circumstance or reason upon which the witness forms his opinion as to the rental value in issue.

4. ———: ACTION ON SUPERSEDEAS BOND: RENTAL VALUE. In an action upon a bond given upon appeal from a judgment of restitution rendered in a suit of forcible entry and detainer, the amount of plaintiff's recovery is not confined to the value of the premises for the purpose for which they were used while so wrongfully detained, but it is entitled to recover for the highest price the premises would bring for any lawful use to which they were adapted and for which they were available.

5. **Pleading**: MISJOINDER: WAIVER. Where a plaintiff in an action upon an undertaking given upon appeal from a judgment of restitution rendered in an action of forcible entry and detainer joins a cause of action against the principal and surety with one against the principal alone, such misjoinder is waived under the provisions of section 96 of the code, where no objection is made thereto by demurrer or answer.

6. **Trial**: INSTRUCTIONS. Where witnesses called to prove the rental value of certain premises have been cross-examined concerning the rental value of other premises in the vicinity thereof, an instruction that the latter evidence is to be considered only in determining the weight to be given to the opinions expressed is not erroneous.

7. **Pleading**: AMENDMENT: EVIDENCE. Where an amendment to a pleading is made by interlineation during the trial, the pleading as it stood before the amendment, the amendment and the pleadings as amended are part of the record of the case, and it is not necessary to offer the pleading as it stood before amendment in evidence in order to make it part of such record.

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

*Albert S. Ritchie, Charles L. Fritscher* and *Thomas F. Lee*, for appellants.

*Baldrige & De Bord, contra.*

CALKINS, C.

This was an action upon a supersedeas bond given upon appeal to the district court from a judgment of restitution rendered by the county court of Douglas county in an action of forcible entry and detainer between the same parties. The bond was given October 7, 1905, the appeal dismissed April 10, 1906, and the defendants surrendered the premises April 15, 1906. The only controverted question of fact in the trial of this case in the district court was the rental value of the premises; the plaintiff alleging it to be $250 and the defendant denying that it exceeded the sum of $100 a month. The jury found against the defendant the Schmoller & Mueller Piano Company in the sum of $1,625, and against its surety in the sum of $1,463. From a judgment rendered upon this verdict the defendants appeal.

1. On the 7th day of September, 1903, Meyer & Raapke let the premises in question to Hockstrasser & Kunde for a term of two years from said date, reserving an annual rent of $1,800 for the first and $1,500 for the second year of said term, with an option to the lessee to take the premises for a third year at an annual rent of $1,800. The defendant Schmoller & Mueller Piano Company came into possession of the premises by virtue of an assignment of this lease, but refused to either avail itself of the option to take the same for a third year or to surrender possession of the premises at the end of the two-year term. The period of wrongful holding for which the action of forcible entry and detainer was brought against it was embraced in the year covered by this option. The plaintiff called four witnesses qualified to give an opinion as to the rental value of the premises, who placed the same at from $200 to $250 a month, while a like number of witnesses called by the defendants estimated the rental value at from $125 to $150 a month during the period in question. Although it appears from the cross-examination of one witness that there had been a change in rental

values prior to April 15, 1905, there is nothing in the record to show the condition of the rental market in September, 1903, at which date the lease in question was made, compared with the period of the wrongful holding. This being the state of the record, the defendants offered the lease in evidence for the purpose of showing the rental value for the period in dispute. This evidence was excluded on the objection of the plaintiff, and it is urged that the failure of the district court to permit this fact to go to the jury constitutes error. Only two cases are cited, *Fogg v. Hill,* 21 Me. 529, where similar evidence was held to be properly admitted, and *Dietrichs v. Lincoln & N. W. R. Co.,* 12 Neb. 225, where, the question being the value of land March 30, 1880, it was held error to admit deeds made to the owner in pursuance of an administrator's sale had on April 10, 1877. This case might be distinguished on the ground that the sale was a compulsory one, but it was followed in *Omaha S. R. Co. v. Todd,* 39 Neb. 818, where the purchase seems to have been at voluntary sale. However, we think the district court had the right to exclude this evidence on principle. The fact in issue was the rental value of the premises. The rule that any fact that shows a fact in issue does or does not exist, or probably does or does not exist, is subject to exceptions and limitations, one of which is that the judge may exclude evidence of facts otherwise relevant which appear to him too remote to be material under all the circumstances of the case. Stephens, Digest of the Law of Evidence, ch. 2, art. 2. While the fact that the owners in September, 1903, made a lease of the property in question for a term of two years, in which the rent was reserved at the rate of $150 a month for the first year, $125 for the second year, and with an option for a third year at $150 a month, in the absence of any other evidence, furnishes some idea of the value of the property, it is of little or no weight in solving the problem presented to the jury, which was at what figure between $125 and $250 a month the actual rental value

should be fixed. The most that the making of the lease would prove is that the parties making the same estimated that the rental value of the property would be that therein named. There is no presumption that the property in a rapidly growing and changing city will remain of the same value from year to year, and the estimate made in the year 1903 is too remote to be received as evidence of the rental value in 1905.

2. The defendants offered to prove by the witness Turner, manager of Schmoller & Mueller Piano Company, that on September 15, 1905, the president of the plaintiff company stated that the defendants might have the property at the rate of $150 a month for the period of one year, and assigned the rejection of such testimony upon the objection of the plaintiff as error. Whether such offer could have been received in evidence if the option referred to had not been contained in the lease it is not necessary to determine. Under that option the Schmoller & Mueller Piano Company was entitled to hold the premises for another year at the rate of $150 a month, and the statement by the president of the plaintiff company that it could hold the property for a year on those terms was no more than a statement of the terms of the option. It could not be construed as an estimate or admission of the rental value.

3. Upon the cross-examination of one of the witnesses called by the plaintiff to testify as to the rental value of the premises, he was examined concerning his knowledge of the character of other property in the neighborhood and as to his knowledge of what the same actually rented for. There appears to have been a building in the vicinity of the property in question known as the "Ramge Building"; and, the witness having testified that he had not made any inquiry and did not know what the corner room in that building rented for, he was asked to say what the reasonable rental value of the same would be. This question was objected to as not proper cross-examination, and, the court having sustained the objection, the defendants

now insist that such ruling was erroneous. The defendants were entitled to examine the witness concerning his knowledge of rental values in the vicinity in order that the jury might have the facts, circumstances and reasons upon which the witness' opinion was based, but this did not give the right to ask the opinion of the witness as to the rental value of other property in the vicinity. This was not a fact, circumstance or reason upon which his opinion was or could be based, and the evidence was properly excluded. Similar questions propounded to two of the plaintiff's other witnesses were excluded for the same reason. What we have said with reference to the cross-examination of the witness Mithin applies to these witnesses.

4. The defendants sought to prove the reasonable rental value of the premises for the piano business, and contend that the refusal of the court to permit them so to do was erroneous, as well as the instruction of the court which did not confine the rental value to the piano business. There is no merit in this contention. The defendants were wrongfully detaining the property, and the plaintiff was entitled to the highest price it would bring for any lawful use to which it was adapted and for which it was available. *Lowe v. City of Omaha,* 33 Neb. 587; *Maul v. Drexel,* 55 Neb. 446; *City of Omaha v. Croft,* 60 Neb. 57.

5. The petition set forth the giving of the bond on October 7, 1905, and alleged that the Schmoller & Mueller Piano Company detained the property without paying any rent therefor from September 15, 1905, to April 15, 1906. This stated two causes of action—one against the Schmoller & Mueller Piano Company for the value of the use of the premises from the 15th of September to the 7th of October, 1905, and one against both defendants upon the bond for the rental value of the property from the date of the giving of the bond to the time when the defendants surrendered possession of the property on the 15th day of April, 1906. This violated the provisions of

section 88 of the code, which provides that the causes of action united must affect all of the parties to the action. The fifth ground of demurrer stated in section 94 of the code is that several causes of action are improperly joined. Had the defendants demurred to the plaintiff's petition upon this ground, the demurrer should have been sustained. Section 96 of the code provides that, if the defect enumerated in section 94 does not appear upon the face of the petition, it may be taken by answer, and, if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action. The defect complained of appeared upon the face of the petition, and the defendants waived the same by not demurring thereto.

6. Instruction No. 3 of the court was as follows: "What other buildings different in size, character and location from the one in question may be rented for, or what their rental value may be, is not to be considered by you in fixing the rental value of the building in question. Evidence of this character was admitted, and you may consider it only for the purpose of aiding you in determining the weight to be given the opinions of the witnesses, respectively, who have been examined as to those matters. And you are instructed that there is no evidence in this case as to what the premises are rented for to Moise & Co." In defendants' brief it is said: "The giving of instruction No. 3 by the court was error. The rental value of the building in question might be come at by the jury by comparison of the value of other property in the vicinity, making due allowance for the differences in size, character and location." This embraces the entire argument of the defendant upon this point. A jury must determine the facts from the evidence brought before them, and it would be impracticable to bring before a jury the differences in size, character and location of other property in the vicinity so as to enable them to arrive at the value of

the property in question by comparison. Evidence as to what other buildings rented for and as to other rental values having been introduced, it was proper for the district judge to caution the jury to consider it only for the purpose of aiding them in determining the weight to be given the opinions of the witnesses who testified to the values of the other properties.

7. The answers of each defendant as they stood at the beginning of the trial denied that the rental value was $250 or any other sum. After the evidence was taken the defendants asked and obtained, over the objection of the plaintiff, leave to amend their several answers by adding by interlineation after the words "or any other sum" the words "exceeding the sum of $100 a month." Upon the argument the attorney for plaintiff started to comment upon the fact that the president of the plaintiff had sworn to an answer denying that the building had any rental value whatever. To this the defendants objected, assigning as a reason that the answer had not been offered in evidence. The pleadings upon which the case is tried being a part of the record are open to comments of counsel and consideration by the jury. *Colter v. Calloway,* 68 Ind. 219; *Holmes v. Jones,* 121 N. Y. 461. Where an amended pleading has been filed, the original loses its force as a pleading, and the adverse party may not read it to the jury nor comment upon it in arguments without first offering it in evidence. *Woodworth v. Thompson,* 44 Neb. 311. This rule is applicable to all cases where the amendment has been made before the commencement of the trial; but where the amendment is made by interlineation during the trial, or, as in this case, after the evidence is in, the pleading as it stood at the commencement of the trial up to the time of the amendment, the fact of the amendment, and the petition as amended are all part of the record, and it is not necessary to offer any one in evidence in order to make it such. There is therefore no merit in the objection that the petition as it existed before amendment was not offered in evidence.

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.

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SAUNDERS COUNTY, APPELLEE, V. CHARLES H. SLAMA, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,441.

County Officers: ACTION FOR FEES: PLEADING: SUFFICIENCY. A petition in an action by a county against one of the officers mentioned in the act of 1877 (laws 1877, p. 215, Comp. St. 1901, ch. 28, sec. 42 *et seq.*) to recover fees received by such officer, which fails to state facts sufficient to show that the amount sought to be recovered is in excess of the amount which such officer is entitled to retain for his own compensation and the compensation of such assistants as may be allowed him in accordance with the provisions of the act in question, does not state facts sufficient to constitute a cause of action.

APPEAL from the district court for Saunders county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

*H. Gilkeson* and *Charles H. Slama,* for appellant.

*Jesse M. Galloway, contra.*

CALKINS, C.

This was an action by the plaintiff to recover from the defendant moneys alleged to have been received by him as county judge of Saunders county for performing marriage ceremonies during his incumbency of that office from the 9th day of January, 1902, to the 3d day of January, 1906. There was judgment for the plaintiff in the sum of $444, from which the defendant appeals.

The petition, after stating the fact of defendant's incumbency of office, is as follows: "That during said term of office the said Charles H. Slama as such county judge, and by reason of said official position as county judge of said county, performed marriage ceremonies in said county of Saunders in the number of one hundred and forty-eight (148), and received a fee therefor in the sum of $3 each or a total sum of four hundred and forty-four dollars ($444), and that said Charles H. Slama as such county judge received as salary the sum of $1,500 for each of the four years as herein set forth. That the said defendant has failed, refused and neglected to account for and turn over to said county the said sum of four hundred and forty-four dollars ($444) so received by him by virtue of his office for performing marriage ceremonies as herein stated, and has failed, refused and neglected to account for same to said county of Saunders as fees of the office of the said county judge of said county, but retains and converts the same to his own use." There was a stipulation of facts in substantially the same language as above quoted from the petition.

It is contended by the defendant that the petition failed to state facts sufficient to constitute a cause of action, and this contention must be sustained. Since the county judge could not lawfully receive a salary, the interpretation of the allegation that he received a salary of $1,500 per annum most favorable to plaintiff is to say that it means that he received fees to the amount of $1,500 for each year, which is probably what was meant. So considered, there is nothing to show that the $444 alleged to have been received as marriage fees was not included in such sum of $1,500, but was in excess thereof. The petition in an action by a county against one of the officers mentioned in the act of 1877 (laws 1877, p. 215) to recover fees received by such officer must state facts sufficient to show that the amount sought to be recovered is in excess of the amount which such officer is entitled to retain for his own compensation and the compensation of such assistants as may

be allowed him in accordance with the provisions of the act in question. This the petition clearly fails to do, and as the stipulation of facts was no broader there is nothing to support the judgment.

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

FAWCETT and ROOT, CC., concur.

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

REVERSED.

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JOHN B. ALLEN, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 19, 1908. No. 15,368.

1. **Carriers:** DUTY TO SHIPPERS. A railway company engaged in the business of a common carrier is obliged to furnish reasonably safe and suitable cars for the transportation of horses tendered to it for shipment; and, if a car offered a shipper can only be made thus safe and suitable by the use of bedding, it is the duty of the carrier to furnish that bedding.

2. ———: ———. Nor is the carrier relieved of that duty by the agreement of the shipper to load and unload his stock, and to feed, water and care for it in transit.

3. **Evidence:** BURDEN OF PROOF. The burden of proof to establish the affirmative of an issue involved in an action rests upon the party alleging the facts constituting that issue, and remains there until the end.

4. **Appeal:** EVIDENCE: HARMLESS ERROR. In an action for the negligent failure of a carrier to properly bed a car so that it would be reasonably safe for the transportation of stock, where the proof is undisputed that the car was unsafe because of improper bedding, testimony concerning the custom of the carrier in preparing other cars for like shipments, if irrelevant, is without prejudice to defendant.

5. Carriers: DELAYS: QUESTIONS FOR JURY. Where the evidence tends to establish that a shipment of horses was materially delayed while the stock was in the carrier's possession, and that the stock was in good condition when received by the carrier and injured and damaged when delivered to the consignee, it is not error to submit the question of unreasonable delay to the jury.

6. Trial: INSTRUCTIONS. "An instruction, which, if standing alone, might be erroneous, may not be so when considered with other instructions upon the same subject given in connection therewith." *Lincoln Traction Co. v. Brookover*, 77 Neb. 221.

APPEAL from the district court for York county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

*J. E. Kelby, Halleck F. Rose, Frank E. Bishop, Fred M. Deweese* and *George M. Spurlock*, for appellant.

*Gilbert Bros., contra.*

ROOT, C.

In December, 1905, plaintiff shipped over defendant's railway a car-load of horses from Venango to York, Nebraska. In transit three of the animals were so injured as to cause their death, and the remaining 21 were, it is claimed, also damaged. Plaintiff recovered judgment for defendant's alleged negligence, and defendant appeals.

1. Exception is taken to the instructions of the court that the alleged negligence of defendant in not properly bedding the car wherein the horses were shipped was an element in plaintiff's cause of action. The horses were transported by virtue of a stock shipper's contract, which provided, among other things: "And in consideration of free transportation for ——— persons, designated by the first party, who have indorsed their names hereon in the presence of the agent, hereby given by said railway company such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said railway company shall not be responsible for such attention and care. It is agreed that said

animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second party shall not be liable for loss from theft, heat or cold, jumping from car or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which results from the nature or propensities of such animals, and that the railway company does not agree to deliver the stock at destination at any specified time, nor for any particular market." Bearing in mind that the verdict for plaintiff resolves all disputed questions of fact in his favor, it may be said that Venango is situated in the western part of the state; that plaintiff maintains a stock ranch in the vicinity of said town, but resides in York, some 300 miles distant. Plaintiff's son, who was in charge of the ranch, telephoned defendant's agent at Venango that he wanted a 30 foot stock car, well bedded, next Sunday night to ship a load of horses to York, and the agent later informed the young man that the car was ready. The horses were driven to the station Sunday afternoon, and plaintiff's son then learned that the car was not bedded, and that the floor thereof was new construction and very hard and smooth. Defendant's agent stated that they were out of bedding, and suggested that Allen had better procure and spread over the car floor some manure which he could secure at a livery stable. Two such loads were thus placed in the car. The evidence is uncontradicted that the car, unless bedded with sand, cinders, hay or straw, was not safe for the transportation of horses, and that the addition of the manure furnished little, if any, additional security.

It is patent from an inspection of the bill of exceptions that a considerable part of plaintiff's loss can be traced directly to a lack of bedding in the car. Defendant argues that, by reason of the contract, and independent of it, the duty rested on plaintiff to bed the car; that, especially in the matter of shipping horses, because of the opinions of different shippers, it is impossible to adopt any method of bedding that would be uniformly satisfac-

tory, and that, when defendant furnished the shipper a sound, properly constructed car for the transportation of his stock, its duty as a common carrier, so far as the car was concerned, was discharged. We are of opinion, however, that it was the defendant's duty to furnish plaintiff a reasonably suitable and safe car for the transportation of his horses; that, if the car furnished could only be made reasonably suitable and safe by bedding it with sand, cinders, hay, straw or some like substance, it was defendant's duty to provide that bedding, and that it could not relieve itself of such liability by suggesting that plaintiff use some other and insufficient article for said purpose. The railway's obligation is implied from the nature of its business as a common carrier and the fact that it undertook in that capacity to transport plaintiff's horses, and it was not essential that the bill of lading should recite that the company had agreed to bed the car so as to make it safe for the shipment of his horses. *Galveston, H. & S. A. R. Co. v. Silegman,* 23 S. W. (Tex. Civ. App.) 298. Nor was defendant relieved of that liability by the fact that plaintiff's agent accepted the car without proper bedding. *Peters v. New Orleans, J. & G. N. R. Co.,* 16 La. Ann. 222, 79 Am. Dec. 578; *Hunt v. Nutt,* 27 S. W. (Tex. Civ. App.) 1031; *St. Louis & S. F. R. Co. v. Brosius & Le Compte,* 105 S. W. (Tex. Civ. App.) 1131. Nor did the written contract exempt defendant from such liability. It nowhere purports to place the burden on the shipper of bedding or otherwise preparing the car, and we are not inclined to extend defendant's exemption beyond the strict letter of the agreement. Nor will the fact that captious shippers might prefer bedding other than that furnished by the carrier excuse it from discharging its obligation. If the car is bedded so as to be reasonably safe, the shipper can ask no more from the carrier; and, if he indulges his whim or judgment to change conditions, he takes his own risk so far as the alteration may be concerned. Instruction numbered 3, requested by the defendant, was properly refused.

2. Complaint is made that the court instructed the jury that the burden was on defendant to prove that plaintiff was guilty of negligence which contributed to his loss. The instruction was correct. Defendant had pleaded certain facts as constituting contributory negligence on the part of plaintiff. The pleadings establish the burden of proof; and, if defendant pleads that plaintiff was guilty of contributory negligence, he assumes the laboring oar in that respect. *Rapp v. Sarpy County,* 71 Neb. 382.

3. It is urged that the evidence does not tend to establish that the shipment was delayed, but, on the contrary, that the horses were transported in due course of carriage. The freight train left Venango about 10 o'clock at night, remained several hours in Hastings, and arrived in Aurora about 9 o'clock the following night. It was necessary to switch the car from one train to another at the last named place. At Allen's request the conductor of the Hastings train had telegraphed in the afternoon to Aurora to hold the Aurora-York train so as to include defendant's car of stock therein. It was dark when the train arrived in Aurora, and some 20 or 30 minutes elapsed between the arrival of the Hastings and the departure of the Aurora train, and Allen, presuming that his car of stock had been switched into and made a part of said train, went into the caboose thereof, although his car of stock was left in the Aurora yards. It is also in evidence that the horses, other than those crippled, were unloaded at Aurora that night, and fed and watered the next day, and then reloaded about noon, so that they were on the track in the car for one-half a day, and not delivered in York for 24 hours later than they could have been if promptly transferred at Aurora. The evidence further tends to prove that the horses were in good condition when shipped at Venango, and gaunt and considerably bruised and marked up when unloaded at York. There was sufficient evidence, in our judgment, to warrant submitting this issue to the jury. *Nelson v. Chicago, B. & Q. R. Co.* 78 Neb. 57.

Instruction numbered "5," tendered by defendant, was properly refused, because there was no evidence to sustain the assumption or proposition that plaintiff abandoned the horses at Aurora, and for that reason the car was not transferred at said point. The following day, when plaintiff learned that his horses were still in Aurora, he notified defendant that he would not accept the stock, but later recanted and did receive it.

4. It is contended that the court improperly overruled defendant's objections to testimony tending to prove the custom of defendant in bedding cars for the use of stock. Plaintiff's right to recover on the cause of action set forth in the petition did not depend upon any custom or usage, but upon defendant's obligation to furnish him a car reasonably safe for the shipment of his horses. We are of opinion, however, that the evidence might be received as interpreting the intention and meaning of the parties in entering into the written contract, which was silent on this point. The testimony was undisputed that the car was unsafe for the shipment of horses in the condition in which it was delivered to plaintiff, and the evidence as to said custom was not prejudicially erroneous to defendant, even if it were irrelevant. Code, sec. 145.

5. Exception is taken to instruction numbered "4," given by the court, which is as follows: "The court instructs the jury that, although they may believe from the evidence that there was a caretaker in charge of the stock transported by the defendant, still if you further believe from the evidence that the injuries to said stock, if any, were the result of the negligence of the defendant, and that said injuries were not occasioned or contributed to by the negligence of said caretaker, then the verdict should be for the plaintiff." The instruction is not perfect, and the court should have qualified the reference to defendant's negligence by restricting it to the allegations contained in the petition; but when this instruction is read in connection with the other instructions of the court on the same subject, it is not misleading or prejudicially

erroneous. *Lincoln Traction Co. v. Brookover,* 77 Neb. 221. The verdict is not excessive, nor for the amount of plaintiff's demand. The trial court was fair in its rulings and charge, and we are of opinion that defendant has had a fair trial and is not in position to complain.

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.

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ASA J. KAZEBEER, APPELLANT, V. S. F. NUNEMAKER ET AL., APPELLEES.

FILED NOVEMBER 19, 1908. No. 15,384.

1. **Judgment in Partition:** CONCLUSIVENESS. District courts have jurisdiction under the constitution and the code to partition real estate; and, when all of the parties interested in a tract of land are before the court in such suit, its judgment fixing the shares of the parties, directing partition, and later confirming a sale of said real estate is final, and the parties thereto, in the absence of fraud upon the face of the proceedings, are estopped thereby, although said judgment is erroneous and would have been reversed on appeal.

2. ———: SALE: BONA FIDE PURCHASER. A *bona fide* purchaser under said decree will be protected by section 508 of the code, even though the judgment is thereafter reversed.

3. **Partition:** JURISDICTION. The failure of plaintiff to file with the clerk of the district court documentary proof of title to the land involved in partition will not deprive the court of jurisdiction.

4. **Judicial Sales:** REVERSAL OF JUDGMENT. The word "reversal" employed in section 508 of the code contemplates a reversal in any proceeding in any court having authority to set aside the judgment.

5. **Judgment as Bar.** A judgment rendered in one proceeding will not support a technical plea in bar in another, unless the same subject matter was involved in each action.

6. ———. Collateral matters which did not properly enter into the final account of a guardian are not concluded by the judgment thereon.

7. Guardian and Ward: ACCOUNTING: ESTOPPEL. The guardian of K., an infant, purchased lands of his ward at a partition sale. The guardian included in his final account in the county court the purchase price for said land, and the account was settled and allowed by said court. The fact that the guardian purchased at said sale without an order of the district court permitting him to bid on the land did not appear in his report, nor was it brought to the attention of the county judge by the ward, who, although present in court when said account was allowed, refused to accept said money from his guardian. *Held*, That the judgment allowing said account did not estop the ward from contesting the legality of the sale of his lands to his guardian.

8. ———: PURCHASE BY GUARDIAN: RECORD: BONA FIDE PURCHASERS. In the foregoing case the conduct of the guardian was fraudulent, and the purchase by him voidable at the option of the ward; and the record in the partition proceedings was notice of that fact to all persons claiming title under the guardian.

9. Infants: JUDGMENT IN PARTITION: IMPEACHMENT. The infant upon attaining his majority could maintain an action to impeach the judgment in partition, to cancel the deed to his guardian and subsequent conveyances affecting said title, for an accounting, and such other relief as was essential to do complete justice in the premises.

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

*Field, Ricketts & Ricketts,* for appellant.

*R. M. Proudfit, contra.*

ROOT, C.

In 1892 David J. Kazebeer died testate in Saline county, Nebraska, seized in fee simple of 400 acres of land. His will, which was duly probated, provided: "It is my wish and desire that the rest, residue and remainder of my property, both real and personal, be divided equally between my children, share and share alike, but I further request that such division of the property be not made

until my children shall become of age." Eight children, including plaintiff, who was but six years of age, survived the testator. In July, 1893, a daughter, who had attained her majority, commenced an action to partition said land, making the other children, upon whom process was duly served, defendants. One Hall, guardian of the defendants, answered for them, and a guardian *ad litem* was appointed by the court, who also answered by way of a general denial. The court found that plaintiff and the defendants each owned an undivided one-eighth of said real estate and that said land should be partitioned. After a report of the referees that the land could not be partitioned without greatly depreciating the value of the shares of each child, 320 acres of said land were sold to the grantor of the defendant Nunemaker, and 80 acres to the guardian Hall. It appears that Hall's purchase was by virtue of an oral agreement with one of the children, and, in conformity therewith, Hall conveyed the land to said devisee when he became 21 years of age, but, upon the failure of said grantee to pay the purchase money, the land was reconveyed to Hall, who later sold it to defendant Dorman. Plaintiff, shortly after he became of age, commenced this action to set aside the judgment in partition, for an accounting of the rents and profits of the land subsequent to the sale thereof, and for partition of all of said real estate, claiming an undivided one-eighth part thereof. The district court found for defendants, and plaintiff appeals.

1. Plaintiff argues that the will of the deceased prohibited a partition of the land until all of the testator's children were adults; that the petition in partition did not state facts sufficient to constitute a cause of action in plaintiff's favor, and that the judgment of partition was null and void, of which fact all persons claiming title through said proceedings had notice. Numerous authorities are cited to establish that the courts will not partition land if the will of the owner postpones a division until a certain day. The cases arose upon a request for the con-

struction of a will, or on appeal from a judgment in partition, and did not decide that the judgments referred to were void. In a valuable note by Professor Freeman to *Carter v. White,* 101 Am. St. Rep. 852, 864 (134 N. Car. 466), will be found an admirable discussion concerning the elements essential to support a valid judgment in partition. Generally three controlling facts must appear: (1) That the court pronouncing the judgment had jurisdiction of the subject matter. The district courts have that power. (2) That the parties in interest were before the court so as to be bound by its decree. The judgment in the partition proceedings recites that due and legal service was made upon each of the minor defendants, and this is not controverted. (3) That the subject matter was properly presented to the court for decision. Counsel assert that, as a copy of the will was attached to and made a part of the petition, it appeared beyond controversy that the devisees under said will did not have a present right to partition said land, and the court could not pass a valid judgment in a case not before it.

The plaintiff in her petition prayed for partition. She thereby tendered the issue of whether she and the minor defendants were cotenants of the land, and whether she was entitled to a partition thereof, and a decision in her favor would be valid until reversed in some proceeding known to the law. *Oliver v. Montgomery,* 39 Ia. 601; *Edson v. Munsell,* 12 Allen (Mass.), 600; *Herr v. Herr,* 5 Pa. St. 428, 47 Am. Dec. 416; *Brandhoefer v. Bain,* 45 Neb. 781; *Staats v. Wilson,* 76 Neb. 204. In the Nebraska cases last cited, the court proceeded in partition under a law that was unconstitutional and void, and yet the decree was held good on collateral attack. In neither of said cases did the facts stated entitle plaintiff to the relief awarded, but the court had jurisdiction of the subject matter and of the parties, and its judgment was upheld. It is not contended that the parties to the Kazebeer partition suit were not vested with title to the land in question, nor that they would not eventually be entitled

to partition thereof, so therefore the parties and their title were before a court vested with authority to establish beyond controversy not only that title, but that the will authorized a partition of the property. In partition proceedings the court may construe a will and thereby settle the rights of the parties thereunder. *Fisher v. Fisher,* 80 Neb. 145. We do not consider that it is necessary to construe the will in the instant case, but the judge who entered the decree in partition is a jurist of much more than ordinary ability and renown, and his judgment is entitled to consideration. He might have taken the view that the testator not having provided that a trustee should hold title to or manage the land intermediate his death and the majority of his youngest child, nor that any one other than his children should enjoy the rents and profits of the farm during that term, the provision against partition was repugnant to the devise and void. In that he would have found some possible support in adjudicated cases. *Greene v. Greene,* 125 N. Y. 506, 21 Am. St. Rep. 743. The cases of *Tindall v. Peterson,* 71 Neb. 160, and *Brandon v. Jensen,* 74 Neb. 569, cited by plaintiff, are not in point. They relate to cases wherein the administrator had secured license for the sale of, and had sold, a homestead of the intestate. It will be observed that the administrator had neither title to nor right of possession of the homestead; that the proceedings were strictly *in rem,* and that the title of the heirs was not submitted for the adjudication of the court. In the partition proceedings every person interested in or having any title to the real estate was before the court, and it had complete jurisdiction to render the judgment that it did.

Plaintiff also argues that the judgment in partition is void because documentary proof of title to support the petition was not filed with the clerk of the district court in conformity with section 809 of the code. The decree in partition recites that the case came on for consideration on "the pleadings, evidence and testimony." There is nothing in the record of this case to show that docu-

mentary evidence was not submitted or filed in the partition suit, nor would such failure deprive the court of jurisdiction. *Mills v. Miller,* 2 Neb. 299.

Plaintiffs has not made any of the parties to the original judgment defendants herein, but their successors in interest only. Plaintiff does not contend that a money judgment could be recovered against plaintiff in the partition suit, even if the judgment should be reversed, and disclaims any intention to ask therefor, but asserts that the present owners of the land and the land itself are the sole objects of pursuit herein. We therefore consider this case as affecting the rights only of the purchasers of the land. All sales made by order or decree under the direction of the court and requiring confirmation by the court are judicial sales. Rorer, Judicial Sales (2d ed.), sec. 29. A partition sale is a judicial sale. *Burden v. Taylor,* 124 Mo. 12, 27 S. W. 349. Section 508 of the code provides: "If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but in such case restitution shall be made by the judgment creditor of the moneys for which such lands or tenements were sold, with lawful interest from the day of sale." Counsel argue that said section does not have reference to proceedings by an infant to vacate an erroneous judgment against it. In a well reasoned opinion written by Mr. Commissioner IRVINE, in *Manfull v. Graham,* 55 Neb. 645, it was held that the word "reversal" in section 508 of the code applied to the action of any court vacating a judgment, and that the policy of the law was to protect purchasers at sales under judgments which had been rendered by courts of competent jurisdiction, no matter how erroneous might be the proceedings leading up thereto. To hold otherwise would work incalculable injury, and depreciate every parcel of land offered at judicial sale. The authorities cited by plain-

tiff, with one possible exception, so far as we are advised, relate to instances where a party to the proceedings had purchased and still retained title to the land. The case of *Blanton v. Rose,* 70 Ark. 415, 68 S. W. 674, cited by plaintiff, does not commend itself to our judgment. Possibly Arkansas has not enacted a statute in terms like section 508 of our code, but, whether it has or not, the reasoning in said case is in conflict with that of Mr. Commissioner IRVINE in *Manfull v. Graham, supra,* and will not be followed. The defendants Nunemaker, who hold title to the north half of section 7 in town 5, range 2 east of the sixth P. M., Saline county, are within the protection of *McAusland v. Pundt,* 1 Neb. 211, and *Green v. Hall,* 43 Neb. 275, and should be protected, and, as to them, the judgment of the district court should be affirmed.

2. A different question is presented as to the defendants Dorman and the south half of the southeast quarter of section 12, in town 5, range 1, east of the sixth P. M. Said land was purchased by plaintiff's guardian, Richard E. Hall, and defendants Dorman hold title thereto by virtue of said transaction. It is a well-settled rule of law that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, carries fraud on the face of it. *Michoud v. Girod,* 45 U. S. *503; *Carpenter v. McBride,* 3 Fla. 292, 52 Am. Dec. 379; *Winter v. Truax,* 87 Mich. 324, 24 Am. St. Rep. 160; *Frazier v. Jeakins,* 64 Kan. 615, 57 L. R. A. 575; *Veeder v. McKinley-Lanning L. & T. Co.,* 61 Neb. 892. Richard E. Hall answered in the partition suit as guardian for the infant defendants. The referees reported that they had sold 80 acres of the land to Richard E. Hall, and there was nothing upon that record to evidence that said purchaser had ever applied to the court for permission to bid at the sale. All persons dealing with the title were warned that Hall represented not only infants, but those of very tender years, and that it was his solemn duty under the statute to conserve and protect the estate of his wards. No one purchasing that land

during the infant's minority could be a *bona fide* purchaser without notice. *Albers v. Kozeluh,* 68 Neb. 522; *Neary v. Neary,* 70 Neb. 319. Nor does the defense that the guardian in good faith purchased the land for one of the infant defendants upon an agreement that the land should be conveyed to said ward upon his majority for the amount of the guardian's bid, and that the transfer was actually made, appeal to us so far as plaintiff is concerned. Hall's duty was alike to each ward. His duty to plaintiff was to exert every reasonable effort to cause the land to be sold for the highest amount possible. His duty toward the other infant, as its agent, was to secure the land as cheaply as possible. He could not acquit himself of one obligation without, to say the least, disqualifying himself from performing the other. Mr. Chief Justice Beasley in *Staats v. Bergen,* 17 N. J. Eq. 554, very succinctly sums up the proposition: "So jealous is the law upon this point, that a trustee may not put himself in a position, in which to be honest must be a strain upon him." Where a person cannot purchase an estate for himself, he cannot buy it as agent for another. *Ex parte Bennett,* 10 Ves. Jr. (Eng.) 381.

3. It is urged that inasmuch as the one-eighth part of the proceeds of the sale of said 80 acres was accounted for by the guardian, and his accounts duly settled by order of the probate court after notice to and appearance by plaintiff after he attained his majority, said judgment is a bar to this action. It is not suggested, nor could it be successfully maintained, that the claim or demand in the instant case is identical with that presented in the county court, and therefore we are not to consider the answer of the Dormans as a technical plea in bar. *Gering v. School District,* 76 Neb. 219. It remains to be ascertained whether any of the points tried and determined in said accounting constitute an essential element of plaintiff's cause of action or defendants' defense herein. Referring to the principle that a fact once litigated between parties shall thereafter not be controverted by

either, an eminent writer says: "The estoppel extends to all steps involved in the judgment as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the obvious principle that if a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion." 1 Van Fleet, Former Adjudication, sec. 217. See, also, *Burlen v. Shannon,* 99 Mass. 200, 96 Am. Dec. 733; *Cromwell v. County of Sac,* 94 U. S. 351; *Hanson v. Hanson,* 64 Neb. 506; *Gering v. School District, supra.* There is nothing in the record to indicate that Hall reported to the county judge that, in a partition sale of the land owned by his ward, he had purchased the 80 acres of land, either for himself or as agent for plaintiff's brother, and that the proceeds of that sale were included in his report, nor that plaintiff herein requested the county court to reduce his guardian's account so as to exclude the purchase price of the land. Matters only collaterally introduced upon the consideration of a guardian's accounts, and not adjudicated in the decree of settlement, do not conclude the infant. *Jessup v. Jessup,* 102 Ill. 480; *Taylor v. Calvert,* 138 Ind. 67. It appears that plaintiff has not accepted, and refuses to receive, any of said money from his guardian, and, in our judgment, the proceedings in the county court did not preclude him from maintaining his action against the Dorman land.

4. It is suggested that part of the proceeds of said sale have been applied in maintaining plaintiff during his infancy. In the state of the record we are not advised as to the exact fact. No bill of exceptions was settled, and the transcript of what purports to be a stipulation of fact cannot be considered by us, so we must be guided by the pleadings and the decree. If it did affirmatively appear that the guardian applied some of the proceeds of the sale of said land for plaintiff's benefit during his infancy, that fact would not be any defense to this action.

*Rowe v. Griffiths,* 57 Neb. 488; *Bachelor v. Korb,* 58 Neb. 122.

5. The defense of adverse possession cannot be maintained because Hall's possession had its inception during plaintiff's infancy, and this action was commenced within a few months of his majority. Citations are not necessary to sustain this self-evident principle of law.

6. We are not altogether certain that defendants challenge the form of these proceedings, but the action seems to have been properly instituted as to the Dormans at least. Hall's conduct was fraudulent as to plaintiff's rights, and the decree might be impeached for that reason and to that extent. Such seems to be the law in Illinois. *Floyd v. Kirkwood,* 112 Ill. 329. In Nebraska the distinctions between actions at law and suits in equity and in the forms of such actions are abolished, and but one form of action is recognized. Code, sec. 2. It therefore is immaterial whether the action is prosecuted under the code or one of the recognized heads of equity jurisprudence, provided the facts alleged bring the plaintiff within either jurisdiction. It appearing that parties other than the guardian were asserting an interest in the 80 acres of land now claimed by the Dormans, and that complete relief could not be given without cancelation of deeds and an accounting of rents and profits, and that the impeachment of the decree would only be a predicate to further and necessary relief, this action will lie. The judgment of the district court was erroneous to the extent that it denied plaintiff relief as to the Dorman real estate, but correct as to the remainder of the land sold in the partition proceedings.

It is therefore recommended that the decree of the district court be affirmed as to defendants Nunemaker and as to the land referred to in the pleadings as situated in section 7, but that it be reversed and the case remanded for further proceedings as to defendants Dorman and the south half of the southeast quarter of section 12, in town 5, range 1 east of the sixth P. M., in Saline county.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is affirmed as to defendants Nunemaker and as to the land referred to in the pleadings situated in section 7, but it is reversed and the cause remanded for further proceedings as to defendants Dorman and the south half of the southeast quarter of section 12, in town 5, range 1 east of the sixth P. M., in Saline county.

JUDGMENT ACCORDINGLY.

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IN RE ESTATE OF CHARLES SWAN.
CHARLOTTE BEMENDERFER, APPELLANT, V. J. O. WALKER, EXECUTOR, APPELLEE.

FILED NOVEMBER 19,1908. No. 15,389.

**Wills:** PROBATE: REVIEW. Where an appeal is taken to the district court from an order of the county court correcting an order admitting a will to probate, and the district court in disposing of said proceedings considers evidence and passes upon an issue of fact, its order and judgment concerning said issue will not be reviewed in this court, in the absence of a motion for a new trial in the district court.

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

*Charles H. Sloan* and *Frank W. Sloan,* for appellant.

*S. W. Christy, L. E. Cottle, M. S. Gray* and *F. B. Donisthorpe, contra.*

ROOT, C.

Appeal from a judgment of the district court for Fillmore county confirming an order of the county court correcting the record of the probate of the last will and testament of Charles A. Swan, deceased. Charlotte Bemen-

derfer, an heir of the deceased and a legatee under his will, appeals.

The only question presented in the brief of counsel for the appellant is that the evidence is not sufficient to sustain the findings and order of the district or the county court. A motion for a new trial was not filed in the district court, and therefore the sufficiency of the evidence is not before us for review. *Wollam v. Brandt & Shipman*, 56 Neb. 527; *Whalen v. Kitchen*, 61 Neb. 329; *Carmack v. Erdenberger*, 77 Neb. 592.

It follows necessarily that the judgment of the district court should be affirmed, and we so recommend.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

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NATHAN CAMPBELL, APPELLANT, V. PETER J. YOUNGSON ET AL., APPELLEES.

FILED DECEMBER 5, 1908. No. 14,847.

REHEARING of case reported in 80 Neb. 322.

BARNES, C. J.

After a careful examination of our former opinion in this case (80 Neb. 322), the briefs and the arguments of counsel on the rehearing, and an extended review of the drainage law of 1881 (laws 1881, ch. 51), in the light of its provisions and subsequent legislation covering kindred subjects, we are of opinion that by the act of 1881 it was not intended to embrace the subject of overflowed lands; and especially is this so where the overflow is caused, as in the case at bar, by surface water. That this was the view taken by the legislature is made clear by the acts of 1905

and 1907, which fully provide for just such a situation as arises in the case at bar.

We can add nothing to the reasons given in our former opinion for enjoining the defendants from proceeding further under the present petition. The petitioner and other interested persons may, if they so desire, organize a drainage district according to the provisions of chapter 153 of the laws of 1907, which are ample and in every way sufficient to enable them to change the channel of Dry creek and Whiskey slough, and divert the waters of those streams at the point in controversy by making a new outlet to the Platte river, and, if necessary, by damming up the old channel of Whiskey slough at and below the point of diversion.

For the foregoing reasons, we are of opinion that we should adhere to our former judgment.

JUDGMENT ACCORDINGLY.

REESE, J., dissents.

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## JUDGE P. COHOE V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1908. No. 15,780.

1. **Information:** ELECTION. Where it is doubtful whether an alleged offense is larceny or conversion by a bailee with intent to steal, the information may contain two counts, one charging the felonious taking, the other the felonious conversion, and the state will not be required to elect upon which count it will rely for a conviction.

2. **Criminal Law:** LARCENY AS BAILEE: VENUE. In a prosecution for larceny of money by a bailee, where the transaction constituting the offense extends through different counties, the venue may be laid and the prosecution had in the county where the bailment arose, and where the defendant has to account for and pay over the money on demand to the one entitled to its possession.

3. ———: CONFESSIONS. A voluntary confession of a defendant is competent evidence in a criminal case, and may, with even slight

corroborating circumstances, be sufficient to establish the *corpus delicti*.

4. ———: LARCENY AS BAILEE: EVIDENCE. In a prosecution for the crime of larceny of money by a bailee, evidence that the accused obtained other sums of money in like manner and about the same time, and the disposition he made of such money, may be received, as tending to show his guilty knowledge and intent.

5. Larceny as Bailee: EVIDENCE. Evidence examined, its substance stated in the opinion, and *held* sufficient to sustain the verdict.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

*E. B. Quackenbush,* for plaintiff in error.

*William T. Thompson, Attorney General, Grant G. Martin, H. A. Lambert* and *E. Ferneau, contra.*

BARNES, C. J.

The plaintiff herein, who was the defendant in the district court, and will be so designated, was convicted of the crime of larceny as bailee, and has brought the case here for review.

It appears that the information on which he was tried contained two counts; one charging him with the larceny of $1,000 in gold, under the provisions of section 114 of the criminal code, and the other charging him with the larceny of the same money as bailee, as defined by section 121*b* of the criminal code. At the close of the state's evidence the defendant moved to require the prosecutor to elect upon which of the counts he would rely for a conviction. The motion was overruled, and this ruling is assigned as error. The defendant contends that the information charged him with two separate and distinct felonies, based on two different sections of the statutes, which denounce different crimes inconsistent and repugnant to each other, and that it was prejudicial error to try him upon both of those counts at the same time, for the reason that in a felony case "only a single issue will

be permitted to go to the jury." This contention is presented by defendant's counsel in his argument and brief with much skill and unusual ability. Without doubt the general rule is that a defendant in a felony case should not be tried upon two distinct and separate charges, and that only a single issue should be permitted to go to the jury. But to this rule there are some exceptions, as we shall presently see. Where the same act constitutes different offenses, the rule is that they may be charged in separate counts in one information, and it is competent and proper "to vary the charge by means of several counts, when the offense is the same, for the purpose of meeting the different phases of the evidence which may be adduced at the trial." 10 Ency. Pl. & Pr. 543. Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence, and this the law permits. Wharton, Criminal Pl. & Pr., sec. 297; *Furst v. State,* 31 Neb. 403. The right to require the prosecutor to elect is confined to cases where the information or indictment contains charges which are actually distinct, and which grow out of different transactions, and the court will not compel the prosecutor to elect where it appears by the indictment that the charges relate to the same transaction modified to meet the proof. *Candy v. State,* 8 Neb. 482. In the case of *Butler v. State,* 91 Ala. 87, the defendant was charged in one count of the indictment with the larceny of a horse, and in another count with the fraudulent conversion of the same horse. The court held that the two counts were properly joined, and that the defendant has no legal right to compel the state to elect upon which it would ask a conviction. In the opinion it was said: "The court will not exercise its power to compel an election, unless it appears, either from the indictment or the evidence, that an attempt is made to convict the accused of two or more offenses growing out of separate and distinct transactions." In *Commonwealth v. Shutte,* 130 Pa. St. 272, 17 Am. St. Rep. 773, the indictment contained two counts; one charging

robbery, and the other larceny as bailee. The defendant was acquitted of the charge of robbery, and convicted of the charge of larceny as baileee. Both charges in the indictment related to the same property, and to one and the same transaction. The defendant there contended that the two charges were improperly joined, and the court in passing on the question said: "Nor do we think there was a misjoinder. While the evidence is not given, it is manifest that both counts were for substantially the same offense. The higher offense was not proved but the defendant was convicted of the larceny as bailee of the same property referred to in the first count. The offense charged in the second count was not repugnant to that charged in the first. It was a constitutent part of the same offense." It has been held that, where it is doubtful whether an alleged offense is larceny or a conversion of property by a bailee with intent to steal, the indictment may contain two counts; one charging the felonious taking, and the other the felonious conversion. *People v. Bogart,* 36 Cal. 245.

In the case at bar it appears from the evidence that one Ulbrich had, before the time alleged in the information, been found insane, and one Boyd had been appointed his guardian. Ulbrich, shortly before his insanity, had sold property and received several thousand dollars therefor. The guardian was unable to find the money which it was supposed Ulbrich possessed. It was believed that he had concealed it upon his premises in Auburn, where he resided at the time he became insane. The defendant rented the premises of the guardian, and was living there with his family at the time of the transaction complained of. It is conceded that the defendant found the money, which he is charged with having stolen, upon the premises in question; that soon after finding the gold he took it to Nebraska City, squandered part of it, then went to Omaha, afterwards returned to Auburn, and stated that he had lost all the money while drunk, except $145 in gold, which he returned to the guardian. He

claimed that he had been authorized to take possession of the gold, and that his wrongdoing consisted in not returning it to the guardian as he had been instructed to do. The prosecution also claimed that he had no authority to take possession of the gold, but that it was his duty, if he found it, to inform the guardian, and there is some evidence tending to support this contention, and that he intended from the first to find it, if he could, and convert it to his own use. It appears, however, that upon a former occasion he reported that he had found $50 upon the premises, and had returned it to the guardian and received a reward therefor. Later he reported to the guardian that he had found some money, but his statements in regard to it and in regard to the amount that he had found were confusing and evasive. He first reported that at this second finding the amount was $800, but afterwards admitted that it was $1,800, and finally, after much hesitancy and quibbling, gave the $1,800 to the guardian. He demanded a share of this money for his services, and was allowed a liberal reward. On the other hand, there is clear and substantial evidence in the record that the defendant was authorized and instructed by the guardian to look out for hidden money while he was making certain repairs on the premises, and, if he found it, to deliver it to him. It appears that the guardian rented the place to the defendant at the agreed price of $100 a year; that the defendant was to pay for the first six months' rent by labor on the place, and the next six months he was to pay cash. The guardian testified that, "when (the defendant) started to fix up this place, I told him to be particularly careful when he changed anything in the way of plastering and cupboards or boards, or anything of that kind; that I thought Ulbrich had hidden some money there, and, as I was unable to find anything up to that time, I wanted him to be particularly careful and make a thorough search for it." It appears that when the defendant found the $1,800 he went with the guardian to the county judge, and he was instructed by them that, if he found any more

money there, he should bring it either to Mr. Boyd or the county judge at once and turn it over to them. They both testified that the defendant promised he would do so; that they repeated the injunction to him several times, and cautioned him about it, saying: "If you find any more money down there, you bring it to us." They further testified that he promised he would do so. They said "he not only promised he would, but appeared sincere in it." After these instructions, it appears that the defendant found $1,000 in gold, which is the money in question, and disposed of it in the manner above described. It can readily be seen that the prosecutor, in order to meet this state of the evidence, deemed it necessary, as a matter of precaution, to charge the offense in the two counts set forth in the information. We think he was justified in pursuing that course, and the district court did not err in refusing to require him to elect upon which count of the information he would rely for a conviction.

Defendant further contends that the judgment should be reversed because of the refusal of the district court to instruct the jury, in substance, as follows: You are instructed that, before you can find the defendant guilty, you must find from the evidence beyond a reasonable doubt that he took the money as charged in the information in Nemaha county; that he formed the felonious intent to permanently deprive the owner thereof while he was yet in Nemaha county; and, if you believe from the evidence in this case that such felonious intention was formed in Otoe or any other county in this state than Nemaha, and that said money was converted in some other county than Nemaha, or, if you entertain a reasonable doubt as to where such felonious intent or conversion took place, you should give the defendant the benefit of that doubt, and find him not guilty. In considering this contention, we find from the record that paragraph six of the instructions given by the court on his own motion states the law applicable to the facts of this case, and therefore defendant cannot complain of the refusal of his request.

Furthermore, we are of opinion that the instruction tendered is not a correct statement of the law. Like questions have been decided by many courts of last resort, and it is said in their opinions that it often appears that the venue cannot be laid in the county where the conversion actually took place. We think the authorities agree that, if the transaction constituting the offense extends through different counties, the county in which the conversion took place has not the exclusive jurisdiction. 1 Bishop, New Criminal Procedure, 61; 7 Ency. Pl. & Pr. 412.

The agreement creating the fiduciary relation in the case at bar was made in Nemaha county. The money was found by the defendant and taken into his possession in that county, and it was his duty to account for it and pay it over to the guardian of the owner in that county. We think it may be safely said that the crime charged in the second count of the information was not complete until the defendant failed or refused to turn the money over to the guardian on demand in that county. In *Regina v. Murdock,* 2 Den. & P. (Eng.) 298, the money was received by the accused in Derbyshire, though both parties lived at Nottingham. Upon inquiry concerning the money at the latter place, Murdock admitted having spent it, and the venue was held to have been properly laid there; Tolfourd, J., remarking: "My opinion is that the offense was completed when the prisoner refused to account to his master in Nottingham." In *Queen v. Rogers,* 3 Q. B. Div. (Eng.) 28, it was held that the signing of a letter by the defaulting employee, in effect denying the receipt of the money from another county where he had collected it, to his employers, and its receipt by them in the county where it was his duty to account, and where both together resided, gave jurisdiction in the latter county. If this were not so, an offender might prevent the completion of his offense by flight, and the result of the defendant's contention, if carried to its legitimate conclusion, would render it impossible to convict him of any offense in any county whatsoever.

In *Campbell v. State,* 35 Ohio St. 70, an agent was prosecuted for the embezzlement of his employer's money in a certain county where he had possession of it, and in which it was his duty to account to his employer upon demand being made. It was held to be no defense to show that he had expended the money for his own use in another county. In *State v. Bailey,* 50 Ohio St. 636, the defendant was employed by a firm in Toledo, Lucas county, to sell goods for cash, or on the instalment plan in Fremont, Sandusky county, and he was to report in person or by letter to the firm at Toledo at the end of each week. Part of the goods were delivered to him in Toledo, and others sent to him at Fremont. After working some time he caused a letter to be written and mailed to the firm, saying that his sales were small and he was discouraged, but would await further orders. He had sold the goods, however, and spent part of the proceeds in Fremont, and afterwards the remainder in Buffalo, New York, to which place he had absconded. It was held that the venue was properly laid in Lucas county; that defendant's obligation was to account to his employers at Toledo, in Lucas county, and this obligation pressed upon him with equal force whether he was within or without that county; that the presence of the offender within the county when the crime is committed is not always necessary to give jurisdiction. This is the rule announced in *Norris v. State,* 25 Ohio St. 217, and *State v. Hengen,* 106 Ia. 711.

As above stated the defendant and the guardian, Boyd, both resided in Nemaha county. The agreement assented to by defendant by which he was to turn over any money found by him to Boyd or the county judge was made in that county. It also appears beyond any reasonable doubt that the money in question was found by the defendant on Ulbrich's premises, in Nemaha county, and it was his duty to account for it and turn it over to the guardian in that county. It follows that the crime for which he was convicted was not complete until his failure or refusal to turn over the money on demand in that county. Therefore

the district court did not err in refusing to instruct the jury as requested.

Defendant also contends that the verdict is contrary to law, and is not sustained by sufficient evidence. He argues that the *corpus delicti* was not proved by competent evidence. As above stated the record shows that the money in question was found on Ulbrich's premises. There is evidence that he was possessed of a considerable amount of money, and that it was his habit to hide it about his premises. In addition to the defendant's admission that he found the money buried there, the evidence discloses that he was in possession of it at Nebraska City, and spent at least a part of it there; that he went to Omaha and gave or delivered $350 of it to his son, William Cohoe; that the money spent at Nebraska City and the money delivered to his son William was tarnished, and had the appearance of having been buried. The defendant also brought and delivered $145 of the same kind of money to the guardian. This was a sufficient corroboration of the voluntary confession of the accused to establish the *corpus delicti.* A voluntary confession of a defendant is competent evidence, and may, with slight corroborating circumstances, establish the *corpus delicti. Sullivan v. State,* 58 Neb. 796. It has been often held that the *corpus delicti* in larceny, like other facts in general, may be established by circumstantial evidence. 18 Am. & Eng. Ency. Law (2d ed.), 483; *Campbell v. People,* 159 Ill. 9, 50 Am. St. Rep. 134; 4 Elliott, Evidence, sec. 3053. We are therefore of opinion that this contention is without merit.

Defendant insists that the court committed reversible error in permitting the state to prove the finding of other money and attempts to commit other crimes. The record contains no evidence showing or attempting to show that the defendant had committed any other crimes. The testimony objected to simply proved that the defendant, when he found other money under similar circumstances, turned it over to the guardian as the money of Ulbrich,

and promised the county judge that, if he found any more money, he would make the same disposition of it. The evidence of those transactions was admissible to show the defendant's knowledge and his intentions when he took possession of the gold and carried it to Nebraska City.

Another contention is that the court committed reversible error in permitting the evidence of the witness Young with reference to a certain gold certificate and its condition to go to the jury without connecting the defendant with it in any way. While it is true that this evidence was immaterial, yet there was nothing in it that could have operated to the prejudice of the defendant in any manner whatsoever.

Finally, it is claimed that the verdict is not sustained by sufficient evidence, and is against the clear weight of the evidence; and it is contended that at the time of the alleged conversion the defendant by reason of intoxication lacked the capacity to form or entertain a felonious intent. While it is shown that after the defendant left Auburn, and while on his way to Nebraska City, he became somewhat intoxicated, and that he was in that condition when he was gambling and spending the money in question at Nebraska City, and that he was partially intoxicated when he reached the city of Omaha, still the evidence is insufficient to show that he was unconscious of his situation or his whereabouts, or that he did not know what he was doing, and did not realize the effect of his conduct at any time while he was absent from Nemaha county on that occasion. We find that this question was fairly submitted to the jury upon the evidence, and by an instruction given by the court for that purpose, and was resolved against the defendant. A careful reading of the whole record satisfies us that the evidence was amply sufficient to sustain the verdict and establish the defendant's guilt beyond a reasonable doubt.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

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D. FRANCISCO ET AL., APPELLEES, V. LEONARD E. FURRY ET AL., APPELLANTS.

FILED DECEMBER 5, 1908. No. 15,395.

1. **Nuisance:** FEED YARD: INJUNCTION. A decree enjoining the use of a feed yard and limiting the use of the owner to the yarding of cattle and hogs therein temporarily and in limited numbers, where the evidence does not make it apparent that it cannot be used as a feed yard without becoming a nuisance, is erroneous.

2. **Injunction:** AFFIDAVITS. Section 262 of the code authorizes the use of affidavits on an application for a temporary injunction, and not on the final hearing.

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

*W. H. Miller, J. P. A. Black* and *George A. Adams,* for appellants.

*A. H. Byrum, contra.*

DUFFIE, C.

The plaintiffs brought this action to enjoin the defendants from maintaining a feed yard, and keeping and feeding cattle and hogs on block 19, in Gage's addition to the city of Franklin. It is alleged in this petition that block 19 is adjacent to a thickly settled part of the city, and that by reason of the filthy and unclean condition of the yard obnoxious exhalations and offensive smells emanate therefrom, and affect and corrupt the air to such an extent that the same has become a nuisance, dangerous to the health, and greatly interfering with a comfortable en-

joyment of the plaintiff's dwelling, as well as those of other people residing in the neighborhood.

The district court upon a final hearing entered a decree, the material part of which is in the following words: "The court, therefore, hereby forever enjoins said defendants or any of them, their representatives or grantees, from the further use of said yards for the feeding of a large number of cattle and hogs, or from the feeding of a large number of either cattle or hogs in said yard. * * * The court further finds and does hereby decree that this decree and injunction shall not in any manner deprive the said defendants from the yarding and keeping of a reasonable number of cattle from time to time, where the said cattle are only being kept there for temporary purposes, and not in such numbers as to become in any manner a nuisance. And it is the decree of this court that the said yards can be used by the said defendants for the purpose of keeping a reasonable number of hogs for feeding, provided that the said defendants do not keep hogs in said yards in such numbers as to in any manner become a nuisance." The defendants have appealed.

The testimony coming from the witnesses of the two parties to the suit is sharply conflicting. If the testimony of the plaintiffs' witnesses states the facts as they exist, the feeding yard in question was a nuisance which called for action on the part of the court. The witnesses called for the defendants deny that they had ever observed any noxious smells or vapors emanating from the yard, or that it was so conducted as to be offensive to any resident of the neighborhood. We might state, however, that most of the evidence offered by the plaintiffs was in the form of affidavits, apparently those used on the application for a temporary injunction, and that the same credit should not be given such evidence as to the testimony of witnesses who have appeared in court and been subjected to a cross-examination by the adverse party. The corruption of the atmosphere by the exercise of any trade or by any use of property that impregnates it with noisome stenches has

ever been regarded as among the worst class of nuisances. The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself, although there are certain uses of property that necessarily impart more or less impurity to the air which are regarded as lawful when reasonably exercised, and must be submitted to as among the incidents of living in a town or thickly settled districts. This subject is fully considered in Wood, Nuisance (3d ed.), ch. 17. A feeding yard is not necessarily a nuisance, and it becomes such only by being improperly maintained or conducted. There is nothing in the evidence showing it to be impossible to maintain the yard in question in such a manner as to free it from the objections which the plaintiffs make. The situation of the yard is favorable to its being conducted in a cleanly and proper manner. That the defendants should be enjoined from conducting their business in the yard in such a manner as to make it a nuisance cannot be denied; but, when the court goes beyond this and limits the time of its use for keeping cattle or hogs, or the number to be kept, we think that it has extended its decree beyond proper bounds. Until it is shown that the yard cannot be maintained as a feeding yard without becoming a nuisance, the feeding of cattle therein should not be enjoined. The order of the court should go no further than to enjoin the defendants from making a nuisance of their feed yard.

We recommend a reversal of the judgment appealed from and remanding the cause for further proceedings, suggesting at the same time that section 262 of the code permits the use of affidavits only on the application for a temporary injunction, and not on the final hearing, unless by the consent of the parties.

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.

REVERSED.

HORACE BROCKWAY, APPELLANT, V. HENRY REYNOLDS ET AL., APPELLEES.

FILED DECEMBER 5, 1908. No. 15,316.

**Jury, Right to Trial by.** In an action for the conversion of the proceeds of a bank check, when the conversion is denied, it is error to refuse a jury trial.

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

*E. H. Whelan* and *J. E. Porter,* for appellant.

*A. W. Crites* and *E. M. Slattery, contra.*

EPPERSON, C.

Plaintiff's action is for the recovery of $125, which he alleges was obtained by the defendants upon a check payable to the defendant Pitman and unlawfully converted by the defendants. Pitman filed an answer and cross-petition, claiming $100, and defendants Reynolds and Slattery filed a counterclaim for $25. They also brought into court $100, which defendant Pitman had demanded of them, and asked that the same be disposed of as the equity of the case may require. The prayer of their answer is that they be allowed to retain the whole $125. On the joint motion of defendants the court withdrew the case from the consideration of the jury, and entertained it as in equity.

The court erred in refusing plaintiff a jury trial, and we recommend that the judgment be reversed and this cause remanded for further proceedings in accordance with law.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing

opinion, this cause is reversed and remanded to the lower court for proceedings in accordance with law.

REVERSED.

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JOHN T. BRESSLER, APPELLEE, V. WAYNE COUNTY, APPELLANT.*

FILED DECEMBER 5, 1908. No. 15,332.

1. **Exceptions, Bill of:** TIME FOR SETTLEMENT. A district judge is without authority, after the expiration of 80 days from the adjournment of the term of court *sine die*, to extend the time for settling a bill of exceptions.

2. **Taxation:** SHARES OF STOCK: LISTING FOR TAXATION. The owner of shares of stock of a domestic investment company is not required to list them for taxation under the provisions of section 10927, Ann. St. 1907, which provides: "Every person * * * shall list all his moneys, credits, bonds, or stocks, shares of stock of joint stock or other companies, when the capital stock of such company is not assessed in this state." Such shares of stock are to be assessed under the provisions of section 10955, which expressly provides that they shall be listed for taxation by an officer of the corporation.

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

*W. T. Thompson, Attorney General,* and *H. E. Siman,* for appellant.

*Frank M. Northrop* and *J. L. Kennedy, contra.*

EPPERSON, C.

In 1906 the board of equalization of defendant county entered upon the tax list 100 shares of stock of the Nebraska Land Company owned by the appellee. Upon appeal to the district court, the order of the board of equalization was reversed, and the county appealed to this court.

The term of court in which the judgment was rendered

* Rehearing allowed. See opinion, 84 Neb. —.

adjourned January 25, 1907. The bill of exceptions was not served within 40 days. The record discloses that the court made an order upon April 20, 1907, extending the time for the settlement of the bill for a period of 80 days from January 25. This order was made 84 days subsequent to adjournment *sine die* of the court. The judge was then without authority to make such order.

We are required, however, to consider the sufficiency of the pleadings to support the judgment appealed from. The petition sets forth the facts substantially as follows: The Nebraska Land Company is a corporation organized under the laws of the state, with its principal place of business at Wayne, in Wayne county. It issued its corporate capital stock to the amount of $30,000 at par, and with this fund it purchased 30,000 acres of land in North Dakota, which was taxed in 1906 upon a taxable valuation of $75,000. The corporation owned no property in Nebraska, nor was its capital stock assessed in this state.

Section 10927, Ann. St. 1907, provides: "Every person of full age and sound mind, being a resident of this state, shall list all his moneys, credits, bonds, or stocks, shares of stock of joint stock or other companies, when the capital stock of such company is not assessed in this state, moneys loaned or invested, annuities, franchises, royalties, and all other personal property."

Section 10955 provides: "The president, cashier or other accounting officer of every bank or banking association, loan and trust, or investment company, shall on the first day of April of each year, make out a statement under oath, showing the number of shares comprising the actual capital stock of such association, bank, or company, the name and residence of each stockholder, the number of shares owned by each and the value of said shares on the first day of April, and shall deliver such statement to the proper assessor. Such capital stock shall thereupon be listed and assessed by him, and return made in all respects the same as similar property belonging to other corporations and individuals. Whenever any such bank,

association or company shall have acquired real estate or other tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such association or company. * * * Such association, bank or company shall pay the taxes assessed upon its stock and shall have a lien thereon for the same."

The appellee alleges that the Nebraska Land Company is an investment company, and contends that its capital stock is to be assessed under the provisions of section 10955, *supra,* and that this section permits the deduction of the assessed value of the North Dakota land from the amount of the actual capital stock of the corporation in arriving at the value subject to taxation in this state; but, as the assessed valuation of the land exceeded the actual capital stock, nothing remains for taxation here. It is the appellant's contention that the stock is liable to taxation under the general statutory provisions, because it is property in this state, and the capital stock in the Nebraska Land Company is not assessed in this state. Plaintiff argues that the case depends upon whether or not the corporation is an investment company. It occurs to us that it is such. The court so found, and the presumption is that the finding is right.

We are required to determine under which section of the statutes above quoted the shares of stock are to be listed for taxation. If under section 10927, then the action of the board of equalization was right; if under section 10955, the district court was right. As to the manner of taxation the statutes are unambiguous. The owner of shares of stock of an investment corporation is not required to list the same with the assessor. The proper officer of the company does that. Section 10955 does not exempt any property from taxation. It simply provides a manner in which its property and shares of stock shall be assessed and taxed. The shareholder has no part in the process of taxation. So far as the public officers are concerned whose duties are to create and collect taxes,

the corporation, and not the shareholder, is the taxpayer and the owner of the property. The shareholder is not required to list his shares of stock in an investment company, and the board of equalization cannot assess the same to him. Section 10955 controls.

Whether or not the corporation is permitted to deduct the value of land assessed to it in another state cannot be determined in this case, because the corporation is not a party to the action.

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.

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W. B. GRISWOLD ET AL., APPELLANTS, V. BOB SZWANEK ET AL., APPELLEES.

FILED DECEMBER 5, 1908. No. 15,388.

1. **Fraudulent Conveyances: GOOD FAITH: EQUITY.** It is not competent for a creditor to receive in settlement of his debt against an insolvent debtor property materially greater in value than the debt paid thereby; but, if he does so without intending to defraud other creditors, equity will require him to account to other creditors only for the value of the property in excess of the consideration paid therefor.

2. **Appeal: VALUE OF PROPERTY: DEMAND.** In an action in equity pending on appeal in this court where the result depends upon the value of the property in controversy, this court will remand the case for further inquiry as to value, when it is impossible from the evidence adduced to determine the same.

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

*R. J. Nightingale* and *W. J. Fisher,* for appellants.

*Aaron Wall* and *R. P. Starr, contra.*

EPPERSON, C.

Plaintiffs and interveners are judgment creditors of the defendant Szwanek, who was formerly engaged in the mercantile business. The aggregate amount of the judgments, exclusive of costs and interest, is $2,139.35. This action is in the nature of a creditor's bill, wherein it is sought to annul a transfer of a stock of merchandise from Szwanek to the defendant Galczenski, and to subject the remainder of the stock and the proceeds of what had been sold to the payment of the several claims of the creditors. Each plaintiff and intervener, either in aid of attachment or execution, had garnisheed the purchaser, but thereby was unable to accomplish satisfactory results. By this process, however, they obtained equitable liens upon the property transferred to Galczenski if the sale was void, or upon that portion thereof, if any, which is in equity subject to the payment of the general indebtedness owing by Szwanek. *Hargreaves v. Tennis,* 63 Neb. 356. In 1905 the defendant Galczenski became surety for $800 of borrowed money, and later for other sums, aggregating $1,646.45 on June 18, 1906. The defendant Jasczenski loaned to Szwanek at different times in the latter part of 1905 and early in 1906 various sums of money amounting to $1,545. The defendant Chilewski had become surety for Szwanek on notes for $1,500, and had loaned him $500. On June 18, 1906, Galczenski and Chilewski, and on July 17 Jasczenski took notes from the debtor, representing the amounts of their respective claims, and Szwanek gave to each a chattel mortgage in blanket form upon his stock of goods, ostensibly to secure each of these creditors for the amount they had loaned to or secured for him. But no rights were ever claimed under the mortgages, and particular reference to them is unnecessary. On July 18, 1906, Szwanek sold and delivered to Galczenski all of his

stock of goods, for which Galczenski canceled his own indebtedness and assumed payment of the indebtedness owing to or secured by Chilewski and Jasczenski, and in addition thereto agreed to give Szwanek employment in the store until the latter could find employment elsewhere.

Plaintiffs contend that the sale is but pretended, and that it was made to defraud them; that the stock of goods was of the value of $10,000. Plaintiffs strenuously urge that they have proved fraud, and that they are entitled to a judgment against the conspiring defendants. As we view the case, its disposition depends upon the value of the stock of goods and Galczenski's intentions in purchasing the same. If the value materially exceeded the consideration paid therefor, then the amount of the defendant Galczenski's liability depends upon his motive in thus accepting the goods. Plaintiffs made an honest and industrious effort to prove the value of the goods. They proved that it was listed by Szwanek for assessment in 1906 at an actual valuation of $10,000, and that it had invoiced that sum the preceding January. They produced evidence of several witnesses who had seen and had not closely inspected the stock, but estimated it at $10,000. This, of course, was unsatisfactory evidence, but was undoubtedly the best plaintiffs could do, not having access to the stock. On the other hand, Szwanek as a witness for the defendants testified that, when the transfer was made to Galczenski, the stock was worth between $6,000 and $7,000, and on cross-examination he fixed the value at $6,711, an amount which exceeded by $1,525 the consideration paid by Galczenski. As will be hereafter shown, we cannot take this testimony as conclusive on the question of value, yet the defendants cannot reasonably contend in the face of this evidence that the valuation was less at the time of the sale than was testified to by Szwanek. It is therefore established that the value of the goods materially exceeded the indebtedness for which it was given. This makes it obviously necessary to ascertain what are the rights of the parties as they are affected by this fact.

Galczenski testified that prior to the transfer he demanded the money due him; that Szwanek could not pay the same, but offered to convey the stock upon the terms and conditions above stated. It is generally considered and held by this and other courts that a creditor may take over to himself the property of an insolvent debtor in order solely to satisfy his indebtedness, where the value of the property does not exceed the debt. *Elwood v. May Bros.*, 24 Neb. 373; *Nathan v. Sands*, 52 Neb. 660; *Sunday Creek Coal Co. v. Burnham*, 52 Neb. 365; *National Bank of Commerce v. Chapman*, 50 Neb. 484; *Lininger v. Raymond*, 12 Neb. 19; *Beels v. Flynn*, 28 Neb. 575; *Blair State Bank v. Bunn*, 61 Neb. 464. At least the value must not materially or appreciably exceed the debt. This leads us to inquire into the intentions of the purchaser who has received property the value of which exceeds his indebtedness and that assumed by him as a part of the consideration. If it was his intention in taking over to himself the property of his debtor to defraud other creditors, whether the consideration was adequate or inadequate, his purchase would be void, and he should account to the other creditors for the full value of the property. The rule is that a creditor may accept only property sufficient in value to satisfy his debt. If at the time of the transfer he is ignorant of its value, and the property should prove of greater value, or if entirely free from fraudulent intentions, should he be required to surrender the whole of it? Or should he be permitted to retain all of it, or enough only to equal his own claim? Galczenski did not know the value of the stock of goods. Szwanek told him that it was worth between $6,000 and $7,000. This would naturally challenge his attention to the fact that he was receiving value in excess of the consideration. But, as he did not pay the excess to the debtor or otherwise benefit him, this fact alone should be considered insufficient to require a court to condemn the transaction as fraudulent. He was also told that there were other creditors, and it seems made some inquiry into the matter, for he was told

by Szwanek that the latter had yet remaining sufficient outstanding book accounts to satisfy all other indebtedness, and that these accounts, when collected, would be thus applied. Nothing appears to indicate that Galczenski knew or had reason to suppose that Szwanek intended to defraud his other creditors. But the fact remains that Galczenski received more than sufficient to pay his own indebtedness and that assumed by him. This was contrary to the rule. Equity required him to see to it that he take no more property than was sufficient approximately to satisfy his claims and those assumed by him. While equity should walk straight, it must cautiously avoid falling over backward, and, as there was shown no actual intent on the part of Galczenski to defraud the other creditors, equity will not require him to surrender his preference unless required by established rules. Galczenski demanded his money, and Szwanek could not pay, but offered property instead. Galczenski must accept or enforce his claim in law, or permit it to run on indefinitely. Under these circumstances, we cannot say as a matter of justice and equity that he should surrender the fruits of his diligence because it developed that the remaining property was insufficient to pay other creditors. From the cases cited above it is apparent that he should not be permitted to retain all. This court has never decided in similar cases how much the preferred creditor should be required to surrender. In *Henney Buggy Co. v. Ashenfelter,* 60 Neb. 1, a conveyance to a creditor was avoided, but there the creditor had paid the excess to the debtor in cash, and thereby enabled him to delay other creditors, and, moreover, had full knowledge of the debtor's fraudulent intent. Its agents participated in the fraud. They paid in cash a part of the consideration for the property taken, knowing that thereby the other creditors would be delayed, hindered and defrauded. In *Switz v. Bruce,* 16 Neb. 463, the preferred creditor also paid money to the failing debtor and purchased all his property, knowing that the aggrieved creditor was

pressing his claim and that the assailed transfer would prevent the collection thereof. The facts in this case above stated are sufficient to distinguish these two cases.

In *Chamberlain Banking House v. Turner-Frazier Mercantile Co.,* 66 Neb. 48, it appears that a chattel mortgage had been given to secure the preferred creditor, who not only canceled his debt and certain other claims, but paid the debtor $500 in money. The contention of the aggrieved creditor was very similar to the contention made in this case. But the facts are different. There all the property owned by the debtor was conveyed, and the preferred creditor knew that the transaction would result in hindering and delaying other creditors. Creditors who deal for the collection of their debts by taking excessive property, paying the balance to the debtor, are classed with other purchasers. Hence, as to them, two rules have become established: First, the rule followed in *Henney Buggy Co. v. Ashenfelter, supra,* and other cases, which will avoid a transfer of property excessive in value, the difference being paid to the debtor with the creditor's knowledge that such sale will result in defrauding other creditors; second, that a creditor may not take property in payment of his debt which is appreciably greater in value than the amount of the debt. The first rule necessarily avoids the transfer made under the circumstances stated therein. The second rule does not necessarily avoid a transfer of property excessive in value. If the purchaser did not actually participate in the fraud, but in good faith accepted the property of his debtor expecting that all of it would be applied upon his debt, he is not a participant, and should not be deprived of his preference. Although this court has not discussed this question, there are cases wherein we have refused to hold a conveyance wholly void when the value of the property exceeded the amount of the debt. See *Bartlett v. Cheesbrough,* 23 Neb. 767; *Lininger v. Herron,* 18 Neb. 450; *Goldsmith v. Erickson,* 48 Neb. 48. Other courts have held frequently, in substance, that, when a creditor without participating in the fraud-

ulent intent of his debtor takes valuable property in excess of his debt, it will be avoided only to the extent of the excess in a suit by aggrieved creditors. *Stamy v. Laning,* 58 Ia. 662; *Ball v. Phenicie,* 94 Mich. 355; *Short v. Tinsley,* 1 Met. (Ky.) 397, 71 Am. Dec. 482; *Gaar, Scott & Co. v. Hart,* 77 Ia. 597.

The leading American decision, and perhaps the earliest one of particular value in the solution of such problems, is *Boyd & Suydam v. Dunlap,* 1 Johns. Ch. (N. Y.) *478. The transfer there considered was one wherein the grantor preferred his son, who was one of his creditors. The property conveyed exceeded the value of the consideration, and, although it was conceded that in law such a conveyance should be adjudicated either as void or as valid because there was no medial course opened to courts of law, yet in equity it was held otherwise, and the grantee was chargeable with the valuation of the property conveyed in excess of the consideration paid. The reasons therefor were expressed by Chancellor Kent in part as follows: "I do not discover, from a view of the pleadings and proofs, such traces of actual and direct fraud, as to feel myself warranted in directing the conveyance of the real estate to be delivered up and canceled, as absolutely null and void. * * * The only question with me has been, whether the plaintiffs ought to be left to their legal remedy, or whether the case affords sufficient ground for a limited interference, by allowing the deed of the real estate to stand as a security only for such consideration as has been shown by the younger Dunlap. There appears to be very considerable inadequacy of price, even admitting the consideration expressed in the deed, and to allow the deed to stand as security only for the true sum due would be doing justice to the parties, and granting a relief which cannot be afforded at law. A court of law can hold no middle course. The entire claim of each party must rest and be determined at law on the single point of the validity of the deed; but it is an ordinary case in this court that a deed, though not absolutely void,

yet, if obtained under inequitable circumstances, should stand only as a security for the sum really due. A deed, fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent. * * * Nothing can be more equitable than this mode of dealing with these conveyances, of such indecisive and dubious aspect that they cannot either be entirely suppressed or entirely supported, with satisfaction and safety." Other courts have reached the same results, somewhat arbitrarily perhaps, by imputing to the parties an intention that the conveyance was intended as security only. *Mitchell v. McKibbon,* 8 N. B. R. 548; *Van Wyck v. Baker,* 16 Hun (N. Y.), 168.

This court has frequently declared void contracts of sale, but only where it was made to appear that the vendee shared the vendor's fraudulent intentions. But, unless it is made plain that the vendee acted with fraudulent intent, such contracts should not be set aside. But, where the case is in doubt, considerable danger of doing one party a great injustice exists, if the strict rules of law are followed, which require that the contract be wholly sustained or wholly defeated. But in cases such as this, where actual fraud of the vendee is not proved, but where he accepts more property than is permitted, it seems necessary to take a medial course. Courts of equity, aided by strenuous efforts of outraged creditors, are frequently unable to detect actual fraud, although the case may savor strongly of its odium, and frequently equitable relief is denied because the court adheres too closely to hard and fast rules. But in such cases, where the vendee has proceeded irregularly, but without fraudulent intent, the transaction is at most only constructively fraudulent. Such is the status of this case, and we consider it necessary to adopt the rule in *Boyd & Suydam v. Dunlap, supra,* which has been followed by many courts.

We are unable to determine the amount of the excess in value of the goods transferred. As above stated it appears that it was at least $1,525. Therefore the plaintiffs and interveners were entitled to judgments against Galczenski for that amount to be distributed among them in the order of their liens. This, however, will be insufficient to pay all their debts, and they contend that they are entitled to more. But because the evidence as to value is unsatisfactory, we are unable to say that they are entitled to more; but can say that because of errors they are entitled to a new trial that this question may be further inquired into. It would seem that defendant Galczenski, being in possession of the goods, would have been able to have given adequate information of the value. He did not do this, probably because the trial court proceeded upon the theory that the adequacy of the consideration was immaterial. Notwithstanding the trial court's theory, a few facts bearing upon the value were developed in addition to those referred to above. At the time of the trial April 9, 1907, the stock then on hand amounted to $5,000 or more. Galczenski had sold goods amounting to $14,-259.18. New goods had been added to the stock, but we are left entirely in the dark as to the value thereof. Under these circumstances, it is absolutely impossible to determine what the value of the property was at the time it was transferred. Galczenski should be permitted or required to furnish this necessary evidence. If he fails in this regard, only one course is open, and that is to charge him with the full amount he received from the business from the time he took charge of it, and declare it subject to the liens of the plaintiffs and interveners, or render personal judgment against him therefor.

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

DUFFIE and GOOD, CC., concur.

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

REVERSED.

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CHARLES H. FALSKEN, APPELLEE, v. FRED E. FARINGTON, APPELLANT.

FILED DECEMBER 5, 1908. No. 15,391.

Notes: PAYMENT. A bank as agent for the payee of a promissory note received the maker's check for the full amount thereof, marked the note "Paid," and gave it to the maker, and immediately delivered to the maker New York exchange for $2,000, representing a part of the amount due upon the note, with the understanding and agreement of the maker that he should apply the $2,000 upon a mortgage owing by the payee. *Held*, That the above transaction was equivalent to a promise of the maker to pay his note by applying the amount of the New York exchange upon the payee's mortgage, and that upon his failure to apply the same the payee may maintain an action upon the note.

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

*Reavis & Reavis,* for appellant.

*Clarence Gillespie* and *Edwin Falloon, contra.*

EPPERSON, C.

Plaintiff sued defendant upon a promissory note, alleging a balance due of $2,000 and interest. Defendant pleaded payment. On July 29, 1899, the plaintiff, then in Kansas City, forwarded the note in controversy to the Falls City State Bank for collection, and gave directions for the distribution of the funds when collected. The bank received defendant's check for the full amount due on the note, and, purporting to act under the plaintiff's directions, gave to the defendant New York exchange for

$2,000, which represented a part only of the amount due upon the note. At the same time the bank marked the note "Paid" and delivered it to the defendant. It has been judicially determined that the conduct of the bank was justified. See *Falsken v. Falls City State Bank,* 71 Neb. 29. It was expressly understood that the New York exchange was to be applied upon a mortgage owing by plaintiff, which the defendant and his former partner as loan brokers had negotiated, and for this purpose was to be forwarded by the defendant to the holder of the mortgage. Instead of applying the $2,000 upon the mortgage, defendant appropriated it to his own use. At the conclusion of the trial each party requested a directed verdict. Plaintiff's request was granted, and defendant appeals.

It appears that the giving of his check for the amount due upon the note and the return to the defendant of the New York exchange was one and the same transaction. The defendant was aware of the fact that he was expected to send the $2,000 to the holder of plaintiff's mortgage in part payment thereof. Not only did he know this at the time he received the New York exchange, but at the inception of the note he knew that the money it represented was intended by the plaintiff to be paid upon the mortgage. The transaction is the mathematical and legal equivalent to an undertaking on the part of the defendant to pay to plaintiff's creditor $2,000 in part payment of his own indebtedness to the plaintiff. His failure to remit to the mortgagee was equivalent to his failure to pay $2,000 upon his note. He admits that he became liable to the plaintiff for the sum of $2,000, the amount of the New York exchange, but says that plaintiff's suit is for money had and received. Defendant substantially agreed that he would pay his note by applying $2,000 of the amount due thereon upon plaintiff's mortgage. He failed to do so. He is not in a position to maintain that he has fully and legally executed his obligation upon the note.

The defendant offered to prove that the holder of

plaintiff's mortgage would not accept payment until the mortgage was due, six months later than the alleged payment of defendant's note. This offer was excluded, and is assigned as error herein. There was no evidence offered tending to show that defendant attempted to make the payment when he received the New York exchange or when the mortgage became due.

Plaintiff further complains of the trial court's order in refusing to strike out a portion of the plaintiff's reply, having reference to allegations setting forth the facts regarding the New York exchange. This error was without prejudice, because under the unobjectionable portions of the pleading and the evidence the plaintiff was entitled to the relief granted.

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.

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HENRY BOLTON ET AL., APPELLANTS, V. THEODORE HEGNER ET AL., APPELLEES.

FILED DECEMBER 5, 1908. No. 15,824.

1. **Intoxicating Liquors: LICENSE: CHARACTER OF APPLICANT.** When the alleged respectable character and standing of an applicant for a liquor license is denied, it is the duty of the licensing board to consider the ignoble acts or crimes which the evidence attributes to the applicant, and from these indices to his character determine whether he is a proper person to receive a license.

2. ———: ———: ———. When it is proved by uncontradicted evidence that an applicant for a license during the preceding year permitted petit gambling in a place of business in his control, and even on one occasion exhibited extremely lascivious pictures, it is the duty of the licensing board to reject his petition.

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

*C. J. Phelps,* for appellants.

*William I. Allen* and *W. M. Cain, contra.*

EPPERSON, C.

The appellees were applicants for a liquor license for the current municipal year. During the preceding two months the applicants were employed by a liquor licensee in the same vicinity, during which time their employer was frequently absent, at one time for two weeks, and at other times for two or three days, and, when absent, his business was in control of the applicants. The appellants remonstrated, denying that the applicants were men of respectable character and standing, and, among other things, alleged that they had on April 11, 1908, permitted gambling and the playing of cards for beer in the place of business so kept by them. In view of the record and the evidence we concern ourselves only with the question of the character of the applicants.

In the trial the city council pursued a course somewhat unusual in such matters. In addition to the consideration of evidence produced by the interested parties, the city council undertook an investigation upon their own account. This was surely a laudable thing to do, and indicated a desire on the part of the city council to learn the facts. The examination of the many witnesses who were remonstrants disclosed that many of them had no personal knowledge of the facts in issue. There was, however, one exception. A witness testified that he had no personal knowledge of the matters in controversy, except that of playing cards for money or its equivalent. For some reason not disclosed by the record, the city attorney did not inquire into this matter minutely, but further examination by remonstrants disclosed

that in the place in which applicants were employed men were permitted to play cards, the value of the stake, as disclosed by this evidence, being only 20 cents. How frequently this had occurred is not shown. Many witnesses called by the remonstrants established the fact that, when the saloon was in charge of the applicants on March 11, a group of customers were permitted to play for a case of 24 bottles of beer. One witness testified that he and another man entered this place of business about the 29th day of March, and, after drinking some beer, witness' companion requested the applicants to show them certain photographs which was done. About a dozen lewd photographs were produced, some of which were as lascivious as it was possible for photographs to be or the mind to imagine. The above is the extent of the evidence which bears upon the character of the applicants. This evidence was not contradicted, nor the facts explained.

It is the purpose of our law to prevent persons who are not of respectable character and standing from obtaining a liquor license. When this question is at issue, a licensing board should make diligent inquiry. They are not limited to the general reputation of the applicants, but must take into consideration whatever ignoble acts or crimes the evidence may attribute to them. The licensing authorities must determine whether the acts and conduct shown as indices to their character are sufficient to disqualify the applicants. Undoubtedly the purpose of this statute and others which render certain acts sufficient to disqualify one from receiving a license is to separate as far as possible all petit crimes and common vices from the saloon. The evidence in this case is insufficient, perhaps, to characterize the place of business, which was at times in charge of the applicants, as a gambling house. Neither do we need to find that the applicants were criminals. It was not a great crime to gamble for 20 cents, nor was it a great crime to gamble for a case of 24 bottles of beer. It was, however, a crime. It is prohibited by our statute. In this particular instance it was indulged

in by loafers with the consent, if not the encouragement, of the applicants. Such a place is a kindergarten of crime. Liquor dealers should not only strictly adhere to the law controlling the liquor traffic, but abide by all the laws. They should not permit even those common vices, especially such as are prohibited by statute, to be indulged in in their places of business, and it is the duty of the officers to see that these laws are strictly enforced. The law looks with disfavor upon kindergartens of vice, and the courts are not permitted to overlook petit crimes.

This is one of five cases which are now before this court, where the conduct of the liquor dealers in the city of Schuyler is inquired into. The general situation does not control the decision of any of the cases, but the traffic is getting beyond circumscribed bounds. Mere boys in their teens have been found intoxicated. In some instances they were permitted to loaf around card tables of the saloons, and we are not surprised to find numerous citizens joining in these remonstrances, requiring the city authorities to make this investigation, which should have been voluntary on their part. In this case the conduct of the applicants in exhibiting lascivious pictures and by encouraging or permitting petit gambling has rendered them ineligible as licensees during the current year.

We recommend that the judgment of the district court be reversed and this cause remanded, with instructions to the district court to enter a judgment canceling the license.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, this case is reversed and remanded, with instructions to the lower court to enter judgment canceling the said license.

REVERSED.

JAMES WOODS ET AL., APPELLANTS, V. THOMAS GARVEY, APPELLEE.

FILED DECEMBER 5, 1908. No. 15,825.

**Intoxicating Liquors:** LICENSE: CHARACTER OF APPLICANT. One who is frequently under the influence of intoxicating liquors, and who during the preceding year permitted gambling in his place of business, is not a man of respectable character and standing within the meaning of section 7150, Ann. St. 1907, and therefore not entitled to a license permitting him to sell intoxicating liquors.

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

*C. J. Phelps,* for appellants.

*W. M. Cain, contra.*

EPPERSON, C.

The appellee made application to the city board of Schuyler for a liquor license for the municipal year ending May 5, 1909. A remonstrance was filed by the appellants, in which, among other things, it was denied that the applicant was a man of respectable character, and alleged that he is an habitual drunkard, and that he had during the preceding year allowed gambling at his place of business. One witness testified that he had been acquainted with the applicant three or four years, and during that time had seen him under the influence of liquor "a considerable number of times." This was corroborated by a witness who testified that within the last year he saw the applicant at one time under the influence of liquor, and at another time considered him drunk. This evidence is not sufficient to characterize the applicant as an habitual drunkard, but is sufficient to show that he is not a man of respectable character and standing, which the statute provides that a licensee should be. And one

of his own witnesses testified upon cross-examination as follows: "Q. You have been in there more or less during the last year? A. Yes, sir; I have. Q. What for? A. I have played cards for cigars, beer or chips. Q. And used the chips to pay for cigars, beer or whiskey? A. Yes, sir. Q. And that has been in the last year? A. Yes, sir." None of the evidence above quoted or referred to was contradicted or explained by the applicant, and we presume that he knew of the gambling and permitted it. With such evidence remaining unexplained the city council should have denied his application.

We recommend that the judgment of the district court affirming the order of the city council be reversed and this cause be remanded, with instructions to the district court to enter judgment canceling the license.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, this cause is remanded, with instructions to the district court to enter judgment canceling the license.

REVERSED.

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WILLIAM A. WILTROUT, APPELLEE, V. J. R. SHOWERS, APPELLANT.

FILED DECEMBER 5, 1908. No. 15,346.

1. **Judgment:** CONCLUSIVENESS. Parties to a judgment are not bound by it in a subsequent action unless they were adverse parties in the original action.

2. ———: ———. In an action upon a promissory note against W., the maker, and S., who assumed and agreed to pay the note, and where no issue is joined as between W. and S. as to the contract of assumption of payment, the rendition of a judgment of dismissal as to S. will not in a subsequent action against him by W. to recover damages for a breach of the contract constitute a defense.

3. **Parol Evidence: DEED: CONSIDERATION.** An agreement to pay an existing note and mortgage as part of the consideration for a conveyance of the mortgaged premises may be established by parol testimony.

4. **Pleading: AFFIRMATIVE DEFENSE.** A defendant cannot avail himself of an affirmative defense unless such defense is pleaded and sustained by sufficient evidence.

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

*W. S. Morlan,* for appellant.

*W. R. Starr* and *P. E. Reeder, contra.*

GOOD, C.

Plaintiff brought this action in the district court for Hayes county to recover damages for breach of an oral contract whereby the defendant assumed and agreed to pay a certain note and mortgage previously executed by plaintiff. A jury was waived and trial had to the court, resulting in a judgment for plaintiff. The defendant has appealed.

The plaintiff Wiltrout was the owner of a tract of land in Hayes county which he had mortgaged to secure his principal promissory note for $500, with interest coupons attached. He afterwards sold and conveyed the land to the defendant Showers. The consideration agreed upon was $3,800. The defendant paid $3,300, and orally assumed and agreed to pay the notes and mortgage for the remainder of the purchase price of the land. The deed contained a covenant warranting the premises to be free of incumbrance. Showers neglected to pay the notes and mortgage, and after they became due the holder brought an action at law in the county court against both Wiltrout and Showers to recover upon the notes. In that action Wiltrout made default and Showers answered, denying liability. Showers, however, paid $475 upon the notes before the case came to trial in the county court, leaving

unpaid a balance of $294.93. The county court found Showers not liable, and entered judgment of dismissal as to him, but rendered judgment against Wiltrout for the unpaid balance and costs of action. Thereafter execution was issued upon this judgment and payment thereof enforced from Wiltrout, who then brought this action against Showers to recover the amount of the judgment, costs and interest which he had been compelled to pay. In the instant case Showers set out in his answer the judgment recovered in the county court, and averred that the matters in controversy in this action are *res judicata,* and also set out the deed of conveyance by which he obtained title to the land, and alleged that Wiltrout is estopped by the covenants in his deed from maintaining this action.

In this court the defendant urges that the judgment entered in the court below is erroneous because the record discloses that the matter in controversy in this action had been litigated and decided in the county court, and that by reason thereof the matter had become *res judicata.* The action in the county court was brought by the holder of the notes and mortgage, and a recovery was sought upon the principal promissory note and one interest coupon. The plaintiff also set out in his petition the facts with reference to the agreement of Showers to assume and pay the notes as a part of the purchase price of the land. As between the two defendants in that action no issue was joined. Wiltrout and Showers were not adverse parties. The question of liability of Showers on the oral contract to assume and pay the notes was not litigated and determined as between Wiltrout and Showers. The rule of law is well settled that parties to a judgment are not bound by it in a subsequent action unless they were adverse parties in the original action. 1 Freeman, Judgments (4th ed.), sec. 158; 2 Black, Judgments (2d ed.), sec. 599; *Pioneer Savings & Loan Co. v. Bartsch,* 51 Minn. 474. The bar of former adjudication can only be raised between those who were adverse parties in the former suit, and the judgment in the former suit settles nothing as to

the relative rights or liability of the codefendants as between themselves unless their conflicting claims were put in issue by cross-petition or adverse answers and were actually litigated and adjudicated. 23 Cyc. 1279; *Whitesell v. Strickler,* 167 Ind. 602. In *Buffington v. Cook,* 35 Ala. 312, 73 Am. Dec. 491, being an action for contribution between two parties where the record of the former trial showed that judgment had been rendered against the two jointly and that one party had paid the judgment, it was held not sufficient to establish the relative liability of the defendants as between themselves. To the same effect is *McMahan v. Geiger,* 73 Mo. 145, 39 Am. Rep. 489. In an action against several obligors upon a bond one of the alleged sureties was exonerated. In a subsequent action against him for contribution by one of the sureties against whom judgment had been rendered, and who had paid the judgment, it was held that the former judgment was not a bar to recovery in the subsequent action. *Koelsch v. Mixer,* 52 Ohio St. 207. It is plain that the matters in controversy in this action were not in issue and were not litigated and decided as between the parties in the former action. It follows that the defense of former adjudication was not sustained.

Defendant contends that parol evidence is not admissible to prove the contract whereby Showers assumed and agreed to pay the notes and mortgage. His theory of the case is that the deed constitutes the contract, and he invokes the well-known rule that the terms of a written contract cannot be altered or varied by parol testimony. It should be observed that the contract whereby the defendant assumed and agreed to pay the mortgage is not a necessary part of the deed of conveyance. Such contract may exist separate and apart from the deed. Another general rule of law that is applicable to the case is that the true consideration for a deed of conveyance may be inquired into and ascertained by parol evidence. The reason for this rule is that a change in or contradiction of the expressed consideration does not in any manner affect the

covenants of the grantor or grantee, and neither enlarges nor limits the grant. 17 Cyc. 653. Where a grantee in a deed of conveyance, as a part of the consideration therefor, assumes and agrees to pay an existing incumbrance, such an agreement may be shown by parol testimony, even though the deed contains a covenant of warranty against incumbrance, for the reason that such evidence does not destroy the warranty, but leaves it in full force and effect except as to the specific incumbrance, the payment or assumption of which was part of the consideration. 17 Cyc. 655. This question has been before this court on several occasions where the doctrine herein announced has been upheld. *Rockwell v. Blair Savings Bank,* 31 Neb. 128; *Reynolds v. Dietz,* 39 Neb. 180. In the latter case it is said: "An agreement to pay an existing mortgage, as part of the consideration for a conveyance of mortgaged premises, need not be inserted in the deed, neither must it necessarily be in writing. Such an agreement is an independent undertaking of the the party making it, the conveyance affording sufficient consideration to sustain it when its existence is established by a preponderance of evidence." The same question was before the supreme court of Michigan in the case of *Strohauer v. Voltz,* 42 Mich. 444. In that case a deed of conveyance recited a consideration of $3,000 and that the same was subject to a certain mortgage for $1,000. It was held competent to show by parol that the consideration was $4,000 and that the grantee agreed to personally pay the $1,000 mortgage. That case is very similar to the one at bar. There, as here, the grantee failed to pay the mortgage which he had orally assumed to pay, and judgment was rendered against the grantor, and he in turn brought action against his grantee to recover damages sustained by breach of the contract. It was held that he was entitled to recover. The following cases hold to the same doctrine. *Hays v. Peck,* 107 Ind. 389; *Bossingham v. Syck,* 118 Ia. 192; *Dennett v. Short,* 7 Me. 150, 20 Am. Dec. 356; 17 Cyc. 655, and cases there cited.

Defendant contends that the evidence is insufficient to show the oral agreement to assume and pay the note and mortgage. If by that the defendant had reference to the proving of the contract by parol testimony, his contention has been disposed of. The parol testimony of the plaintiff is plain and unequivocal that the defendant agreed to pay $3,800 for the land; that he paid $3,300; that for the other $500 he assumed and agreed to pay the notes and mortgage. This evidence is nowhere contradicted. It is ample to prove the contract.

Defendant urges that, even if he assumed to pay the notes and mortgage, he had been discharged from his obligation; that by the payment of the $475 he was to be released and discharged from any further liability. He contends that by the contract of assumption he became the principal and the plaintiff herein the surety, and that he having been discharged by reason of the payment would work a discharge of the surety, and that plaintiff was not bound to pay the judgment obtained against him in the county court. No such defense was pleaded by the defendant in his answer. This question was not an issue in the case, and, had it been an issue, the evidence would not sustain his contention. The evidence goes no further than to show that the defendant paid $475 upon the obligation which he should have paid in full. The evidence does not show that any composition or settlement was made between the defendant and the holder of the notes and mortgage. The record clearly shows the making of the contract, the breach thereof, and that plaintiff has sustained damages in consequence thereof in the amount for which judgment was rendered in the district court.

The judgment appears to have been properly rendered. No reversible error is shown, and we recommend that the judgment 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.

CONTINENTAL LUMBER COMPANY, APPELLANT, V. MUNSHAW & COMPANY, APPELLEE.

FILED DECEMBER 5, 1908. No. 15,374.

1. Trial: INTENT: QUESTION FOR JURY. When the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of a jury. *Continental Lumber Co. v. Munshaw & Co.*, 77 Neb. 456, followed and approved.

2. Appeal: EVIDENCE: HARMLESS ERROR. The admission of incompetent testimony will not work a reversal of a case unless it appears that such evidence was prejudicial to the complaining party.

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

*E. R. Leigh,* for appellant.

*A. H. Murdock, contra.*

GOOD, C.

This is the second submission of this case in this court. A statement of the issues and facts involved may be found in the former opinion, reported in 77 Neb. 456. After the case was remanded to the district court the defendant filed a supplemental answer, in which it was alleged that plaintiff had, subsequently to the former trial, exercised ownership over the lumber that was alleged to have been sold and delivered to the defendant, by offering to sell the lumber to third parties. Plaintiff replied that the offer to sell was made at the instance of the defendant, and that the offer that was made was an attempt to compromise and settle the differences between the parties. A trial resulted in a verdict and judgment for defendant for the amount of its counterclaim for freight advanced upon the car-load of lumber. From this judgment plaintiff has appealed.

Plaintiff contends that the evidence is insufficient to

support the verdict, and claims that defendant's letter of December 17, 1903, wherein it objected to the quality of the lumber and asked for a credit slip for $30.71, was in the nature of a claim for damages, and showed that defendant had elected to accept the lumber and stand upon a claim for damages, instead of refusing to accept the lumber. The correspondence is set out in the former opinion referred to. In that opinion it was held: "When the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of the jury." The facts and circumstances relating to the acceptance of the lumber were fully before the court, and it was determined that the question was one of fact to be submitted to the jury. Upon the second trial the evidence was similar to that given on the first trial. There was some conflict and some ambiguity in the circumstances, and different inferences might have been drawn from the facts and circumstances proved. We think the principle of law announced in the former opinion is particularly applicable to the present situation. Under the circumstances, the question was one for the determination of a jury, and its finding thereon is final. In this connection we might remark that we think the entire correspondence, taken together, shows that the plaintiff sought to rescind the contract when it ordered the defendant to keep the lumber intact and to hold it subject to its disposition; and when defendant thereafter refused to accept the lumber, except upon the conditions named in its letter of December 17, there was a practical abandonment of the contract. We think the principle of law announced in *Herpolsheimer v. Christopher,* 76 Neb. 352, is applicable to this case. In that case it was held: "A contract will be treated as abandoned, where the acts of one party, inconsistent with its existence, are acquiesced in by the other."

Plaintiff pleaded and attempted to prove that a custom existed among lumber dealers in the community to submit to an inspector any controversy arising between the re-

tailer and the wholesaler as to the quality of the lumber. Plaintiff contends that under the showing made it was entitled to have a verdict directed in its favor. On this point the evidence tends to show that defendant in purchasing the lumber refused to sign a written order for the lumber, whereby he might be bound by stipulations he did not fully understand. It further shows that plaintiff's salesman represented the lumber to be number 2 shiplap, as good as sold by any other manufacturer. It also tends to show that defendant had no knowledge of the rules and regulations of the said lumber dealers' association with reference to the grading of the lumber, and there is nothing in the rules offered in evidence which would bind the defendant to accept and abide by the result of an inspection. Under these circumstances, it could not be held as a matter of law that defendant was bound to submit to or abide by an inspection of the lumber. The order was for a car-load of number 2 shiplap. Under the contract of purchase defendant was entitled to a car-load of lumber of that grade. Plaintiff could not, under the contract, require the defendant to accept a different kind of lumber, or to accept a car-load of lumber a considerable portion of which was below the grade agreed upon. The car in question contained something over 23,000 feet of lumber. Defendant claimed, and his evidence tended to show, that more than 10,000 feet of lumber were below grade. Plaintiff conceded that 862 feet of lumber were below grade. As was indicated in the former opinion, this was sufficient to give the defendant a right to refuse the lumber. The principal question, therefore, was whether the defendant did in fact accept the lumber. This question was fairly submitted to the jury and determined adversely to the plaintiff.

The trial court admitted in evidence over plaintiff's objection a letter written by it to a Mr. Young. This letter disclosed that there was a controversy between plaintiff and defendant regarding the lumber, and plaintiff

therein offered to sell the lumber to said Young at a certain price upon the condition that the defendant would consent thereto. Plaintiff urges that this letter was incompetent because it showed an offer of compromise, and was prejudicial as tending to show that plaintiff was assuming to exercise ownership over the lumber. We think the letter shows neither an offer of compromise nor assumption of ownership over the lumber by the plaintiff. The evidence may have been immaterial, but we think it was not prejudicial, because it had no bearing on the only issue of fact submitted for the jury's determination, and disclosed nothing to the jury that had not been disclosed by competent evidence.

The evidence shows that upon the trial of the case in the district court the defendant offered specimens of the lumber in evidence. Plaintiff contends that defendant, in using the lumber to offer in evidence, exercised acts of ownership over the lumber which were inconsistent with its position that it had refused to accept the lumber. It is also disclosed that the plaintiff offered in evidence samples of the lumber. If taking samples of the lumber and offering in evidence was an exercise of ownership, then both parties were in the same position. We think neither is entitled to take any advantage of the other's act in this respect. Such acts might be submitted to the jury for consideration in determining the question as to whether or not the defendant had accepted the lumber. The mere fact of this use of a few pieces of lumber by the defendant, especially in view of the fact that the plaintiff had made a like use of certain parts of the lumber, would not justify the court in saying as a matter of law that defendant had accepted the lumber. There are other errors of law assigned, but the view that we have taken of the case makes it unnecessary to consider them. The only live question in the case was whether or not the defendant accepted the lumber, and that question was properly submitted to the jury for its determination.

The verdict is conclusive. We therefore recommend that the judgment 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.

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F. J. GENTRY, GUARDIAN, APPELLANT, V. SARAH A. BEARSS ET AL., APPELLEES.

FILED DECEMBER 5, 1908. No. 15,407.

1. **Pleading:** CAPACITY TO SUE: WAIVER. If the petition on its face discloses plaintiff's lack of capacity to sue, such defense will be waived unless raised by demurrer.

2. **Statutes:** CONSTRUCTION. As a general rule, when a state adopts a statute from another state, it also adopts the construction which has been previously placed upon it by the courts of the state from which taken.

3. **Guardian and Ward:** SALE BY GUARDIAN: VALIDITY. Under general sections 1530, 1535 and 1536 of the Oklahoma statutes, 1893, a guardian of a minor cannot make a valid sale of a ward's personal estate without the authorization of court, and a sale without such authority will be void and vest no title in the purchaser.

4. ———: ———: RECOVERY FROM PURCHASER. In an action by a guardian of a minor to recover property of his ward from one who has purchased such property from a former guardian who had not the court's authority to sell, it is not incumbent on the plaintiff to return or offer to return the purchase price, when it appears that no part thereof ever came to the plaintiff's hands, and in the absence of evidence that the purchase money was used for the minor's benefit.

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

*Warren Pratt,* for appellant.

*N. P. McDonald* and *John N. Dryden, contra.*

GOOD, C.

This action was instituted in the district court for Buffalo county by F. J. Gentry, as guardian of Otto J. Worrell, a minor, to determine the ownership of a promissory note and a real estate mortgage securing the same, and for foreclosure of the mortgage. The facts out of which this action arises are as follows: In 1903 A. A. Davies, as guardian of Otto J. Hansen, a minor, loaned $1,000 of his ward's funds to Sarah A. and Sylvester Bearss upon their promissory note secured by a mortgage on real estate in Buffalo county. The note and mortgage were made payable to Davies, as guardian. Hansen, the minor, was adopted by John B. Worrell and wife, and his name was changed to Otto J. Worrell. Davies resigned as guardian, and John B. Worrell was appointed in his stead by the probate court of Grant county, in the territory of Oklahoma. Davies transferred the property of his ward, including the Bearss note and mortgage, to John B. Worrell, the guardian of said minor. The note was indorsed and the mortgage assigned to John B. Worrell, as guardian of said minor. March 15, 1904, John B. Worrell undertook to sell the Bearss note and mortgage, and in pursuance of his purpose indorsed the note and assigned the mortgage to Edward J. Scott, and received therefor from Scott the sum of $1,010. Worrell, as guardian, obtained no order from the court authorizing the sale of the note and mortgage, other than the authority contained in the order of the court appointing him guardian. Some time thereafter John B. Worrell was removed as guardian of said minor, and F. J. Gentry was appointed in his stead by the probate court of Grant county. Worrell never paid over any of the proceeds derived from the sale of the note and mortgage to his successor, nor did he turn over to his successor any property of his ward. Subsequent to the giving of the note and mortgage in question the Bearsses transferred the real estate covered by the mortgage to Frank E. Wilcox. Gentry brought this action against the

Bearsses, Wilcox and wife, and Edward J. Scott, alleging the facts above set forth, and further alleged that the note and mortgage were in the possession of the defendant Edward J. Scott. Plaintiff prayed to be adjudged to have title and right of possession to the note and mortgage, and for a decree of foreclosure.

The defendants Sarah A. and Sylvester Bearss and Wilcox and wife admitted the making of the note and mortgage, and Wilcox alleged the payment of two instalments of interest to Scott, and that he was ready and willing to pay the amount then due upon the note and mortgage to the person the court should decide entitled thereto, and also demanded judgment against Scott for the interest paid to him in the event it should be held that plaintiff was entitled to recover such interest. The defendant Scott alleged that the sale of the note and mortgage to him by Worrell was made pursuant to an order of the probate court of Grant county, Oklahoma, and that Worrell represented at the time of the purchase that he had good right and lawful authority to sell and assign the said note and mortgage, and that said defendant Scott had no notice of any lack of authority on the part of Worrell to make a valid sale and transfer. He alleged that the amount paid by said defendant for said mortgage was the full value thereof; that no part thereof had been repaid to him, nor had any offer been made to return the same, and the plaintiff was thereby estopped to claim any interest in or title to the note and mortgage. He also alleged that plaintiff did not have legal capacity to sue. The plaintiff replied, denying the new matter set up in the answers. Upon the trial of the issues the court found in favor of the defendants and against the plaintiff, and that the defendant Edward J. Scott was the owner of the notes and mortgage and was entitled to receive payment thereof. Judgment was rendered dismissing plaintiff's cause of action. From that judgment the plaintiff has appealed.

At the outset we are confronted with the question of plaintiff's right to maintain this action. Defendants con-

tend that, as plaintiff is a guardian appointed in another state or territory, he has not legal capacity to sue in this state. It is undoubtedly the general rule that a guardian cannot sue in the courts of another state than that of his appointment unless by statutory authority of such other state. It is a general rule that, if the petition on its face discloses a lack of capacity to sue, the defense will be waived unless raised by demurrer. 2 Abbott, Trial Brief (2d ed.), p. 1341; 15 Ency. Pl. & Pr. 473, 474. Section 94 of the code provides that lack of legal capacity to sue is a ground of demurrer if that fact appears upon the face of its petition. Section 96 authorizes the question to be raised by answer where it is not disclosed upon the face of its petition, and provides that the defense shall be waived unless taken advantage of by answer or demurrer. The construction which these sections have received by this court makes it clear that lack of capacity to sue, if disclosed upon the face of the petition, will be waived unless taken advantage of by demurrer. *Claire v. Claire,* 10 Neb. 54; *Lederer v. Union Savings Bank,* 52 Neb. 133; *Clark v. Carey,* 41 Neb. 780; *Union P. R. Co. v. Vincent,* 58 Neb. 171; *Castile v. Ford,* 53 Neb. 507. The petition in this case clearly shows upon its face the plaintiff's lack of capacity to sue. The defendants failed to demur and thereby waived this defense.

Plaintiff contends that the transfer of the note and mortgage by Worrell as guardian was absolutely void, and that the title thereto never passed to the defendant Scott, because said Worrell had never been authorized by the court making his appointment, or any other court, to sell or dispose of the note and mortgage. The law of Oklahoma then in force relating to the right of guardians to sell and dispose of personal property of the ward is contained in general sections 1530, 1535 and 1536 of the Oklahoma statutes of 1893. They are as follows:

"When the income of an estate under guardianship is (in)sufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guar-

dian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

"If it appear to the court or judge, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate or some part of it, the court must order the sale to be made.

"A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all parties interested therein, and the next of kin, notice need not be served personally or by publication."

These sections of the Oklahoma statute appear to have been adopted from California. Previous to their adoption they had been construed by the supreme court of California in the case of *Kendall v. Miller,* 9 Cal. 592, wherein the court held that a guardian could not sell the personal property of his ward without the order of the court, and that any such sale was void. This ruling was reaffirmed in the case of *De La Montagnie v. Union Ins. Co.,* 42 Cal. 290. It is a general principle of law that, when one state adopts a statute from another state, it also adopts the construction which has been previously placed upon it by the courts of the state from which it is taken. The provisions of the Oklahoma statute are somewhat similar to

those of Nebraska relating to the right of a guardian to sell or dispose of the property of his ward. In *Hendrix v. Richards,* 57 Neb. 794, it was held that a guardian must have a prior authorization of the court to sell or transfer property of his ward. This ruling was approved and followed in *In re Estate of O'Brien,* 80 Neb. 125. A consideration of these authorities makes it clear that Worrell could not lawfully sell and dispose of the note and mortgage without first obtaining an order of the court authorizing him so to do. The evidence discloses that no other order of the court was had except that contained in the order appointing Worrell his guardian. It seems clear that that order was wholly insufficient to authorize a sale of the property. It went no further than to direct Worrell to receive and collect the property of his ward. Indeed, the statute appears to make it clear that it was necessary to make application for the order and give notice and have a hearing thereupon. No application was made, no notice given, no hearing was had, and no order such as was contemplated by the statute was ever made authorizing Worrell to sell the note and mortgage. In *Bachelor v. Korb,* 58 Neb. 122, a sale of real estate by a guardian was held void because the guardian had not given a bond, and had not taken the oath "before fixing on the time and place of sale." The court held that the wards could recover the real estate, and without returning the purchase price. We think it is clear that the attempted sale was void, and the title to the note and mortgage did not pass to Scott.

The defendant Scott contends that he is an innocent holder of the note and mortgage, and that plaintiff cannot maintain the action without returning, or offering to return, the consideration paid to the former guardian for the note and mortgage. The note and mortgage both showed that they were not the property of Worrell, but the property of his ward. The very indorsement and assignment by which Scott claims to have acquired the title discloses that the note and mortgage were the property of the minor, and Scott was bound to take notice of the law

that required the guardian to obtain an order from the court before he could make a lawful sale. It was Scott's duty to ascertain whether Worrell had sufficient authority. If he failed to do so, it was his own fault. No prudent person, under these circumstances, would have accepted the note and mortgage without first making the inquiry, and a proper inquiry would have disclosed that Worrell was without authority to sell the note and mortgage. Scott was not an innocent holder. *O'Herron v. Gray,* 168 Mass. 573; *Gillespie v. Crawford,* 42 S. W. (Tex. Civ. App.) 621. The evidence fails to disclose that the minor ever received any benefit from the money paid by Scott to Worrell. No part of the proceeds of the sale of the note and mortgage ever came to the hands of the present guardian. If the fund were in the hands of the present guardian who now represents the minor, a different situation would be presented. The record discloses that the money never came into the hands of the plaintiff, and fails to show that any of it was expended for the benefit or use of the minor. Under these circumstances, the plaintiff cannot be required to return or tender the consideration paid by Scott as a condition to his maintaining the present action.

The defendants urge that, because the plaintiff has a right of action against Worrell and his bondsmen to recover the value of the trust property that came to Worrell's possession, the plaintiff should be remitted to such action. It is not questioned but that plaintiff might have sued Worrell and his bondsmen, but the plaintiff has the right of election as to which course he will pursue, and it is not for the defendants to dictate.

After considering all of the questions presented, we are of the opinion that the judgment of the district court should be reversed and the cause remanded for further proceedings according to law, and we so recommend.

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 according to law.

REVERSED.

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HENRY M. KEMP, APPELLANT, V. MELVIN A. KEMP ET AL., APPELLEES.

FILED DECEMBER 5, 1908. No. 15,251.

Deeds: CANCELATION: EVIDENCE. Evidence examined and set out in the opinion *held* ample to sustain the findings and judgment of the district court.

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

*Berge, Morning & Ledwith,* for appellant.

*A. M. Post, contra.*

FAWCETT, C.

This action was brought in the district court for Colfax county to obtain the cancelation of a deed executed by plaintiff and his former wife to the defendant Melvin A. Kemp; to require defendants to reconvey to plaintiff the real estate described in said deed; to permit the return by plaintiff to defendant Melvin of certain notes and a bond which had been executed by said defendant and delivered to plaintiff; and to quiet the title of said real estate in plaintiff, on the ground that said defendant, who is the son of plaintiff, had obtained said deed from plaintiff through undue influence exercised over plaintiff at a time when plaintiff's wife, defendant's mother, was dangerously ill, and plaintiff, by reason thereof, was not competent to deal at arm's length with said defendant, and alleges that there was an oral agreement giving him the right to demand a reconveyance of the property in case he at any time became dissatisfied.

In a separate answer, defendant Melvin admits the relationship of the parties and the subsequent remarriage of his father; denies all allegations of fraud or undue influence; and alleges that the contract entered into between himself and his father and mother was not only voluntary on the part of his parents, but was upon their earnest solicitation; that a prior contract entered into between himself and his father on October 1, 1896, of a somewhat similar character to the one in controversy was written out by the father; that its terms were all complied with by defendant, and that the subsequent contract of January 26, 1898, set out in plaintiff's petition, was also voluntary on the part of plaintiff, and, in fact, entered into at the solicitation of the plaintiff; that in arranging the details of said later contract each of the parties was represented by competent counsel; that the papers were prepared and executed by the parties in the office of plaintiff's attorney; denies all fraud and undue influence in the execution of said later contract; alleges that defendant has duly performed all the conditions of said later contract, and that both plaintiff and defendant, ever since the execution of said contract, have acquiesced in and acted in accordance with the terms and conditions thereof; that no oral agreement ever existed at the time of the execution of either of said contracts for a reconveyance of the property to plaintiff; that, if any such oral agreement had been entered into, the same would be void under the provisions of sections 3 and 5, ch. 32, Comp. St. 1895; alleges that by reason of the relation of landlord and tenant existing between the parties, particularly described in the petition and answer, plaintiff is now estopped to dispute defendant's title to said real estate or to assert title thereto adverse to defendant; and denies all allegations in plaintiff's petition not admitted by the answer. The defendant, Mary Kemp, wife of Melvin, adopts all of the several allegations in the answer of her husband, and makes the same her answer. The reply was a general denial. The court found generally in favor of

defendants and entered judgment dismissing plaintiff's action. A motion for new trial was filed and overruled. Plaintiff appeals. The assignment of errors is as follows: "(1) The court erred in entering judgment in favor of said defendants and against plaintiff. (2) The court erred in deciding the issues joined in said action against said plaintiff and dismissing the plaintiff's petition. (3) The judgment and findings of the court are contrary to law. (4) The judgment and findings of the court are contrary to the evidence. (5) Under the law and the evidence, the judgment should have been in favor of the plaintiff as prayed in the petition. (6) Errors of law occurring at the trial duly excepted to by said plaintiff." Under the well-settled practice in this court, none of the above assignments of error can be considered except the fourth—"The judgment and findings of the court are contrary to the evidence."

The facts as disclosed by the record are substantially as follows: Plaintiff's children, with the exception of defendant, had all married and started in life for themselves. Defendant was 22 years of age, and engaged to be married. He told his parents that it was his intention to go farther west and establish a home for himself. As to this point there is a conflict in the evidence. Plaintiff says that defendant commenced importuning the father and mother to convey the farm to him, and that he would support them. Plaintiff says he objected, for the reason that he did not think it would be a wise thing to do, but that the mother, who was quite infirm and in a nervous condition, could not bear the thought of the son leaving, and that she importuned plaintiff to accede to the son's demands; that his reason for acceding to the son's demands was that he wanted to pacify his wife, and, as far as possible, prolong her life. The testimony of the son is that the proposition to deed the farm to him came from his father, and did not meet with his approval; that the matter was discussed between them for a couple of weeks, the father and mother both wanting him to take a deed to

the farm, and bring his prospective wife there, and take charge of everything, and that he finally agreed to submit the matter to his affianced. Defendant and his wife both testify that, when he submitted the proposition to her, she objected, stating that she would prefer to have a home of their own; but, after discussing the matter on several occasions, she finally yielded, and the agreement was entered into. A contract was drawn up, by the father himself, which the son signed. This contract provided the terms upon which the son was to take the farm, and the support that he was to give the old people. He was to pay an outstanding note against the old gentleman of $80, was to care for the old folks, and give them a home on the place. The old lady was to have a barn fowl for her use whenever she desired it, and, in addition, the son was to pay the old folks $70 a year for their clothing. In accordance with this contract, the father and mother executed a straight warranty deed to the son, and the son gave back a $4,000 mortgage to act as security for the old people.

The mother is dead. The father claims that his son agreed orally that, if the arrangement did not prove satisfactory to the old people, they could have the deed back whenever they wanted it. This the son emphatically denies. After living together and eating at the same table for a number of months, the old folks became dissatisfied, and retired to two rooms of the house in which they lived and did their own cooking. The son paid the $80 note, and paid the first year's instalment of $70. Before the second year rolled around, the father became very much dissatisfied, and, as he says, demanded a deed from the son. The son denies this, and testifies that what the father wanted was for the son and his wife to move off the place, and give the old folks a lease upon the property, running to them, or the survivor of them, for life, so that they might have the use of the old home as before. The father and son each employed counsel, and they and their respective attorneys met in the office of the father's at-

torney, in Schuyler, where the matters were talked over and adjusted, the result of which was that the father released the $4,000 mortgage which the son had given him; the son gave the father a lease running to his father and mother, or the survivor of them, for life, and also gave notes to the father, aggregating $750, in favor of his brother and two sisters, being $250 to each, and executed a mortgage in favor of his brother and sisters to secure those notes. The son also gave the father his individual bond for $3,000 in which he bound himself not to convey the land to any one during the lifetime of the parents or either of them, and also executed to the father a $3,000 mortgage to secure the bond. Again, nothing was said in any of the papers about any right on the part of the old gentleman to recede from that arrangment and demand a deed. The father insists, however, that again there was an oral agreement that he might call for a deed if he was dissatisfied, which the son emphatically denies; and both attorneys testify that no such talk was had in their presence at the time of the adjustment of the differences between the father and son. The defendant and his wife moved off the premises in accordance with this last agreement, and the plaintiff has been in the possession, use and occupancy of the lands ever since, a period of about eight years. Shortly after his wife's death, and about six years prior to the commencement of this suit, the plaintiff remarried, and we think it is clear from the allegation of his petition that the purpose of this suit is not to gain anything for his other children, as he argued, but that the real purpose is explained by the sixth paragraph of his petition, which reads: "Plaintiff further states that shortly after the execution of said lease and notes the said wife of this plaintiff, Angelina Kemp, died of her before-mentioned ailments, said death taking place on the 14th day of February, 1900, and that thereafter this plaintiff remarried (plaintiff's testimony on the stand would indicate that he remarried the next month. He may possibly be mistaken by a year, but that is the only

construction that can be placed upon his evidence), and is now living with his said wife upon said real estate; that plaintiff is now 83 years of age, and that his present wife is the only person that is now taking care of and assisting him in his home, and that plaintiff is advised that it is quite probable that his present wife would have no legal right to remain upon said premises under the terms of said lease, and that the said defendants are threatening to drive her from said premises upon the death of this plaintiff, and this plaintiff is now dissatisfied with said last-mentioned arrangement and desires to entirely revoke the same, including the execution of the said deed of conveyance here procured from this said plaintiff by reason of the situation in which he was then placed, the sickness of his wife aforesaid, and the undue influence of his son, and plaintiff now brings into court for cancelation and to be returned to the said defendants the said three promissory notes above mentioned and said bond."

Nowhere in his petition does he allege, as a reason for bringing this action, a desire to get the property in shape where his other children may obtain a larger patrimony than the $250 each, represented by defendant's notes. When plaintiff's present wife married him, his deed to the defendant and defendant's life lease to him and to his wife Angelina, or the survivor of them, for their natural lives, was on record so that plaintiff's present wife was well advised by the records that her marriage with plaintiff would not give her any interest, inchoate or otherwise, in the land then occupied by plaintiff. It seems to us, therefore, that when we consider the testimony of the son and his wife, and of the two lawyers who represented the respective parties at the time of the adjustment of their differences in 1900, and plaintiff's long acquiescence in the contract as made, the judgment of the district court was clearly right in dismissing plaintiff's suit.

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.

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CHRIS H. STARKE ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 5, 1908. No. 15,398.

**Railroads:** NEGLIGENCE: EVIDENCE. In an action to recover damages for the killing of an animal by a train of cars upon a railroad track, the mere fact of killing is not sufficient to establish negligence on the part of those in charge of the train. *Burlington & M. R. R. Co. v. Wendt*, 12 Neb. 76.

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

*J. E. Kelby, Fred M. Deweese, F. E. Bishop, Halleck F. Rose* and *L. H. Blackledge,* for appellant.

*A. H. Keeney* and *J. C. Saylor, contra.*

FAWCETT, C.

The petition alleges that on February 9, 1906, defendant negligently and carelessly ran over and killed a horse belonging to plaintiff, which was at the time, without fault on the part of plaintiff, upon defendant's railway track, and prays damages in the sum of $150. The answer is a general denial.

All that the evidence shows is that in November, 1905, plaintiff placed the animal in question with his other horses in a pasture on the south side of defendant's track; that on the morning of February 9, 1906, the dead body of the animal was found lying on the right of way of defendant on the north side of its track; that the marks on the body indicated that it had been struck by an engine; that there was blood and hair on the ties and rails for a dis-

tance of from 40 to 50 yards from where the body of the animal was found; that the track just west of this point is straight for a distance of half a mile; and that a passenger train was scheduled to pass that point, running east, during the night. This is substantially all of the evidence that was offered on the trial of the case. When plaintiff rested, defendant moved the court to direct a verdict in favor of the defendant, which motion was overruled. In this the district court erred. As early as *Burlington & M. R. R. Co. v. Wendt,* 12 Neb. 76, we held: "In an action to recover damages for the killing of an animal by a train of cars upon a railroad track, the mere fact of killing was properly held to be no evidence of negligence on the part of those in charge of the train." The rule there announced has never been overruled or modified in this court.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceeding according to law.

CALKINS and ROOT, CC., concur.

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

REVERSED.

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## FIRST NATIONAL BANK OF ELGIN, APPELLEE, V. TOM ADAMS ET AL., APPELLANTS.

FILED DECEMBER 5, 1908. No. 15,340.

1. **Replevin:** EVIDENCE. In the absence of any direct evidence to the contrary, possession is *prima facie* presumptive evidence of ownership; but, when direct evidence is offered, the fact of possession loses its presumptive character, and is to be considered only in connection with the other facts at its real probative value.

2. **Appeal:** ASSIGNMENTS OF ERROR. Under the practice established by

the statute of 1907 (laws 1907, ch. 162), where the printed brief of the appellant particularly sets out the error in giving a specified instruction alleged to be erroneous, such error will not be disregarded because, in the assignments of error filed in this court by the appellant, the only specification of such error was that made to a group of several instructions, of which this was one.

APPEAL from the district court for Antelope county: JOHN F. BOYD, JUDGE. *Reversed.*

*S. D. Thornton* and *O. A. Williams,* for appellants.

*Jackson & Kelsey, contra.*

CALKINS, C.

This was an action in replevin by plaintiff to recover possession of two horses. The plaintiff alleged a special interest in the property by virtue of a chattel mortgage executed by the defendant Wright, and the answer of the defendant Adams, from whose possession the property was taken by the writ, was a general denial. There was a trial to a jury, and a verdict for the plaintiff, and from a judgment rendered thereon defendant Adams appeals.

1. The defendant complains of error in the instructions given by the court on its own motion. The most serious objection is that made to instruction No. 8, which was: "You are instructed that if the horses replevied were in the actual possession of O. K. Wright when the mortgage was given, and were included in the mortgage, such possession would be presumptive evidence of ownership." An examination of the evidence discloses the fact that the real question at issue was whether the property replevied was owned at the time of the execution of the mortgage by Wright or by Adams; and, while we think there was evidence enough to support a verdict that the property belonged to Wright, there was testimony very strongly tending to show that it was really the property of Adams at the time of the execution of the mortgage. There is a presumption of ownership from the possession of prop-

erty; but this obtains only in cases where there is no actual evidence of ownership. A presumption means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference be disproved. Stephen, Digest of the Law of Evidence, art. 1, p. 4; *Reynolds v. State,* 58 Neb. 49; *Blaco v. State,* 58 Neb. 557. When evidence of actual ownership is introduced, the fact of possession loses its presumptive character. If, under the circumstances shown, possession in one party is inconsistent with the ownership in the other, it may be considered at its probative value. If the circumstances of possession by one are consistent with the ownership of the other, it has no force whatever. In this case both parties introduced evidence of actual ownership. The possession in Wright was not inconsistent with the facts tending to show ownership in the defendant. The instruction given was likely to lead the jury to give great weight to the fact of possession by Wright, when such fact might be entitled to but little consideration.

2. While in the motion for a new trial the above mentioned instruction was separately objected to, in the typewritten assignments of error filed in this court the only objection to this instruction was that made to a group of several, of which this was one. The plaintiff does not in its brief defend the giving of this instruction, but depends upon the rule, so often announced by this court, that an assignment of error directed against a group of instructions is insufficient, and will be considered no further than to ascertain that any one of such instructions was properly given. In cases brought to this court by petition in error this question was too well settled to be disturbed; but the act of 1907, which provides for appeals to the supreme court in civil cases (laws 1907, ch. 162; code, secs. 675-675*e*), if it does not change this rule, renders it inapplicable to cases now brought to this court upon appeal. Section 4 of the act in question provides: "The supreme court shall by general rule provide for the

filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other assignment of errors shall be required beyond or in addition to the foregoing requirement. The supreme court may, however, at its option, consider a plain error not specified in appellant's brief." At the time of the enactment of this statute parties were, by a long-standing rule of this court, required to furnish printed briefs of their points, and citations in support thereof, to the opposite party, and such briefs were to be filed with the clerk of this court. No other or different briefs had ever been required, and these were undoubtedly in the mind of the legislature when this statute was enacted. It provides, as we have seen, that the briefs shall set out particularly each error asserted and intended to be urged, and that no petition or other assignment of error shall be required in addition thereto. We are satisfied that it was the intention of the legislature to simplify the practice in bringing cases to this court, and to require no other assignments of error than those prescribed to be inserted in the printed briefs.

Other errors are assigned, but as they are not likely to recur upon another trial it is unnecessary to notice them.

For the reasons above stated, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

ROOT, C., concurs.

By the Court: For the reasons above stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FIRST NATIONAL BANK OF ELGIN, APPELLEE, V. TOM ADAMS ET AL., APPELLANTS.

FILED DECEMBER 5, 1908. No. 15,341.

APPEAL from the district court for Antelope county: JOHN F. BOYD, JUDGE. *Reversed.*

*S. D. Thornton* and *O. A. Williams,* for appellants.

*Jackson & Kelsey, contra.*

CALKINS, C.

This is an action between the same parties as in *First Nat. Bank v. Adams, ante,* p. 801. It is an ation to recover other property claimed to be covered by the same mortgage. The evidence is similar, and the instructions were practically the same.

It therefore presents the same questions, and we recommend that, for the reasons stated in the opinion in that case, the judgment of the district court be reversed and the cause remanded for further proceedings.

ROOT, C., concurs.

By the Court: For the reasons above stated, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

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KIMBALL BROTHERS COMPANY, APPELLANT, V. MARY FITZGERALD, APPELLEE.

FILED DECEMBER 5, 1908. No. 15,380.

1. **Second Appeal:** LAW OF CASE. Where, in an action brought against an administratrix personally for improvements made upon the real property of the intestate, it is held that the evidence is insufficient to show that the agent actually making the contract had authority from the defendant so to do, the fact that upon a

second trial it appears that the property in question had been set off to the administratrix as dower does not call for a different disposition of the case; the evidence regarding the agency being the same as upon the former trial.

2. Evidence: AUTHORITY OF AGENT: CONCLUSIONS OF WITNESS. The authority of an agent to execute a particular contract cannot be proved by calling as a witness a third party, and asking him who had charge of the principal's business. Such a question calls for the conclusion of the witness, and is properly excluded upon that ground.

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

*O. B. Polk* and *R. S. Mockett,* for appellant.

*T. J. Doyle, contra.*

CALKINS, C.

The first trial of this case resulted in a verdict and judgment for the plaintiff. It was brought to this court by defendant, and the judgment reversed in an opinion by ALBERT, C. (*Fitzgerald v. Kimball Bros. Co.,* 76 Neb. 236), to which we refer for a statement of the facts appearing on the former trial. The second trial in the district court resulted in a verdict for the defendant, and from a judgment rendered on this verdict the plaintiff appeals.

1. The opinion referred to discloses that the case was reversed for the reason that the evidence was insufficient to sustain the verdict. It was there held that the evidence was insufficient to support a finding that Mr. Manahan had authority to sign the contract; that the claim that the contract was ratified by the defendant could not be maintained because it did not appear that it was ever brought to her knowledge that he had exceeded his authority; and that she had a right to assume, as she saw the work progressing, that it was being executed according to the terms of the contract she had authorized Mr. Manahan to make. Upon neither of these points was any

additional or different testimony produced upon the second trial; but it was made to appear that the building in which the elevator was installed had been set apart to the defendant as part of her dower, and that she was entitled to a life estate therein. The plaintiff brought the action against the defendant personally on the theory that, the contract not being executed by her in her representative capacity of administratrix so as to bind the estate, it was her personal obligation. This claim was conceded by this court in the former opinion, and the discovery of the fact that she has a personal interest in the property does not render any of the reasons given for that decision inapplicable.

2. On the second trial the plaintiff called as a witness Mr. Adams, a practicing attorney, who testified that he was acquainted with the Fitzgerald estate in a general way, and knew of Mrs. Fitzgerald's acting as administratrix; that he had had business with the estate, and that he knew who had the charge and general management of the Fitzgerald estate; that he knew the office of Mrs. Fitzgerald; and that when he found anybody there it was Mr. Manahan. Having laid this foundation, the plaintiff asked: "Do you know who had general charge of Mary Fitzgerald's business during the year 1901 and some time prior thereto?" This question was objected to on the ground that it called for the conclusion of the witness, and was incompetent, immaterial and irrelevant. The objection was sustained, and this action of the court is now assigned as error. We think this question was objectionable as calling for the conclusion of the witness. The plaintiff had the benefit of the facts detailed by the witness, and the inferences to be made from those facts should be drawn by the jury, and not by the witness. The additional evidence produced by the plaintiff upon the second trial does not add any material fact to the evidence which was held insufficient to support the former verdict, and the court would have been justified in directing a verdict for the defendant upon the second trial.

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.

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WILLIAM A. CLINGAN, APPELLANT, V. DIXON COUNTY, APPELLEE.

FILED DECEMBER 5, 1908. No. 15,396.

1. Trial: INSTRUCTIONS: CONTRIBUTORY NEGLIGENCE. Any instruction to a jury which conditions the plaintiff's right to recover damages for defendant's negligence upon plaintiff's fault, negligence, want of care or ordinary care submits the question of contributory negligence.

2. ———: ———: ERROR. Where there is no evidence from which the want of ordinary care on the part of the plaintiff is shown or may be inferred, it is prejudicial error to submit to the jury the question of plaintiff's contributory negligence. *Clingan v. Dixon County*, 74 Neb. 807, followed.

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

*J. J. McCarthy* and *W. D. McCarthy*, for appellant.

*C. A. Kingsbury, C. H. Hendrickson* and *F. S. Berry*, *contra.*

CALKINS, C.

This was an action to recover damages for injuries sustained by reason of the negligence of the defendant county in failing to maintain in proper repair a bridge across a stream therein. The first trial resulted in a verdict for the defendant, from which the plaintiff prosecuted error to this court, where the judgment was reversed. *Clingan v. Dixon County*, 74 Neb. 807. The case being remanded,

it was again tried, with the same result; and it is now brought to this court upon the plaintiff's appeal.

1. The former judgment was reversed for the giving of an instruction which submitted to the jury the question of contributory negligence, when the evidence failed to disclose any negligence on the part of the plaintiff. The plaintiff complains that, the evidence still failing to show any negligence on his part, the court again submitted the question in the second trial. The defendant does not claim that upon the second trial there was any evidence of negligence on the part of the plaintiff, but insists that the references made in the charge of the judge as to plaintiff's fault, negligence, want of care or ordinary care, and other similar words, do not constitute a submission to the jury of that question. The first instruction given to the jury upon the request of the defendant was as follows: "You are instructed that the plaintiff was bound to exercise ordinary care for his personal safety while passing or riding along or over the public highway of the defendant; and, if the jury believe from the evidence that plaintiff's negligence, if any, contributed directly to the alleged injury, then you will find for the defendant." We do not understand how, in the face of the giving of this instruction, the defendant can contend that the question of contributory negligence was not submitted to the jury. But this is not all. In three of the instructions, given by the court on its own motion, the jury were, in substance, told that the injuries must have resulted from the negligence of the defendant, and not from any fault, negligence or want of ordinary care on the part of the plaintiff. This constitutes a submission of the question of contributory negligence and is in direct violation of the rule laid down on the former hearing of this case.

2. The plaintiff, who was riding horseback along the highway, was found injured and unconscious upon the bridge in question. He was unable to give any account of how the accident occurred, and did not regain conscious-

ness for a considerable time after he was discovered. It is perfectly clear that the bridge was in a dangerous condition, one of the planks being broken in such a way that its unsafe state would only be disclosed when weight was placed upon it. The witness who first discovered the plaintiff testified that the horse which he had been riding had its hind feet in the hole caused by the broken plank. It was the theory of the defense that the horse had fallen because the bridge was wet and slippery, and not from stepping upon the broken plank. This question was for the jury, and the evidence would have sustained a verdict for the plaintiff. Under these circumstances, there being no evidence from which the want of care is shown or might be inferred, we think the plaintiff was entitled to an instruction submitting the question whether the injury was caused by the negligence of the defendant, without such instruction in any manner calling the attention of the jury to the principle of law requiring him to use ordinary care to prevent an injury.

We therefore recommend that the judgment of the district court be reversed and that the cause be remanded for further proceedings in accordance with this opinion.

FAWCETT and ROOT, 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 accordance therewith.

REVERSED.

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DOUGLAS COUNTY, APPELLANT, V. DUNCAN M. VINSONHALER ET AL., APPELLEES.

FILED DECEMBER 5, 1908. No. 15,488.

1. **County Judges:** LIABILITY FOR FEES. Where an action is brought against a county judge and his surety for a failure to report fees, in excess of the amount allowed him as compensation, earned, but not collected, it must appear that he wilfully omitted to

charge the prescribed fee with intent to evade the provisions of the act of 1877 (laws 1877, p. 215), or negligently omitted to collect such fees, or, in taking security therefor, negligently failed to require sufficient surety. *State v. Hazelet*, 41 Neb. 257; *Hazelet v. Holt County*, 51 Neb. 716; *Sheibley v. Dixon County*, 61 Neb. 409; *Boettcher v. Lancaster County*, 74 Neb. 148, limited and distinguished.

2. **Marriage:** STATUTES: CONSTRUCTION. The power given by section 8, ch. 52, Comp. St. 1899, to judges and clergymen to perform the marriage ceremony in this state is permissive, and not mandatory, except as to such officers as are given fees for the performance of such ceremony.

3. **County Judges:** FEES. The provisions of section 8, ch. 28, Comp. St. 1899, giving to the county judge, for any service performed by him in any matter within the jurisdiction of a justice of the peace, the same fees as are allowed by law to the justice of the peace for like services, are limited to those cases in which the county judge derives his power to perform the service solely from the grant to him of the ordinary powers and jurisdiction of a justice of the peace. It does not give him the right to charge a fee for marriage ceremonies, because the power to perform such ceremonies is not derived from such grant of the ordinary powers and jurisdiction of a justice of the peace.

4. **Statutes:** CONSTRUCTION. Where the meaning of a statute is doubtful, long usage is a just medium by which to expound it; and the fact that the officers whose duty it was to enforce the act of 1877 (laws 1877, p. 215) have for many years construed it so as not to require a county judge to report fees received for performing marriage ceremonies may properly be considered in construing a statute by which it is claimed the right to such fees was given.

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

*F. S. Howell* and *F. A. Shotwell*, for appellant.

*C. J. Greene, M. A. Hall, Smythe & Smith, Baxter & Van Dusen, J. W. Woodrough, George W. Shields* and *Byron G. Burbank, contra.*

CALKINS, C.

The defendant Vinsonhaler was county judge of Douglas county from January 4, 1900, to January 3, 1906, a

period embracing three terms, for each of which the defendant the American Surety Company was surety upon his official bond. During that time he reported all fees collected (other than fees for performing marriage ceremonies), and paid the excess, over and above the amount which he was permitted to retain as compensation for himself and deputies, into the county treasury, except the sum of $21.55, which sum was duly tendered to the plaintiff and by the plaintiff refused. He earned a large amount of fees which had not been collected nor received during his incumbency of office, and these he did not report; nor did he report having received any fees for marriage ceremonies, although it is conceded that he performed 1,819 such ceremonies. This action was upon his official bond to recover the amount of fees earned, but not collected, and the sum of $3 for each of said marriage ceremonies. The district court found that the defendant could not be charged with uncollected fees, except the marriage fees, and held defendant liable for $3 for each marriage ceremony performed, for which amount, with interest, and the $21.55 referred to, it rendered judgment in the sum of $6,862.92. From this judgment both parties appeal; the plaintiff challenging so much of the decision of the district court as refused to allow it to recover for fees earned and uncollected other than the fees earned for performing marriage ceremonies, while the defendant insists that the conclusion of the court in reference to the marriage fees is erroneous.

1. Prior to the act of 1877 (laws 1877, p. 215) the fees collected by the county judge and other officers named in said act belonged to such officers, and the county had no interest therein. These fees had been fixed upon such a liberal scale that the offices mentioned had in some localities already become more lucrative than in the opinion of the legislature their dignity and importance justified. To meet this condition it was necessary to either reduce the scale of fees allowed or to limit the amount which such officers might retain. As many localities were

yet sparsely settled, it was urged that the existing scale of fees could not be generally reduced without impairing the efficiency of the public service in the newer sections of the state, and the plan of limiting the amount of fees to be retained by the officer, with the incidental provision of turning the excess into the public treasury, was adopted. Section 1 of the act fixed the aggregate amount of fees which the county judge should retain, and directed that he pay the excess into the county treasury. It also contained a classification of counties, and a provision for employing deputies and paying them out of the excess. Sections 2, 3 and 4 we quote in full:

"Section 2. Each of the officers named in section one of this act shall on the first Tuesday of January, April, July and October of each year make a report to the board of county commissioners under oath showing the different items of fees received, from whom, at what time and for what service, and the total amount of fees received by such officer since the last report, and also the amount re-received for the current year.

"Section 3. Each of the officers named in section one of this act shall keep a book, which shall be provided by the county, and which shall be known as the fee book, and shall be a part of the records of such office, and in which shall be entered each and every item of fees collected, showing in separate column the name of the party, from whom received, the time of receiving the same, the amount received, and for what service the same was charged.

"Section 4. Any of the officers named in section one of this act, who shall omit to comply with the provisions of this act, or shall fail or neglect to keep a correct account of the fees by him received, or shall fail and neglect to make a report to the board of county commissioners as herein provided, or shall wilfully or intentionally omit to charge the fees provided by law, with intent to evade the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction, shall for each offense be fined in any sum not less than twenty-five dollars, nor

more than one hundred dollars; and any officer named in this act who shall make a false report under oath, shall be guilty of perjury, and punished accordingly."

It is significant that in each of these provisions it is the amount of fees received that is uniformly mentioned; and the fees earned, and not received, are nowhere alluded to. Section 2 provides that officers shall make a report of the items of "fees received, * * * the total amount of fees received" since the last report, also the "amount received" for the current year. Section 3 directs that the officer shall keep a fee book upon which shall be entered every item of "fees collected," showing the name of the party from whom "received," and the time of "receiving" the same, and the amount "received." If we are to construe the language used in its ordinary meaning, no interpretation is necessary. The statute simply requires the fees received or collected to be put upon the books and reported, and the language is too plain to be misunderstood. The principal reason urged upon the argument and in the briefs submitted for the interpolation of the word "earned," or some word of similar meaning, into this statute, so as to require fees which the officer had earned, but for any reason not collected, to be included in the report, is that this court has already so decided in cases which have been cited, and which we shall presently examine.

Before proceeding to do so, we will consider whether there exists any cause which would require such a construction of the statute in question, were it now being construed for the first time. It is suggested that the legislature had a right to and did assume that the officer would in each case collect the prescribed fee, and that all fees would therefore be received. If the statute had made no provision for the failure to collect fees, we might conclude that all fees were to be regarded as collected for services performed under such circumstances as would justify the officer performing the service in refusing to act until and unless his fees were paid in advance. The statute

does, however, recognize the fact that there might be a failure to demand the stipulated fees for services performed, and provides that, if such officer shall "wilfully or intentionally omit to charge the fees provided by law with intent to evade the provisions of this act," he shall be guilty of a misdemeanor. This provision would have been quite unnecessary if the statute were interpreted to require the report of fees earned, and not collected. For, if he were required to report fees, whether collected or not, the failure to collect would not evade the law, and the intent, which is made an element of the offense, could not exist.

It is said that the provisions of section 31, ch. 28, Comp. St. 1899, permitting a county judge to require fees to be paid in advance or security given therefor, furnish a reason why the statute of 1877 should be construed to hold a county judge liable for all fees earned. This section was enacted when all the fees collected belonged to the officer, and was evidently intended to assist the officer in the collection of such fees; but, if it be construed as a contemporaneous enactment, it is permissive in form, and contemplates the giving of credit for fees, for it provides that the officer may require payment in advance or security for such fees. If this statute has any bearing upon the proper construction of the act of 1877, it tends to show that the legislature recognized the practice of giving credit for fees.

In cases where the words used in the statute are doubtful, we may consider the consequences of any proposed construction, and should always prefer that which is consistent with acknowledged principles of constitutional law, and which is the least likely to result in hardship or end in absurdity. To require a county judge to collect fees provided for strictly ministerial acts before rendering the service would impose no hardship upon such officer, nor greatly inconvenience him in the performance of such duties. To make the same requirement in respect to fees earned in judicial trials or in the ex-

ercise of his probate jurisdiction would be not only impracticable, but it might in many cases result in an actual denial of justice. While the plaintiff may be compelled to pay or secure the payment of the costs made by him, he cannot be required to pay the costs made by the defendant; and it is quite conceivable that the refusal of a county judge to perform those services which would be necessary to enable a defendant to present his defense might result in a denial of the right to be heard in person and by witnesses, and infringe the provision of the constitution that all courts shall be open, and that every person shall have a remedy by the due course of law, and justice administered without denial or delay. Constitution, art. I, sec. 13.

There are fees for services not performed for either party, like the fee provided for the continuances arising by operation of law. In the exercise of the original jurisdiction given by the constitution in matters of probate, settlement of estates of deceased persons, appointment of guardians, etc., there frequently occur cases in which there is no responsible person to pay or guarantee fees that imperatively demand the performance by the county judge of services for which fees are prescribed. The argument of inconvenience is therefore not opposed to the plain meaning of the words used, but is in harmony therewith. So with the argument of contemporaneous construction. It is conceded that ever since the enactment of this statute it has been construed by the officers whose duty it was to enforce it as requiring county judges to account only for fees received, and this consideration, which sometimes constrains courts to give the words of a statute a different meaning from that which they would otherwise infer therefrom, is here in accord with the ordinary meaning of the words actually used.

This brings us to the consideration of the cases which, it is urged, have committed this court to a construction of the statute which would practically substitute the word

"earned" for the words "received" and "collected," wherever the latter occur.

In *State v. Hazelet,* 41 Neb. 257, a county clerk, who was required to furnish the sheriff with a certificate showing the amount of all lands and incumbrances upon lands about to be appraised and sold as upon execution, for each of which he was entitled to charge a fee of $2, entered on his fee book 25 cents for each certificate. Upon an order to show cause why a peremptory mandamus should not issue to require him to report the full fee of $2 for each certificate, he answered, not that the fee was uncollected, but that the actual work of examining the record and preparing the certificates had been performed by some clerk or employee in his office other than his deputy, and that whatever sum had been paid by the sheriff in excess of the 25 cents reported had been paid to the person who performed the labor connected with the examination of the records and the preparation of the certificates. This presented the question, not whether the county clerk was liable for uncollected fees, but whether the county clerk might, by the device employed, sequester a portion of the fees earned and collected by some one under his control. Such a proceeding was clearly inhibited by the fourth section of the act, which provides a penalty for the officer who, with intent to evade the provisions of the act, wrongfully or intentionally omits to charge the fees provided by law; and the court very properly held the answer insufficient. But in so doing the court said: "There is no room for doubt, under the sections above referred to (laws 1877, p. 215, secs. 1-3), that it is the duty of each county clerk to keep a fee book, and to enter therein every item of fees received or earned by him for official services, and to make an accurate report of the same to the county board." The process of reasoning by which the word "earned" was read into the statute is not given; and, since it was unnecessary to the determination of the question before the court

to so construe the law, we are constrained to believe that it was done inadvertently. The language of the judge writing the opinion should be understood as spoken in reference to the facts under consideration, and limited in meaning by those facts. *Brooks v. Marbury,* 11 Wheat. (U. S.) *78; *United States v. Burr,* 4 Cranch (U. S.), *470. The decision of the case in question was right, and the reasoning applied to the facts before the court sound; but beyond that we are not permitted to consider it as authority.

*Hazelet v. Holt County,* 51 Neb. 716, was an action against the clerk and his bondsmen to recover fees received for making road books and assessors' books, and fees collected for making the certificates of incumbrances mentioned in *State v. Hazelet, supra.* There was no question in the case of fees earned, but not collected; and, while the language of the opinion in *State v. Hazelet* was quoted with approval, that portion of it which relates to fees earned and uncollected had no bearing upon the case then being considered.

In *Sheibley v. Dixon County,* 61 Neb. 409, the question was presented whether the county clerk was required to enter in his fee book and report fees received for making a certificate to abstracts and fees received for taking the acknowledgments to deeds and mortgages. It was held that he was required to report such fees. The pleadings charge that the fees were collected. What the evidence established concerning this fact does not appear from the opinion; but the last paragraph contains this statement: "Another matter urged is that, although acknowledgments were taken by plaintiff, he did not in fact charge any fee for taking the same, and, therefore, should not be called upon to account for the same, never having received any money to account for. This is hardly a tenable position. The law cast upon him the duty of collecting this fee, and if he did not do so the fault was with him, and he should be compelled to account for the same. *State v. Hazelet,* 41 Neb. 257." It is conceded that the statute

imposes upon the county clerk the duty to use reasonable diligence to collect the fees prescribed for purely ministerial functions, and the facts in this case probably justified the conclusion that the fault was his and that he was guilty of negligence. For the reasons that we have already stated, the decision gains no support from *State v. Hazelet, supra,* and is to be regarded as resting upon its own foundation solely.

*Boettcher v. Lancaster County,* 74 Neb. 148, was an action against the clerk of the district court and the surety upon his bond for failing to account for the fees of his office in excess of the amount allowed him as compensation. It appeared from the record that at the expiration of his term fees to a considerable amount which Boettcher earned during his incumbency were uncollected; and the question was there presented whether the clerk of the district court was chargeable with such fees. It was there held that the county had a pecuniary interest in the services of the clerk and the earnings of the office, and that to the extent of that interest he was the agent of the county and was without authority to extend credit. This conclusion was partially, at least, based upon the theory that section 31, ch. 28, Comp. St. 1899, which provides that a clerk of the district court and other offiers therein mentioned may in all cases require the party for whom any service is to be rendered to pay the fees in advance or give security, forbade the giving of credit by the clerk. It is not explained what the result would be if the clerk took the security provided for by statute and it should prove inadequate. If we are correct in what we have already said concerning this section, it offers no support to the argument that credit is not to be given. That circumstances might excuse a district clerk for failure to collect the prescribed fees was recognized in the opinion, when it was said: "Whether special circumstances might excuse a clerk for a failure to collect his fees is a question which does not arise in this case." And neither this case nor that of *State v. Several Parcels of*

*Land,* 82 Neb. 51, goes further than to hold that the unexplained failure of the clerk to collect fees for ministerial duties rendered him liable for the amount thereof. If we assume that the county is the principal and the officer the agent, and apply the ordinary rules governing the liability of principal and agent, it is very plain that, in a suit brought against one of the officers mentioned in the act of 1877 for fees not collected, the petition should charge that the officer had wilfully omitted to charge the prescribed fee with intent to evade the provisions of the act, or had negligently omitted to collect such fees, or had, in taking security therefor, negligently failed to require sufficient surety. That a failure to collect fees for purely ministerial services would support the charge of negligence is clear, while in case of fees earned in judicial and probate proceedings, where the right and propriety of demanding the payment of fees at the time of performing the service is doubtful, actual negligence should be shown. This conclusion is, we think, consistent with the actual decision in each of the cases to which we have referred, as well as with a just and proper interpretation of the statute under consideration. In the instant case there is neither allegation nor proof of want of diligence; and the evidence as to the amount of fees uncollected included the different classes of services we have mentioned, without distinguishing amongst the same. It necessarily follows that the judgment of the district court in respect to these fees was correct, and should be affirmed.

2. The plaintiff concedes that no specific fee can be collected for a public service unless it is authorized by statute; that, even where a duty to perform the act is imposed without the provision of any fee therefor, such duty must be performed for the compensation provided in other ways. The defendant contends that the power to perform marriage ceremonies conferred upon county judges is permissive, and not mandatory, and that no fees were provided for the performance of such ceremonies by the statutes in force during the period of defendant's incum-

bency of the office of county judge. Section 8, ch. 52, Comp. St. 1899, provides that every judge and justice of the peace, and every preacher of the gospel authorized by the usages of the church to which he belongs to solemnize marriages, may perform marriage ceremonies in this state. It was urged upon the argument that the statute, being permissive in form, should not be construed as imposing a duty upon any of the officers therein named to perform such ceremony. This question is not directly involved, but is proper to be considered in determining the principal question. The ordinary meaning of the word "may" is permissive, and it should receive that interpretation unless the rights of the public or third persons depend upon the power conferred, or it is necessary to give effect to the clear intention of the legislature that it should be construed as mandatory. Whether the grant of power to perform marriage ceremonies, permissive in form, should be construed as mandatory has not been the subject of consideration in any of the cases cited. Section 905 of the code provided that justices of the peace should have authority to solemnize marriages; and section 11, ch. 28, Comp. St. 1899, fixed the fee of such officers for such ceremonies at $3. Not only was no fee fixed for the performance of this ceremony by a minister of the gospel or by a judge, unless the statutes we shall hereafter consider gave such a fee to the county judge by implication, but the power of the legislature to give judges of the supreme court and the district court fees is limited by the constitutional provision that no judge of a supreme or district court shall receive any other compensation, perquisite, or benefit, for or on account of his office, in any form whatsoever, than the salary provided by the constitution. Constitution, art. VI, sec. 14. The performance of the marriage ceremony by clergymen and by judges of the higher courts is usually the result of voluntary arrangement. The usages of some church denominations forbid the solemnization of certain marriages which the law regards as valid, and these the clergymen of such churches should

not be required to perform. We can easily imagine circumstances in which it would seriously interfere with the performance of the ordinary duties of a supreme or district judge to compel him to perform such ceremonies. We do not think the legislature intended to make the performance of this duty obligatory upon either. If there were no other provision, we might, in order to give persons desiring this ceremony the right to have it performed, hold the word "may" in section 8 of the marriage act (Comp. St. 1899, ch. 52) to mean "shall"; but the legislature has otherwise provided for the performance of this ceremony by justices of the peace, who are given a fee therefor, and we think that the right of the public and third persons to require the performance of this function is sufficiently conserved by holding it to be obligatory upon officers who are given fees therefor to perform such ceremonies.

3. This brings us to an examination of the statutes which the plaintiff contends gave to the county judge a fee for the performance of the marriage ceremony. We are much indebted to counsel, who have with great learning and laborious research given an exhaustive history of our legislation upon this subject from territorial times to the present. We think, however, that the provisions of the statute in force during the period of defendant's incumbency, considered as contemporaneous acts, are too plain to make it necessary for us to extend this opinion by recapitulating their history. In addition to the probate jurisdiction and his jurisdiction concurrent with the district court, a county judge is by section 2, ch. 20, Comp. St. 1899, given the ordinary powers and jurisdiction of a justice of the peace. His authority to charge fees is found in section 8, ch. 28, Comp. St. 1899, where he is given, first, authority to charge, for any services performed by him in any matter within the jurisdiction of a justice of the peace, the same fees as are allowed by law to justices of the peace for like services; second, for all civil actions triable in the county court, of which a

justice of the peace has not jurisdiction, certain fees there specified, including a fee for issuing marriage licenses, but none for performing the ceremony; third, in matters of probate, another and different schedule of fees for services performed in that capacity. The question turns upon the construction of the word "jurisdiction" in section 8, ch. 28. This word may be defined in law as the power to hear and decide a legal controversy. In speaking of the exercise of a judicial power by a court or judge, we speak of such power as "jurisdiction," while the power of an officer to perform a purely ministerial act is designated as "authority." The defendant insists that the word should be given its ordinary meaning, and that the statute should be construed to give the county judge the fees of a justice of the peace only for services which he performs in a judicial, as distinguished from a ministerial, capacity.

There is no doubt that the word "jurisdiction" may be and is sometimes used in such connection that it should be construed as meaning "power" or "authority," and it is urged by the plaintiff that it should be so interpreted here. It is argued that, since section 2, ch. 20, gives to county judges the ordinary powers and jurisdiction of a justice of the peace, it was the intention of the legislature to fix for the services granted by said section 2 the same compensation as was given to justices of the peace for like services, whether they were ministerial or judicial. Conceding this, it could only apply to the jurisdiction and powers conferred upon a county judge by section 2, which he would not otherwise have possessed. We think it was the intention of the legislature to give to the county judge fees for the exercise of the jurisdiction and powers which he acquired solely by the grant to him of the ordinary powers and jurisdiction of a justice of the peace. But no reason is suggested why the legislature should give to a county judge the fees of a justice of the peace for the exercise of powers which were directly granted to him by other provisions of the law, merely because such powers were also included in the grant to him of the

ordinary powers and jurisdiction of a justice of the peace. While, therefore, we cannot give to the word the narrow construction contended for by defendant, we are satisfied that there is no reason for interpreting it so as to give the county judge the fees of a justice of the peace for the exercise of powers directly granted to him in cases where his authority does not depend upon the grant to him of the ordinary powers and duties of a justice of the peace.

4. It is conceded that the statute of 1877 has been construed by the administrative officers, whose duty it was to enforce the same, so as not to give a county judge the right to charge a fee for performing a marriage ceremony, or, at least, so as not to require any compensation which such county judge may have received for such performance of that ceremony, as the fees of his office, to be accounted for under the statute. It is one of the principles governing the interpretation and construction of statutes that, where the meaning of a statute is dubious, long usage is a just medium by which to expound it. *Franklin v. Kelley,* 2 Neb. 79; *State v. Holcomb,* 46 Neb. 88; *State v. Sheldon,* 79 Neb. 455; *United States v. Hill,* 120 U. S. 169. We think the operation of such a rule is just and salutary; and this court has gone so far as to hold that a construction so made will in some cases be regarded as adopted by the legislature, although the language of the statute would indicate a different meaning. *State v. Sheldon, supra.* That the right of the county judge to charge a fee for performing marriage ceremonies was doubtful, in the opinion of the legislature, is indicated by the fact that in 1907 section 8, ch. 28, *supra,* was amended so as to expressly allow him a fee for performing the same. If a contemporaneous construction may be considered to give the language used a different meaning, it may certainly be invoked as an aid where there is any doubt about the meaning that should be given to the language used, and the fact that we here find it in harmony with the interpretation arrived at from a considera-

tion of the language itself gives added confidence in the integrity of such an interpretation.

With reference to the $21.55, the defendant's answer alleges, and the plaintiff's reply admits, a tender and payment into court of that amount. As this sum equaled the amount which should have been found due the plaintiff, the judgment should have been for the defendant. It follows, from what we have already said, that the district judge should have found for the defendant upon all the issues.

The judgment of the district court is therefore reversed and the cause remanded, with instructions to enter judgment dismissing the plaintiff's petition, with costs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and cause remanded, with instructions to enter judgment dismissing the plaintiff's petition, with costs.

REVERSED.

FAWCETT and ROOT, JJ., not sitting.

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## J. T. MATHEWS, APPELLANT, V. A. E. HEDLUND ET AL., APPELLEES.

FILED DECEMBER 5, 1908. No. 15,350.

1. **Physicians and Surgeons:** REVOCATION OF LICENSE: REVIEW. An order made by the state board of health, under sections 9800 *et seq.*, Ann. St. 1907, revoking for cause the license of a physician to practice medicine, surgery and obstetrics in Nebraska, may be reviewed in the district court by error proceedings under section 580 of the code. *Munk v. Frink*, 75 Neb. 172.

2. **Constitutional Law.** Sections 9800 *et seq.*, Ann. St. 1907, do not contravene section 15, art. III of the constitution of the state of Nebraska, nor are they repugnant to the fourteenth amendment to the constitution of the United States.

3. **Physicians and Surgeons:** REVOCATION OF LICENSE: PLEADING. In

a hearing before said board for committing a criminal abortion upon a pregnant woman, it is not necessary to allege or prove that she was in any stage of uterogestation, but simply that she was pregnant of a vitalized embryo or fœtus. *Munk v. Frink*, 81 Neb. 631.

4. ———: ———: CONDITIONS PRECEDENT. A trial and conviction in a competent court is not a condition precedent to the institution and prosecution of said proceedings.

5. ———: ———: REVIEW. In case the secretaries of the board refuse to issue supbœnas for witnesses for the defendant, or to compel witnesses to answer material questions propounded by him, or refuse to hear argument, that conduct will not be considered in the district court, unless the defendant requested the board to direct its secretaries to comply with defendant's requests, and said board improperly refused so to do.

6. ———: ———: CORRECTION OF RECORD. In case the secretaries and the board find against the defendant, but by mistake or oversight the record does not evidence their said action, said board has power to correct its record so that it will speak the truth, even though error proceedings are then pending in the district court.

7. ———: ———: AFFIDAVITS AS EVIDENCE. In contested proceedings for the revocation of a physician's license to practice medicine, it is within the discretion of the state board of health, and of its secretaries, to receive affidavits relating to relevant facts at issue in said hearing.

8. ———: ———: REVIEW. In said proceedings, if it appears that the state board of health has acted within its jurisdiction, and that all of the jurisdictional facts essential to uphold its final order are sustained by some evidence competent for that board to consider, its orders will be upheld in error proceedings to the district court, and on appeal to this court.

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

*John O. Yeiser and W. W. Slabaugh*, for appellant.

*William T. Thompson, Attorney General*, and *Halleck F. Rose, contra.*

ROOT, C.

Appeal from a judgment of the district court for Lancaster county affirming the action of the state board of

health in revoking defendant's license to practice medicine, surgery and obstetrics in Nebraska.

1. The state board of health has filed a motion to dismiss this case for want of jurisdiction of the court to review said order in error proceedings. The argument of counsel, although forceful and learned, urges no better reasons in favor of his client's contention than were presented in *Munk v. Frink,* 75 Neb. 172, wherein the identical point was considered and decided against said board. We are asked to overrule *Munk v. Frink, supra,* for the alleged reasons that the board is not inferior in jurisdiction to the district court; that in said proceedings it exercises administrative functions only, and that its orders may not be reviewed by petition in error. It is conceded by counsel, and doubtless it is the law, that the legislature may provide for a review in court of the orders of administrative boards. The organic act creating the territories of Nebraska and Kansas vested the judges of the district court with chancery and common law jurisdiction. Ann. St. 1907, sec. 211. The territorial legislature in 1855 adopted parts of the then Iowa code to regulate the procedure of courts in Nebraska. Section 545, p. 39, 1 Complete Session Laws of Nebraska, 1855-1865, provided that whenever specially authorized by law, and also in all cases where an inferior tribunal or officer exercising judicial functions is alleged to have exceeded their proper jurisdiction, or is otherwise acting illegally, the writ of certiorari might issue. In 1858 the territorial legislature enacted a very comprehensive code of civil procedure and therein abolished writs of error and certiorari. Code, 1858, sec. 539. It is also provided in section 520 of said code that a judgment rendered or final order made by a county court, justice of the peace, or any other tribunal, board or officer, exercising judicial functions, and inferior in jurisdiction to the district court, might be reversed, vacated or modified by the district court. In the constitution of 1866, and that of 1875, the district courts were by the people given common law and chancery juris-

diction, and the cited sections of the 1858 code were carried into and made part of our present code. In *Traphagen v. Township of West Hoboken,* 39 N. J. Law, 232, in an elaborate and well-reasoned opinion, it was held that the legislature could not deprive a court vested with common law jurisdiction of the power to review by certiorari the action of statutory tribunals, unless an adequate remedy was substituted. Section 901 of the code provides that, in case said code does not furnish a procedure for the enforcement or protection of a right, or the redress or prevention of a wrong, the practice theretofore in use might be adopted to prevent a failure of justice. This is a copy of section 619 of the code of 1858.

In commenting upon this legislation, Mr. Justice NORVAL, in *Moline, Milburn & Stoddard Co. v. Curtis,* 38 Neb. 520, 532, reasons that a case might arise in Nebraska wherein the writ of certiorari could be issued. We are not advised that a district court in Nebraska has ever issued such a writ and the reason for this inaction, we are of opinion, is that section 580 of the code has furnished a sufficient remedy. It seems plain from a consideration of the organic act, the constitution and the codes that the people did not purpose to cut down the right of review in the courts, but rather intended that, in all cases where at common law the action of a special or statutory tribunal or inferior court might be reviewed by certiorari or writ of error, the losing party might prosecute error to the district court. Out of an abundance of caution, and apprehensive that the courts might not receive and interpret the code in the liberal spirit in which it was conceived, section 901, *supra,* was enacted. Recourse has not been necessary to the old common law remedy because the courts of Nebraska have accepted the spirit as well as the letter of the code. Under section 580, *supra,* the orders of a county board of equalization were reviewed by the district court, and later by us in *Sioux City & P. R. Co. v. Washington County,* 3 Neb. 30, 40. In *Minkler v. State,* 14 Neb. 181, the district court reviewed on error the ac-

tion of a board of county commissioners in removing a surveyor for misfeasance in office. Like proceedings were had in *Hopkins v. Scott,* 38 Neb. 661, where a county treasurer had been removed from office by the county commissioners. In *State v. Palmer,* 18 Neb. 644, Mr. Justice MAXWELL suggests that the order of a county superintendent changing the boundaries of a school district may be reviewed in the district court under section 580, *supra.* And in *State v. Scott,* 17 Neb. 686, we held that the action of the commissioner of public lands and buildings forfeiting the lease of school land for nonpayment of rent could be reviewed by error proceedings in the district court. In *Ayres v. Moan,* 34 Neb. 210, the orders of a board of county commissioners overruling a remonstrance, and calling a special election to locate a county seat, were reviewed by the district court under section 580, *supra.* It will therefore be observed that the personnel of the board is not a test of the jurisdiction of the courts to review the orders made, but rather the nature of the power exercised by that board. In the instant case the legislature selected three state officers and vested them with power to subpœna and examine witnesses, to take depositions according to the code, and to determine certain facts. While sitting as that special board, their functions approximate the judicial, and they are as well within the scope of section 580 of the code as were any of the officers referred to in the Nebraska cases cited, *supra.* The legislature has convened many times since the decision in *Sioux City & P. R. Co. v. Washington County, supra,* and it has not expressed its disapproval of our construction of section 580 of the code. Rather it will be noticed that, at the first session of the legislature subsequent to our decision in *Hopkins v. Scott, supra,* that neither a board of supervisors nor its presiding officer had authority to settle and allow a bill of exceptions, section 331 of the code was so amended as to authorize the presiding officer of any board to settle and allow such a bill. Thereby it seems to us the legislature

clearly indicated that in its judgment the courts had not exceeded their jurisdiction in the many and diverse proceedings reviewed by them under section 580, *supra.* We are safe in concluding that the legislative branch of the government does not agree with counsel that the courts have usurped power in extending their jurisdiction to cases like the one at bar.

It is urged that one cannot have a property right in a license to practice medicine; that it is within the police power to name the conditions upon which such a permit shall issue and may be enjoyed, and that the holder thereof takes the privilege with the condition annexed that his license may be revoked at any time by the power that gave it. There is much force in the argument, and many authorities may be cited to sustain it, but we are of opinion that after a license has been issued the right thereunder to practice medicine is a valuable right, and one that may not be taken away without good cause; that, if such license is canceled by a board of health, it must be upon proper charges, with opportunity to appear and defend by the introducing of evidence and the cross-examination of those witnesses who testify against the physician at the hearing. *Munk v. Frink,* 75 Neb. 172; *Hewitt v. State Board of Medical Examiners,* 148 Cal. 590; *Smith v. State Board of Medical Examiners,* 117 N. W. (Ia.) 1116. The hearing in the instant case did not involve the determination of the learning or professional skill of the defendant, but whether he had performed a criminal operation upon the person of a patient. Under the circumstances of this case the revocation of defendant's license, as reasoned by Mr. Commissioner AMES in *Munk v. Frink, supra,* was analogous to a forfeiture and involved the exercise of judicial or *quasi* judicial power, within the meaning of section 580 of the code. *Board of Aldermen v. Darrow,* 13 Colo. 460, 16 Am. St. Rep. 215; *State v. Common Council,* 53 Minn. 238; *People v. Board of Police Commissioners,* 155 N. Y. 40; *People v. Hoffman,* 166 N. Y. 462; *College of Physicians & Surgeons v. Guilbert,* 100 Ia. 213. We

are of opinion that, in so far as *Munk v. Frink,* 75 Neb. 172, sustained the jurisdiction of the district court, it properly interpreted the legislative will, and is in harmony with our fundamental law. The motion to dismiss the appeal will be overruled.

2. Defendant argues that the statutes regulating the practice of medicine in Nebraska are void because they conflict with section 15, art. III of the constitution of Nebraska, and the fourteenth amendment to the constitution of the United States. It has been uniformly decided in numberless cases that the legislature may regulate the practice of medicine, and require practitioners to conform to those requirements, or in default thereof cease their practice; that subsequent legislation may impose greater burdens upon a physician, and that thereby he is not deprived of any privilege or immunity guaranteed by the constitution. Nor is it apparent to us, as suggested by counsel, that the inducement for the passage of said statutes was to exclude osteopaths or Christian scientists from practicing the art of healing. *Eastman v. State,* 109 Ind. 278, 58 Am. Rep. 400; *State v. Green,* 112 Ind. 462; *Dent v. West Virginia,* 129 U. S. 114.

3. Defendant asserts that the findings of the board of secretaries are insufficient to justify a revocation of his license. Neither the secretaries nor the board in the first instance entered any findings of fact upon their record, but later, after this case had been taken to the district court, corrected the record so that it recited that the charges filed against defendant were true. No one can doubt from an inspection of the record that the board found that the charges made against defendant were true. Nor do we doubt the authority of that tribunal to make its records conform to the truth. *Olympian Tribune Publishing Co. v. Byrne,* 28 Wash. 79; *White v. Burkett,* 119 Ind. 431.

4. It is claimed that the complaint was insufficient, and furthermore that defendant's license could not be revoked until after his conviction in a criminal court. These ob-

jections must be resolved against defendant on the authority of *Munk v. Frink,* 81 Neb. 631, and *Edwards v. State,* 79 Neb. 251.

5. It is also insisted that there should be a reversal because of misconduct on the part of the secretaries in not issuing subpœnas requested by defendant, in refusing to compel witnesses to answer certain questions, and because members of the board refused to produce certain letters sent them concerning said transaction, also that said secretaries were biased against defendant, and that one of them, Dr. Bailey, is interested in the prosecution. As to all matters of practice defendant had ample remedy in applying to the board for an order to its secretaries, and the record does not disclose that he pursued that remedy. *State v. Moores,* 29 Neb. 122; *State v. Laflin,* 40 Neb. 441. There is no evidence that the board itself was guilty of any impropriety, and we are of opinion that defendant is not in position to complain. Furthermore, we do not think that the evidence warranted challenging the competency of Dr. Bailey to sit as one of the secretaries, or that it tended to show that he had any improper interest in the proceedings before the board.

6. It is also urged that the secretaries erred in admitting as evidence an affidavit made by the patient and purporting to contain a statement of the facts concerning the alleged criminal operation; that, had said affidavit been excluded, there would not have been any evidence to connect defendant with the alleged criminal act. The practice to be observed in cases like the one at bar is thoroughly discussed by Mr. Commissioner FAWCETT in *Munk v. Frink,* 81 Neb. 631. Within the rule therein announced the affidavit was competent evidence. Section 9803, Ann. St. 1907, which authorizes the secretaries to issue subpœnas and to take depositions and the testimony of witnesses is cumulative, and not intended to exclude other methods of proof in proceedings before them. Independent of the affidavit, there are many facts and circumstances as shown by the evidence that tend to connect

defendant with the act complained of. It is true that he most strenuously denies such conduct, and that he is corroborated in many particulars by other witnesses. However, in error proceedings prosecuted to the district court from a final order of the state board of health, the judgment should be affirmed if all of the jurisdictional facts were established by any competent evidence, even though opposed by other and weighty evidence. In referring to the evidence as "competent" we mean evidence competent for that character of proceedings.

We are of opinion that, in substituting section 580 of the code for the earlier statutes concerning certiorari and writs of error, the legislature did not intend to destroy all distinction that plainly existed in the law between the character and extent of evidence sufficient to sustain the order of a board having *quasi* judicial power and that to uphold the judgment of a justice of the peace. Any general statement on this subject contained in the opinion of Mr. Commissioner AMES in *Munk v. Frink,* 75 Neb. 172, must be considered in the light of the question that was presented and determined in that case, which was whether the district court had any jurisdiction in the premises. In the second appeal of said case, which was upon the merits (81 Neb. 631), Commissioner FAWCETT correctly stated the rule as to the weight of evidence essential to sustain a final order of the board of health, and his opinion is in harmony with our conception of the law.

We have carefully considered all of the evidence contained in the bill of exceptions, and are forced to the conclusion that there was competent evidence before the board to sustain all of the jurisdictional facts essential to uphold its order canceling defendant's license to practice medicine, obstetrics and surgery in Nebraska. 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.

ROSE, J., not sitting.

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GEORGE W. WERTZ, APPELLANT, V. JOHN C. SPRECHER, APPELLEE.

FILED DECEMBER 5, 1908. No. 15,372.

Libel: DEFENSES. The truth alone is not a complete defense in a civil action for libel, but, if the defendant justifies, he must further allege and prove that he published the alleged defamatory matter with good motives and for justifiable ends. Bill of Rights, sec. 5; *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64; *Neilson v. Jensen*, 56 Neb. 430.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

*George W. Wertz, pro se.*

*John J. Sullivan, contra.*

ROOT, C.

Plaintiff is a duly licensed attorney at law residing in Colfax county, and has been engaged in the active practice of his profession for some years past. In 1903 he was elected county attorney for said county. Thereafter defendant published in his newspaper the following article of and concerning plaintiff: "County Attorney Wertz for the prosecution and George W. Wertz for the defense get together and agree upon a compromise, and the wise county board, upon motion duly made, seconded and carried, indorse it. Oh, this official service in Colfax county is great." Plaintiff brought this action, alleging that said statement was false and maliciously made; that thereby

defendant charged him with improperly and corruptly acting in the interests of an individual client against Colfax county, and that he was guilty of unprofessional conduct and malfeasance in office. Defendant admitted that plaintiff was a duly licensed attorney at law in Nebraska and county attorney of Colfax county, and that defendant published said article, but alleged that the same was true, and denied all other statements in the petition. Upon motion, defendant answered with particularity that preceding plaintiff's election he had represented one Dunkle in resisting a claim of Colfax county; that after plaintiff's election he represented both Dunkle and said county in compromising said demand, and represented Dunkle in filing a confession of judgment in favor of the county for the amount of that compromise. Plaintiff replied, denying all allegations in the answer. The court charged the jury that the publication was libelous *per se,* to which defendant did not except, nor complain in this court, so that we will accept the interpretation of the learned trial judge. Plaintiff, in a motion for judgment on the pleadings, by objections to the introduction of defendant's evidence, by moving for a verdict, and by excepting to the instructions, challenged the sufficiency of said answer. The court denied all of said motions, and instructed the jurors that, if they found from the evidence that the statements in the publication were true, they should find for the defendant. Defendant prevailed, and plaintiff appeals.

Defendant has not appeared in this court, and we are somewhat embarrassed by the lack of argument or brief to support his theory of the case. However, this record squarely presents for our consideration the value of the truth of an article as a defense in a civil action for libel, or whether, in addition thereto, a defendant must plead and prove good motives and justifiable ends to complete his defense. In *Pokrok Zapadu Publishing Co. v. Zizkovsky,* 42 Neb. 64, we held that the verity of the publication alone was not a sufficient defense in a civil suit for libel, but that the further elements of good motives

and justifiable ends must be made to appear to exonerate defendant. We confirmed that decision in *Neilson v. Jensen,* 56 Neb. 430. In the opinion of Mr. Justice SULLIVAN in *Larson v. Cox,* 68 Neb. 44, there is an intimation that the rule is not correctly stated in *Pokrok Zapadu Publishing Co. v. Zizkovsky* and *Neilson v. Jensen, supra,* and much dependence is placed upon the opinion of Mr. Chief Justice Horton in *Castle v. Houston,* 19 Kan. 417, to justify the criticism made upon our former holdings. *Larson v. Cox, supra,* was a slander suit, and all of the suggestions therein concerning a defense in libel cases is dictum merely. The learning of the author of that opinion is such that his statements have caused practitioners to doubt somewhat the former decisions of this court, and possibly said opinion had a potent influence in inducing the learned counsel for the defense in the instant case to omit from his answer the allegations of good motives and justifiable ends, and not to mention in his evidence proof of those elements of a defense. Mr. Chief Justice Horton in *Castle v. Houston, supra,* was correct in stating that the decision of the New York supreme court in *People v. Croswell,* 3 Johns. Cas. (N. Y.) *336, that the truth of a libel would not be received as any part of a justification in criminal prosecutions for libel, caused state legislatures and constitutional conventions thereafter to provide by statutory or fundamental law that the old harsh maxim of the common law in such cases should give way to a more merciful, just and rational rule.

The third subdivision of the bill of rights in the constitution of 1866 provided: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel the truth may be given in evidence; and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and

the jury shall have the right to determine the law and the fact." It will be noticed that reference is not made therein to the truth of a publication as a defense in civil actions, and it is likely that the framers of said article understood and believed, as they properly might, that action on their part was not necessary to make the truth alone a defense in civil suits for libel. The fifth section of our present bill of rights reads: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Now, if it was not the intention of the men who formed the constitutional convention in 1875 to compel the defendant in civil as well as criminal cases, if he attempted to justify, to prove good motives and justifiable ends, as well as the truth of his charges in publishing a libel, the inclusion of the words "both civil" in the later constitution was and is senseless and surplusage. The same amendment was proposed in the constitution prepared in 1871, but not ratified by the people. It was adopted by the convention without debate, and with the sole amendment of the word "for" next preceding the word "justifiable." 1 Nebraska Constitutional Conventions, pp. 205, 219, 220, 506. The individuals who formed the body of those conventions were men of prominence, education and ability. Many of them were then, and have continued to be, leaders at the bar of this state, and some of them later became members of this court and of the various district courts of the commonwealth. The fact that the change was adopted without debate demonstrates that the words employed in the amendment were well known as applied to constitutional law, and had a general and well-understood meaning, which it was intended that they should continue to have. *Williamson v. United States,* 207 U. S. 425.

Mr. Justice Horton in *Castle v. Houston, supra,* reasons that in a civil action the plaintiff by his own misconduct,

if guilty of the offense imputed, has excluded himself from his action at law; that his original misbehavior taints the entire transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled; that if the publication is malicious, although truthful, the criminal law will afford sufficient punishment for the guilty and example to the community. It is also true that convictions for criminal libel are rare, and that the individual does not control the machinery of the criminal courts. It is a further fact that individuals guilty of improprieties, indiscretions, or crimes, it may be, can, by subsequent observance of the laws of man and of God, win for themselves the respect and confidence of their associates and of the community. It is repugnant to the crudest ideas of justice to say that, under such circumstances, the truth of a recital of past history ought to entitle a defendant to a verdict in a civil action. If the truth of the article is alleged, it should be received in mitigation of damages without regard to the motives of defendant or the end sought by the publication, but the truth alone ought not to be an absolute bar to recovery.

It may be well to notice that the constitution of Kansas differs from ours upon the subject now before us. Section 11 of the Kansas bill of rights is as follows: "The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel the truth may be given in evidence to the jury and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." The language thus employed may be construed according to the reasoning of Mr. Justice Horton, so that the words "the truth may be given in evidence to the jury" will apply to the words "civil or criminal," but that the words "and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall

be acquitted," will refer solely to the word "criminal." The words "accused party shall be acquitted" are more appropriate with reference to a criminal prosecution than to a civil suit, and are strongly relied on to justify the construction of Mr. Justice Horton. But the framers of our bill of rights have left nothing for construction or interpretation. The language is lucid and unmistakable, and evidences the intention of the members of that convention to place the defendant in civil and criminal cases for libel on an exact equality so far as the elements of a defense are concerned. We cannot justify ignoring a plain and unambiguous clause in the constitution of our state. The constitutional conventions were not pioneers in this field. In Massachusetts, prior to 1827, the defendant in a criminal prosecution for libel could not prove the truth of the publication as a justification, and in that year the legislature provided by statute that in all such prosecutions the defendant might give in evidence the truth of the libel, but that such fact would not be a justification unless it was made to appear that the publication was with good motives and for justifiable ends. In 1855 the legislature of that state further provided: "In every prosecution, and in every civil action for writing or publishing a libel, the defendant may give in evidence, in his defense upon the trial, the truth of the matter contained in the publication as libelous; and such evidence shall be a sufficient justification, unless malicious intention shall be proved." Held to apply to civil and criminal cases alike. *Perry v. Porter,* 124 Mass. 338.

In the Florida bill of rights it is provided: "In all criminal prosecutions or civil actions for libel the truth may be given in evidence to the jury, and if it should appear that the matter charged as libelous is true, but was published for good motives, the party shall be acquitted or exonerated." Mr. Justice Raney in *Jones, Varnum & Co. v. Townsend's Adm'x,* 21 Fla. 431, 58 Am. Rep. 677, in commenting on the opinion of Mr. Chief Justice Savage in *Root v. King,* 7 Cow. (N. Y.) *613, *628, says: " 'The

liberty of the press will not be invaded by requiring the conductors of our presses to stand responsible for the truth of what they publish.' Nor, we will add, by requiring them to show the same 'good motives' which the bill of rights requires of all." In Maine the statute provides: "In a suit for writing and publishing a libel, evidence shall be received to establish the truth of the matter charged as libelous. If its truth is established, it is a justification, unless the publication is found to have originated in corrupt or malicious motives." In *Pierce v. Rodliff*, 95 Me. 346, it was held that the statute had changed the common law in civil actions for libel, and that the truth of a publication was not in itself a defense therein. Sufficient has been said to demonstrate that the opinions filed in *Pokrok Zapadu Publishing Co. v. Zizkovsky* and *Neilson v. Jensen, supra,* were sound and in accord with the constitution of this state. In so far as the dictum in *Larson v. Cox, supra,* is opposed to the earlier cases, it is not adopted, but disapproved, nor was it ever law in this state. It follows that the learned district judge erred in holding that the answer of defendant was sufficient, and in instructing the jury to find for defendant if it found that the allegations in defendant's answer were true.

Other errors are assigned, but they will not be examined, as the foregoing is sufficient for the disposition of this case.

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

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 the cause remanded for further proceedings.

REVERSED.

BUFFALO COUNTY TELEPHONE COMPANY, APPELLEE, V. BART TURNER, APPELLANT.

FILED DECEMBER 5, 1908. No. 15,393.

1. **Telephones:** RENTS. A rule of a rural telephone company that telephone rent must be paid six months in advance is reasonable, and a subscriber refusing to comply therewith is not entitled to service from the company.

2. ———: ———: COUNTERCLAIM. Nor will the existence of a counterclaim or set-off asserted by the subscriber, a large part of which is exorbitant and illegal, justify him in demanding that he be given service without prepayment of charges as other subscribers pay.

3. ———: ———: DEDUCTIONS. A telephone subscriber is presumed to know that his telephone is liable to get out of order, and, if it is situated in the country, that some time may elapse before it can be repaired, and such subscriber is only entitled to a deduction from his bill subsequent to the expiration of a reasonable time after the company had notice of the trouble and has failed to repair it.

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

*Fred A. Nye,* for appellant.

*Warren Pratt, contra.*

ROOT, C.

Plaintiff is a corporation engaged in the telephone business in the vicinity of Kearney. Its stockholders, officers and subscribers are farmers, who are served by connecting the telephones with party wires which converge at Kearney, and are there connected with a local switchboard owned, controlled and operated by the Kearney Telephone Company. Plaintiff pays said company a fixed sum for connecting the telephones of its subscribers to complete service. Plaintiff charges $1 a month, payable six months in advance, for the use of its telephones. Plaintiff's

business does not warrant the continuous employment of an electrician or mechanic to repair its telephones, but as repairs are called for it disconnects the faulty instrument and has it repaired in Kearney. Defendant is a stockholder in and a customer of plaintiff. In June, 1905, his telephone did not give satisfaction, and one of plaintiff's officers took it to Kearney for repairs. The instrument was not returned for a week, and defendant, at the suggestion of one of the plaintiff's directors, brought the instrument home with him one day when in Kearney on other business, and for this he insisted that he should receive from plaintiff $3 and an allowance of 25 cents for the week that he did not have the use of the telephone. When the semiannual rental of $6 became due in January, 1906, defendant refused to pay it unless given credit for $3.25, and in March plaintiff disconnected defendant's telephone. Defendant paid said rent, and there was no further difficulty until an attempt was made to collect the second instalment of rent for said year. Defendant refused to pay, because plaintiff would not allow him for the time his telephone was out of commission, nor his charges for services hereinbefore referred to, plus a charge of $1.50 for reconnecting the telephone in March, 1906. Defendant would not permit plaintiff's employee to take its telephone out of his house. The employee disabled said instrument, and later the line from defendant's telephone to the party wire was disconnected. Defendant repaired the telephone, reconnected it with the party line, and insisted upon service through the switchboard of the Kearney company; and plaintiff brought this action for an injunction against defendant. The district court perpetually enjoined defendant from in any manner meddling with the appliances of plaintiff, and from making or permitting any connections of the telephone in defendant's house with the lines of plaintiff, or from using said telephone in connection with said lines. Defendant appeals.

1. It is apparent that neither party to this controversy is entirely without fault. Plaintiff is a public service

corporation, and should render to each individual in situation to patronize it equal service and upon the same terms. Defendant was not notified that, if he did not pay his rental as demanded, the service would be discontinued and the actual work of disconnecting was done after dusk, and so adroitly in one instance that no one other than a skilled lineman could detect the severance of the lead wire. On the other hand, plaintiff is a small concern, evidently created for neighborhood accommodation, and not as a source of profit to its stockholders. Its resources are slender, and its ability to serve its customers and keep its plant in condition for efficient service depends upon prompt payment of the rentals charged. If a considerable fraction of its subscribers become contentious and refuse to pay the tolls and charges unless counterclaims for faulty service or for insignificant acts performed for its benefit are deducted from the rental, plaintiff would be without means to pay for switching charges and maintenance of its lines and instruments. *Vanderberg v. Kansas City M. G. Co.*, 126 Mo. App. 600, 105 S. W. 17; *Rushville Cooperative T. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327. Although defendant was not specifically informed that, if he did not pay, he would not be permitted to receive service, we are of opinion that he did know who was responsible for the discontinuance of the service and the reasons therefor. Defendant's demand to be paid $3 for bringing the instrument from Kearney to his home was exorbitant, and was properly disallowed. It appears from the evidence that none of the other stockholders or the directors of the company had ever charged for like services, and, had defendant intimated that he did not intend to abide the custom, some other stockholder or one of the directors, all of whom resided in the neighborhood, would have returned the telephone to his place. Also the demand for a rebate of 25 cents was uncalled for. A telephone subscriber must be presumed to know that the instrument is liable to get out of order, and, if situated in the country, that a reasonable time must pass to

secure its repair. There is nothing in the record to warrant a holding that the delay of one week was unreasonable in the instant case; and unless the delay was unreasonable, he would not have been entitled to any allowance for impaired service. *Eastern Kentucky T. & T. Co. v. Hardwick,* 106 S. W. (Ky.) 307. The subsequent charges are based upon the efforts of defendant to forcibly and against the will of plaintiff, and while defendant was in default in the payment of his rental for that very term of six months, compel plaintiff to give him service, and we do not think that he is entitled to collect from plaintiff therefor.

Defendant insists that, as plaintiff had not formally adopted a rule that if subscribers did not pay in advance they would not be given service, the case of *Rushville Co-operative T. Co. v. Irvin, supra,* does not apply. We are of opinion that, in the circumstances of all of the parties to this squabble, it was not necessary for plaintiff to prove the formal adoption of said rule. There is no evidence in the record to indicate that plaintiff arbitrarily discriminated against defendant, or that the same remedy would not have been applied to any other contumacious subscriber. Defendant occupies the unenviable distinction of being the only subscriber who absolutely refuses to pay for the use of a telephone and service. Nor is this case within the principle of *State v. Nebraska Telephone Co.,* 17 Neb. 126. In the cited case the relator had refused to pay an accrued charge and his telephone had been taken out. He thereafter tendered the regulation charge for reinstalling said instrument, and it appeared that he was able, ready and willing to pay according as other subscribers paid, and the rules of the respondent did not exact a prepayment of charges. In the instant case defendant is able, but neither ready nor willing, to pay the charges according to the rules of plaintiff, nor has he tendered the payment exacted from all subscribers alike.

2. In one particular the decree, we think, is erroneous. Plaintiff charges that defendant and members of his

family in the use of the telephone would take down the transmitter when other patrons on the party lines were called, and would listen to conversations not intended for them; that they would sing and whistle into the receiver, and break in on conversations between the other subscribers, and so conduct themselves as to become a nuisance. There is a general finding for plaintiff, and a perpetual injunction against defendant. There is not one scintilla of evidence to sustain the charges above referred to. The evidence shows that plaintiff maintains the only telephone service available for defendant, and he should not be precluded from its benefits if he will pay therefor. Defendant, by tendering $6 to plaintiff, will be entitled to telephone service for six months, and thereafter, by paying that sum twice a year, may have the continued use of plaintiff's telephone, provided that he and the members of his family conduct themselves within the reasonable rules of plaintiff in that use.

The decree should be modified by finding in favor of defendant as to the charges of misconduct in the use of the telephone, and so that he may receive service from plaintiff by paying in advance every six months therefor and abiding by the reasonable rules of the corporation. As thus modified, the decree should be affirmed, and we so recommend.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree in this case is modified by finding in favor of defendant as to the charges of misconduct in the use of the telephone, and so that he may receive service from plaintiff by paying it $6 semiannually in advance therefor and abiding by the reasonable rules of said corporation. As thus modified, said decree is hereby affirmed.

JUDGMENT MODIFIED.

GORDON A. RUTH, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED DECEMBER 5, 1908. No. 15,402.

**Cities:** SIDEWALKS: NOTICE OF DEFECTS. A written notice to the mayor and city council of a metropolitan city, given more than five days before an injury caused by a defective sidewalk, that said walk for a designated space of two blocks, including the point where said injury occurred, "is in awful shape, people are tripping up and falling occasionally," and requesting an acknowledgment of the receipt of such communication "in order that proper damages may be secured should accidents occur thereon," is sufficient under section 7711, Ann. St. 1907, where the proof clearly shows that the sidewalk over the entire space referred to in said notice was at said time in a defective and generally dangerous condition.

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

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

*Frank T. Ransom* and *John F. Moriarty, contra.*

ROOT, C.

Plaintiff, an infant, by his father as next friend, recovered judgment against defendant, a metropolitan city, for injuries inflicted by reason of a defective sidewalk in said city. Defendant appeals.

But one question is presented for our consideration, and that is whether the city had sufficient notice of the defective condition of said sidewalk to make it liable to plaintiff. Sections 7710, 7711, Ann. St. 1907, were in force at the time plaintiff was injured, and are as follows:

"Section 7710. No city governed by this act shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city, unless actual notice in writing, describing fully the accident and the nature and extent of the injury com-

plained of and describing the defects causing the injury and stating the time when and, with particularity, the place where the accident occurred, shall be proved to have been filed with the city clerk within ten days after the occurrence of such accident or injury, and it is hereby made the duty of the city clerk to file said notice and keep a record showing the time when and by whom such notice was given, and he shall forthwith report the filing of such notice to the city attorney and transmit a copy thereof to him.

"Section 7711. Cities of the metropolitan class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof within such cities, unless actual notice in writing of the defect of such public way or sidewalk shall have been filed with the city clerk at least five days before the occurrence of such injury or damage. In the absence of such notice, so filed, the city shall not be liable, and in all cases such notice shall describe with particularity the place and nature of the defects of which complaint is made."

A notice was given in compliance with section 7710, *supra,* after the injury, so that defendant was not prejudiced in the matter of securing evidence and preparing itself for trial of the instant case. The notice relied on by plaintiff as a compliance with section 7711, *supra,* was not given by him, but by a Mr. Johnson. It is as follows: "Omaha, Neb., April 27, 1905. City Clerk: This is to notify you that the sidewalk on Ohio street 22d to 24th, north side, is in awful shape. People are tripping up and falling occasionally. Please acknowledge receipt so I can know this communication has been received in order that proper damages may be secured, should accidents occur thereupon. Yours truly, D. Johnson." This notice was filed with defendant April 27, 1905, and plaintiff was injured on June 27 of said year.

It is argued by learned counsel that, as the defect causing the injury was a hole about four inches in width

located between two cross-boards of a wooden sidewalk, the notice given by Johnson cannot be said to describe with *particularity* the *place* and *nature* of said defect, and therefore plaintiff is not within the statute. The city of Omaha is vested by statute with comprehensive powers respecting the control, improvement and repair of its streets and highways, including the sidewalks thereon. It has authority to secure funds by taxation, the right to expend them for said purposes, and the power to recover for those expenditures in many instances from abutting property owners. Its duty, therefore, is to exercise its powers so as to construct reasonably safe streets and sidewalks for the accommodation of the public. If those sidewalks become out of repair and thereby unsafe, the city, in the absence of any controlling statute, after notice of that condition and reasonable opportunity to repair, would become liable for all damages resulting from its negligent failure to perform its duty. It is not essential that said liability should be imposed by the specific terms of the statute governing the municipality, but may be and is implied from the authority and resources given the city. *Burke v. City of South Omaha,* 79 Neb. 793; *Goodrich v. University Place,* 80 Neb. 774. It is entirely competent for the legislature to either remove or qualify the implied liability above referred to. *Goddard v. City of Lincoln,* 69 Neb. 594; *Schmidt v. City of Fremont,* 70 Neb. 577.

Defendant's charter neither specifically imposes nor directly exempts it from liability for damages because of injuries arising from its defective walks and streets, but qualifies the implied liability therefor. In applying the statute we must give it a reasonable construction. But for section 7711, *supra,* defendant would be liable if it had actual or constructive notice of the defective condition of the walk for such a time preceding the injury as that it might in the exercise of reasonable diligence have repaired it. *City of Central City v. Marquis,* 75 Neb. 233. With the number of officers in its employ to whom

notice would be notice to the defendant, and the constant change in such officials, one succeeding the other, and those stepping down and out frequently leaving the city, it became a matter of moment and public concern to limit the methods of proving that notice, and to fix a statutory time thereafter within which the municipality might make repairs, during which time it would not be subject to litigation. It was the evident intention of the legislature to absolve the city from liability for all injuries that might result before, or within five days after, actual notice to it of a defect in its sidewalks, and that the notice should not only be in writing, but describe the nature and place of the imperfection so definitely as that its employees with the aid of said information might readily locate and repair said way. There is less reason for insisting upon explicit notice of a defect where the information is given before, than one furnished after, an injury. Upon receipt of the first notice, liability has not attached to the city, and, if its servant may, with the assistance of the notice, locate the fault, all useful purpose is served. In case of notice after injury more specific information is necessary to enable the city to make a proper defense. Its liability may not turn on the existence of various defects, but whether or not at the very point where the accident occurred the unsafe and dangerous condition existed and proximately caused the injury to claimant. In the instant case it appears from the testimony that the sidewalk was in bad repair and unsafe for the space of the two blocks referred to in the notice, and that those defects were patent and had existed for a considerable length of time before the notice was given. Defendant had ample time within which to repair said walk far in excess of that given by the statute. The statutory requirements of notice to municipalities like the one at bar should be liberally construed, to the end that persons having meritorious claims may not be cut off by technicalities as to the form of notice. *City of Lincoln v. O'Brien,*

56 Neb. 761; *City of Lincoln v. Pirner*, 59 Neb. 634; *Rusch v. City of Dubuque*, 116 Ia. 402; *Buchmeier v. City of Davenport*, 116 N. W. (Ia.) 695.

We are of opinion that the notice was sufficient. It is not claimed that the case was not fairly submitted to the jury, nor that the recovery is excessive, and therefore the judgment of the district court should be affirmed, and we so recommend.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

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CHARLES F. CROCKER, APPELLANT, V. WILL H. STEIDL, APPELLEE.

FILED DECEMBER 5, 1908. No. 15,413.

1. **Evidence of Value:** COMPETENCY. Where the value of a stock of general merchandise was in issue, it was not competent to inquire of a witness, not shown to have seen, or to know anything about the condition of, said stock, what was the fair market value of said goods.

2. **Appeal:** EVIDENCE. If the testimony is conflicting and is fairly submitted to the jury, a new trial will not be granted if there is evidence sufficient to sustain the verdict, even though this court might have reached a different conclusion from the evidence than that attained by the jury.

3. ——: BILL OF EXCEPTIONS. An affidavit relating to newly discovered evidence will not be considered in this court unless included in a bill of exceptions.

APPEAL from the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Affirmed.*

*J. C. Dort*, for appellant.

*Story & Story, contra.*

ROOT, C.

In the spring of 1906 plaintiff was engaged in the general merchandise business. By virtue of letters and telegrams the parties hereto entered into a contract whereby plaintiff was to sell to defendant, and the latter was to purchase, plaintiff's stock of goods, for the consideration of the cost price of the groceries and 90 per cent. of the cost price of all other goods contained therein. Defendant refused to comply with his contract, and plaintiff instituted this action for damages. Plaintiff recovered a verdict for $1, and appeals to this court.

1. Concerning the instructions given by the court on its own motion, we are of opinion that plaintiff should not complain, for the reason that he did not request instructions more definite in the particulars criticised, and the court seems to have given every instruction submitted by plaintiff.

2. It is argued that the court should have permitted the witness Munneke to testify as an expert upon an assumed state of facts concerning the market value of the merchandise in question. The witness had never seen the goods, nor did he know the proportion of boots, shoes, dry goods, groceries or clothing contained in the aggregate of said stock, or when the articles were purchased, or their condition or qualities. The offered testimony was properly excluded. *Smith v. First Nat. Bank*, 45 Neb. 444.

3. It is asserted that the verdict must have been the result of prejudice and passion because the evidence clearly demonstrates that plaintiff was entitled to substantial damages and for a much greater sum than $1. According to the testimony of plaintiff and that of two other witnesses the stock of goods bargained for cost about $9,000 but was not worth on the market to exceed 75 per cent. of that price. Defendant, on the other hand, qualified as competent to testify upon this issue by showing that he had been engaged in the general merchandise business in southeastern Nebraska for 10 or 12 years preceding said

trial; that he had made a critical examination of said stock, and that the shirts, dry goods, shoes and groceries therein were worth their cost price, and the clothing worth 90 per cent. thereof. The evidence does not indicate that said stock contained any merchandise other than groceries, shirts, dry goods, shoes and clothing. If the jurors believed defendant, and discredited plaintiff and his witnesses, their verdict is supported by the evidence. The credibility of the witnesses was peculiarly for the determination of the jury. The evidence would have sustained a much greater recovery for plaintiff, but the verdict is not so manifestly wrong as to justify us in granting a new trial. *Davey v. Davey,* 73 Neb. 726.

4. Plaintiff argues that he was entitled to a new trial because of newly discovered evidence. The assignments of error do not raise this question, nor does the bill of exceptions contain any of such evidence. We cannot consider said point. *Omaha, N. & B. H. R. Co. v. O'Donnell,* 24 Neb. 753. The transcript contains the copy of an affidavit of plaintiff's counsel relative to such evidence, but it cannot be considered in this court because not embodied in a bill of exceptions. *Ray v. Mason,* 6 Neb. 101; *Vindquest v. Perky,* 16 Neb. 284; *National Lumber Co. v. Ashby,* 41 Neb. 292.

A careful consideration of the record satisfies us that plaintiff's motion for a new trial was properly overruled, and 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.

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3. In an action on contract by a correspondence school against a pupil for tuition, that plaintiff might have employed the time to the education of another scholar is a matter of defense, which plaintiff is not required to anticipate. *International Text-Book Co. v. Martin*..... 403

4. Where a contract is susceptible of two constructions, that construction should be adopted which will prevent a forfeiture. *Hamann v. Nebraska Underwriters Ins. Co*..... 429

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2. The rule that a vendee is not a *bona fide* purchaser until he has paid or become irrevocably bound for the payment of the price cannot be invoked against one who has promised a consideration for the transfer, unless the transfer will hinder or delay creditors. *Everitt v. Farmers & Merchants Bank*..... 191

3. A *bona fide* purchaser of stock of a corporation may sue to compel it to enter the assignment and issue a new certificate, and to restrain the sheriff from selling the stock on an execution against the vendor. *Everitt v. Farmers & Merchants Bank*..... 191

4. Reorganization *held* not to change the legal entity of a corporation. *Carlon v. City Savings Bank*..... 582

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1. Where the supreme court grants additional time to appellants to file briefs, attorney's fees occasioned thereby will not be taxed against appellants as costs. *Omaha Loan & Building Ass'n v. Hendee* ..... 24
2. In the absence of any statute providing for taxation of costs in proceedings for disbarment, *held* proper to require each party to pay his own costs. *State v. Fisher* ..... 361
3. A judgment against defendant for costs, after payment in full of the claim on which the action was brought, is erroneous, if not void. *Hayes County v. Wileman* ..... 669

**Counties and County Officers.** See INJUNCTION, 8. JUDGES.

1. Where, in reliance on the proviso added to sec. 19, ch. 10, Comp. St. 1899, by the act of 1901 (laws 1901, ch. 11), a county treasurer sues to recover the amount paid a surety company on his official bond approved by the county board, the county is not estopped to assert the invalidity of the statute. *Prowett v. Nance County* ..... 400
2. Courts will not interfere with a county board unless it acts fraudulently or exceeds its powers. *Roberts v. Thompson* .. 458
3. Under sec. 4443, Ann. St. 1907, it is the duty of the county board to provide suitable offices for the courts and county officers. *Roberts v. Thompson* ..... 458
4. In making an estimate of expenses, a county board may provide for probable expenses, the amounts of which are unknown. *Roberts v. Thompson* ..... 458
5. County board *held* not authorized to levy taxes to pay expenses of subsequent years, nor to contract with reference to levies of subsequent years, unless authorized by the electors. *Roberts v. Thompson* ..... 458
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2. Only that part of affidavits for a continuance which sets forth the evidence of the absent witnesses should be read to the jury. *Shumway v. State* ..... 152
3. Overruling challenges for cause *held* not prejudicial, unless accused was compelled to accept objectionable jurors for want of peremptory challenge. *Shumway v. State* .....152, 165
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5. Requested instructions are properly refused, if covered by instructions given. *Shumway v. State* ..... 152
6. It is proper in instructions to quote so much of the statutes as is necessary to define the crime charged, and ordinarily to include the punishment provided. *Shumway v. State* ... 152
7. It is not necessary to cover all the elements of the crime charged by a single paragraph of the instructions. *Shumway v. State* ..... 152
8. An instruction treating the evidence as both direct and circumstantial *held* proper, there being direct evidence of certain facts. *Shumway v. State* ..... 152
9. Instruction that, if the jury believe any witness has wilfully testified falsely to any material fact, they may disregard the testimony of such witness, *held* not objectionable as being especially directed against defendant. *Shumway v. State* ..... 152
10. Instruction that, if the jury have a doubt of defendant's guilt, they will then determine whether such doubt is reasonable, *held* not erroneous. *Shumway v. State* ..... 152
11. On a trial for murder in the perpetration of a robbery, certain evidence held admissible. *Shumway v. State* ..... 152
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18. Decision of trial court on conflicting evidence as to alleged misconduct of the county attorney will not be disturbed unless unsupported by evidence and clearly wrong. *Holmes v. State*..... 406
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Where a wife, as tenant in common with her brothers and sisters of lands subject to the dower and homestead right of their mother, joins in an agreement with the mother not to partition the lands during the lifetime of the mother, the agreement is binding on her husband claiming as tenant by the curtesy. *Mathews v. Glockel* ..... 207

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2. The county board, in fixing assessments for benefits conferred by a branch ditch constructed under art. I, ch. 89, Comp. St. 1881, acts judicially, and its judgment will not be reviewed in a suit to enjoin its execution. *Omaha & N. P. R. Co. v. Sarpy County*..... 140
3. Where three railroad companies join in a suit to restrain proceedings under the drainage act (laws 1881, ch. 51) for want of notice, they must show want of knowledge of such proceedings. *Omaha & N. P. R. Co. v. Sarpy County*..... 140
4. Where three companies are interested in a railroad claimed to be damaged by a branch ditch constructed prior to the building of the road, the question of damages is properly disposed of in the original proceedings; and that no damages were allowed one company does not make the proceedings void. *Omaha & N. P. R. Co. v. Sarpy County*..... 140
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**Evidence.** See CRIMINAL LAW. FORCIBLE ENTRY AND DETAINER, 5-7.

1. That a witness has testified to a conversation with a party, in which the latter made admissions against interest, will not permit the party to testify to another conversation consistent with his theory of the case. *O'Connor v. Padget*, 95
2. Where a county judge identifies entries in records of his office, the want of a certificate conformable to sec. 4817, Ann. St. 1907, does not render them inadmissible. *Kolterman v. Chilvers*..... 216
3. Where the evidence relative to a material fact is conflicting, any collateral fact tending to establish the probability or improbability of the disputed fact is admissible. *Landis & Schick v. Watts*..... 359
4. Hypothetical questions which fairly reflect the facts proved are sufficient, provided the subject is one for expert testimoney. *Landis & Schick v. Watts*..... 359
5. In an action for injury to chattels, the owner is qualified to give an estimate of their value. *Hespen v. Union P. R. Co.* ..... 495
6. In an action on an accident policy, where the question is

**Evidence**—*Concluded.*

whether death resulted from an accidental injury, evidence of bodily condition of insured between the date of injury and his death *held* admissible. *Ward v. Aetna Life Ins. Co.*, 499

7. Where the opinion of a physician as to cause of death is called for, it is improper to include in the hypothetical question the fact that the attending physician had pronounced the patient cured of an injury from which it was claimed his death resulted. *Ward v. Aetna Life Ins. Co*.... 499

8. Error is not committed in permitting a hypothetical question whch fairly reflects the case as made by plaintiff, because other facts afterwards established by defendant are not included. *Ward v. Aetna Life Ins. Co*..... 499

9. One skilled in handling an engine can testify as to within what distance an engine running at a given rate of speed can be stopped. *Zelenka v. Union Stock Yards Co*..... 511

10. The burden of proof rests on the party alleging the affirmative of an issue. *Allen v. Chicago, B. & Q. R. Co*..... 726

11. Bill of lading *held* to constitute the contract of shipment, and its terms cannot be varied by parol evidence. *Whitnack v. Chicago, B. & Q. R. Co*..... 464

12. An agreement to pay a note and mortgage as part consideration for a conveyance may be established by parol evidence. *Wiltrout v. Showers*..... 777

13. Authority of agent to execute a contract cannot be proved by asking a third person who had charge of the principal's business. *Kimball Bros. Co. v. Fitzgerald*..... 805

14. Question calling for conclusion of witness *held* properly excluded. *Kimball Bros. Co. v. Fitzgerald*..... 805

15. Evidence of value of goods by one who does not know their condition *held* incompetent. *Crocker v. Steidl*..... 850

**Exceptions, Bill of.** See APPEAL AND ERROR, 18-20.

1. In order to review proceedings on the impaneling of a jury, all matters which it is desired to present should be preserved by bill of exceptions. *Shumway v. State*..... 165

2. The trial judge cannot settle a bill of exceptions more than 100 days from the adjournment of the term at which the cause was tried, decree entered, and motion for a new trial overruled; and a bill allowed in violation of the statute will be quashed on motion. *Walker v. Burtless*..... 211

3. A district judge is without authority, after 80 days from the adjournment of the term of court *sine die*, to extend the time for settling a bill of exceptions. *Bressler v. Wayne County*..... 758

**Executors and Administrators.**

Allowance to the widow is payable out of the assets, and cannot be paid out of the homestead left by decedent. *In re Hadsall* ..... 587

**Forcible Entry and Detainer.**

1. Ch. 163, laws 1907 (code, sec. 1032c), extends a similar remedy to actions for forcible entry and detention to that provided by sec. 591 of the code for the enforcement of judgments in actions on contracts for the payment of money only. *Magic City Realty Co. v. Scheneckenberger*..... 648
2. Under ch. 163, laws 1907, the court which renders the final judgment of ouster is the proper court to issue the writ. *Magic City Realty Co. v. Scheneckenberger*..... 648
3. Perfecting an appeal does not deprive the court which rendered a judgment of ouster of jurisdiction to allow a bond and issue a writ of restitution. *Magic City Realty Co. v. Schneckenberger* ..... 648
4. In an action on a bond on appeal in a forcible entry and detainer suit, plaintiff can recover the highest price the premises would bring for any lawful use to which they were adapted. *Raapke & Katz Co. v. Schmoller & Mueller Piano Co.* ..... 716
5. Statement by landlord that tenant could hold premises for another year at $150 a month, *held* not an admission of the rental value. *Raapke & Katz Co. v. Schmoller & Mueller Piano Co*..... 716
6. One testifying as an expert to rental value may be cross-examined as to his knowledge of rental value of other property in the vicinity. *Raapke & Katz Co. v. Schmoller & Mueller Piano Co*..... 716
7. On the issue of rental value of premises wrongfully detained, *held* not error to exclude the amount of rent fixed in a lease made two years before. *Raapke & Katz Co. v. Schmoller & Mueller Piano Co*..... 716

**Forfeitures.** See CONTRACTS, 1. INSURANCE, 3. LANDLORD AND TENANT, 2.

**Fraudulent Conveyances.**

1. Where a transfer of property between persons not related is assailed as fraudulent, that the consideration was paid to the grantor's near relative does not change the rule imposing on the party assailing the transaction the burden of proving it fraudulent. *Everitt v. Farmers & Merchants Bank* ..... 191
2. Where a creditor without intent to defraud receives property in excess of his debt, equity will require him to account to other creditors only for the excess. *Griswold v. Szwanek*, 761

**Garnishment.** See JUDGMENT, 3.

**Guaranty.**

Extension of time of payment to a principal debtor *held* a sufficient consideration for a new contract of guaranty made after renewal of the principal obligation. *Home Savings Bank v. Shallenberger* ..... 507

**Guardian and Ward.**

1. The appointment of a guardian by a county court is not conclusive as against a parent's right to the custody of his children, unless he had notice of the proceeding, and the question of his competency was adjudicated. *Clarke v. Lyon* ..... 625
2. Judgment allowing guardian's account *held* not to estop the ward from contesting the legality of a sale of his lands to his guardian. *Kazebeer v. Nunemaker* ..... 732
3. Purchase of ward's land by guardian *held* fraudulent, and voidable at the option of the ward; and the record in a partition suit was notice of that fact to all persons claiming title under the guardian. *Kazebeer v. Nunemaker* ..... 732
4. Under secs. 1530, 1535, 1536, Okla. St. 1893, a guardian cannot make a valid sale of his ward's personalty without authority of the court. *Gentry v. Bearss* ..... 787
5. In an action by a guardian to recover property of his ward unlawfully sold by a former guardian, plaintiff need not return or offer to return the purchase money which never came into his hands, nor was used for the minor's benefit. *Gentry v. Bearss* ..... 787

**Habeas Corpus.**

After conviction of a misdemeanor, a prisoner will not be liberated on habeas corpus for insufficiency of the complaint, if an offense is even defectively stated. *In re Caldwell* ..... 544
*Rhyn v. McDonald* ..... 552

**Highways.**

1. Equity will not restrain the discretion of a county board in its action on a petition for the establishment of a road. *Throener v. Board of Supervisors* ..... 453
2. A landowner has an adequate remedy at law to recover damages for the taking of his property for a road, and cannot enjoin its establishment. *Throener v. Board of Supervisors* ..... 453
3. Rejection of a petition for a road will not bar another petition therefor. *Throener v. Board of Supervisors* ..... 453
4. The public cannot be deprived of its right to have a highway established because the officers have neglected to preserve one previously established along the same route. *Throener v. Board of Supervisors* ..... 453

**Highways**—*Concluded.*

5. That there are no funds available to pay damages and no tax levied therefor will not justify restraining a county board from approving a petition for a road. *Throener v. Board of Supervisors* ..... 453
6. Cities of the second class and villages were road districts under sec. 76 of the road law (Comp. St. 1899, ch. 78) as it existed prior to the amendment of 1901, and entitled to one-half of the road tax levied within their limits. *City of Chadron v. Dawes County* ..... 614
7. Where a county has collected a road tax levied within the limits of a city of the second class or village, it holds one-half thereof as a public trust, with the continuing duty to pay it to such city or village. *City of Chadron v. Dawes County* ..... 614
8. A county holds one-half of road taxes collected within the limits of a city of the second-class or village in trust and one-half of the road tax levied within their limits. *City of v. Dawes County* ..... 614
9. Where a county appropriates the portion of the road tax which should be paid to a city of the second class or village, it is liable to such city or village in a direct proceeding. *City of Chadron v. Dawes County* ..... 614

**Homicide.** See CRIMINAL LAW.

**Husband and Wife.**

1. A wife is not guilty of desertion in leaving a husband who because of drunkenness and vicious associations fails to support her; and in such case she is entitled to support for herself and minor children. *Sample v. Sample* ..... 37
2. A nonresident separated from her husband without fault may sue him in this state for support and maintenance. *Hoon v. Hoon* ..... 688
3. In a suit for support and maintenance, *held* proper to require the payments to be made in monthly instalments. *Hoon v. Hoon* ..... 688

**Indictment and Information.**

1. In charging a statutory crime, the information should negative any exception, unless the allegation of the affirmative part of the statute clearly negatives the other. *Holmes v. State* ..... 406
2. By a plea of not guilty defendant waives all defenses which may be raised by motion to quash or plea in abatement. *Ingraham v. State* ..... 553
3. In charging an offense as to property belonging to several owners, it is sufficient under sec. 418 of the criminal code to

**Indictment and Information**—*Concluded.*

allege that the property belonged to any one or more of them. *Brinegar v. State*..... 558

4. Where it is doubtful whether an offense is larceny or conversion by a bailee with intent to steal, the information may charge both offenses. *Cohoe v. State*..... 744

**Infants.**

1. Sec. 5, ch. 75, art. I, Comp. St. 1907, authorizes the commitment of a boy to the state industrial school when convicted of a felony, except murder or manslaughter, or a misdemeanor. *Roberts v. State*..... 651
2. Commitment to the state industrial school is in no sense a punishment, nor is the school a prison in the ordinary acceptation of that term. *Roberts v. State*..... 651
3. An infant on attaining his majority can maintain a suit to impeach a decree in partition under which his lands were purchased by his guardian. *Kazebeer v. Nunemaker*..... 732

**Injunction.** See HIGHWAYS, 1, 2, 5. JUDGMENT, 9. MUNICIPAL CORPORATIONS, 5.

1. One cannot enjoin a threatened wrong, where the injury he will sustain is not different from that suffered by the public. *Lee v. City of McCook*..... 26
2. Courts will not, as a rule, enjoin the passage of unauthorized resolutions or ordinances. *Lee v. City of McCook*..... 26
3. Plaintiff *held* not entitled to an injunction to restrain defendant from interfering with harvesting crops purchased from defendant's tenant, where the acts complained of did not prevent plaintiff from harvesting them. *Kirkpatrick v. Fonner* ..... 32
4. An order of injunction which does not contemplate a hearing is a temporary injunction, and an order dissolving it may be superseded. *State v. Graves*..... 282
5. Where a second injunction was in contravention of one in force, *held* that it should be vacated. *State v. Graves*..... 282
6. Order *held* to be a temporary injunction which after dissolution could be superseded, and not a restraining order. *State v. Graves*..... 282
7. A restraining order is in aid only of the main action; its office being to hold matters *in statu quo* until a hearing on a temporary injunction. *State v. Graves*..... 282
8. Equity will restrain public officers from illegally creating a debt which must be paid by taxation. *Roberts v. Thompson* ..... 458
9. A single trespass on land, with no showing that it will be repeated, will not warrant an injunction. *Cox v. Sheen*... 472

**Injunction**—*Concluded.*

10. An allegation in an answer in a suit to enjoin trespass on land justifying a single act of trespass *held* insufficient to show a purpose to repeat the trespass. *Cox v. Sheen*..... 472
11. Equity will restrain waste threatened by a tenant for years, and his agents or employees. *Hayman v. Rowud*..... 598
12. Sec. 262 of the code authorizes the use of affidavits on an application for a temporary injunction, and not on the final hearing. *Francisco v. Furry*..... 754

**Insurance.**

1. Beneficial association *held* not estopped to plead exemption from liability for death of insured, due to his engaging in a prohibited occupation, by accepting his dues and assessments, with knowledge that he was so engaged. *Crites v. Modern Woodmen of America*..... 298
2. Contract construed, and *held* there was no default by assured in not keeping his books of account in a fireproof safe until the expiration of the time within which to take an inventory. *Hamann v. Nebraska Underwriters Ins. Co*.. 429
3. Forfeitures will be enforced only when the strict letters of the contract requires it. *Hamann v. Nebraska Underwriters Ins. Co*..... 429
4. In an action on a note for the second premium on a life policy, defense that the note was obtained by fraud *held* not sustained by the evidence. *State Life Ins. Co. v. Bolton*, 622
5. A surety company organized under ch. 23, Comp. St. 1873, is an insurance company, and may, under sec. 55 of the code be sued in the county where the cause of action arose, or where any contract of the company has been violated or is to be performed. *Sullivan v. Radzuweit*..... 657
6. Whether death was caused by accident is for the jury, unless the evidence is so convincing that all reasonable men would adopt the same conclusion. *Ward v. Aetna Life Ins. Co.* ..... 499
7. Disease, which would not have been fatal but for lowered vitality following an accidental injury, *held* the cause of death. *Ward v. Aetna Life Ins. Co*..... 499
8. Where death results from morbid changes in vital functions induced by an accidental injury, it is caused by such accident. *Ward v. Aetna Life Ins. Co*..... 499

**Intoxicating Liquors.** See PARTIES.

1. In an application for a license, where the sole objection was as to the character of the applicant, and the evidence showed him to be of good character, the city council properly granted a license. *In re Phillips*..... 45

Intoxicating Liquors—*Continued.*

2. In the absence of a constitutional provision, the power to regulate or prohibit the liquor traffic is vested exclusively in the legislature, and cannot be delegated to the courts. *In re Phillips* ..... 45
3. An employee of a licensed saloon-keeper does not violate sec. 7179, Ann. St. 1907, where he has had nothing to do with the unlawful placing or maintaining of screens in a saloon. *In re Adamek* ..... 448
4. It is a violation of law for an employee of a licensed liquor dealer to sell liquor to an habitual drunkard. *In re Adamek*, 448
5. A licensing board should refuse a license where the evidence shows that the applicant, during the past year, while employed as a bartender, sold liquor to an habitual drunkard. *In re Adamek* ..... 448
6. A licensing board must see that an applicant for license is a man of respectable character, and it cannot presume that he is, when it is denied. *Batten v. Klamm* ..... 379
7. Affidavits are incompetent to prove that petitioners for a liquor license are freeholders, when that question is in issue. *Batten v. Klamm* ..... 379
8. On a hearing before an excise board a witness testified to circumstances to establish sales of liquor by applicant to a minor, refusal either to require witness to disclose the name of the minor or to strike out his testimony *held* error. *Batten v. Klamm* ..... 379
9. Cities having excise boards with exclusive power to license sale of liquors cannot appeal from an order denying or granting a license. *Batten v. Klamm* ..... 379
10. A license should be recalled pending appeal in the district court from an order overruling a remonstrance, and mandamus will issue to compel its recall. *State v. Rathsack* .. 386
11. Where an applicant for a liquor license tenders a bond not conditioned as required by statute, it is error for the license board to approve the bond and issue a license. *In re Clyde*, 537
*In re Johnson* ..... 539
12. Where a bond not conditioned as required by statute has been accepted, the applicant cannot, on appeal in the district court, cure the defect by filing an amended bond. *In re Clyde* ..... 537
*In re Johnson* ..... 539
13. Where the respectable character of an applicant for license is denied, the licensing board should consider the acts charged in determining his fitness. *Bolton v. Hegner* ..... 772
14. Where it is proved that an applicant for license during the preceding year permitted gambling in his place of business, license should be denied. *Bolton v. Hegner* ..... 772

**Intoxicating Liquors**—*Concluded.*

15. A person frequently under influence of liquor and who permits gambling in his place of business, is not of respectable character under sec. 7150, Ann. St. 1907. *Woods v. Garvey*, 776
16. In an action by a wife against liquor dealers for loss of support, though the evidence fails to show the cost of such support, a verdict will not be set aside, unless so large as to clearly indicate prejudice of the jury. *Olmsted v. Noll*..... 147
17. Under ch. 174, laws 1905 (code, secs. 675-675*d*), the final order of a district court on appeal from an order of the city council granting a license is reviewable in the supreme court. *In re Adamek*..... 448
18. That the transcript of the proceedings before a licensing board is defective is not ground for dismissing the appeal. *Clark v. Foltyn*..... 610
19. In an appeal by remonstrators from an order granting a license, jurisdiction is conferred on the district court by giving notice of appeal, and filing a transcript of the proceedings within a reasonable time. *Clark v. Foltyn*..... 610
20. That a certified transcript of the evidence before a licensing board on an application for a license is not filed with the transcript of the proceedings is not ground for dismissing the appeal. *Clark v. Foltyn*..... 610
21. The sale of liquors, as well as injury resulting therefrom, may be established by circumstances. *Sullivan v. Radzuweit* ..... 657

**Judges.**

1. In an action against a county judge and his surety for failure to report fees earned, but not collected, intent to evade the statute (laws 1877, p. 215), or negligent omission to collect fees, or negligent failure to require surety must be shown. *Douglas County v. Vinsonhaler*..... 810
2. Sec. 8, ch. 28, Comp. St. 1899, *held* not to give county judge right to charge fees for marriage ceremonies. *Douglas County v. Vinsonhaler*..... 810

**Judgment.** See COSTS, 3. WILLS, 3.

1. Suit in equity to vacate decree for fraud, *held* a proper proceeding. *Schneider v. Lobingier*..... 174
2. Where a party applies to a court of equity for relief against a decree, the decree entered should protect defendant as well as plaintiff. *Schneider v. Lobingier*..... 174
3. An unconditioned order under sec. 249 of the code, that a garnishee pay money into court, is a judgment within the statute making judgments docketed in the district court liens on lands. *Johnson v. Samuelson*..... 201

Judgment—*Continued.*

4. A proceeding to revive a dormant judgment, while not the commencement of a new action, is the commencement of new proceedings. *St. Paul Harvester Co. v. Mahs*..... 336

5. A judgment debtor served with notice of application to revive a dormant judgment may interpose all suitable defenses, as payment and that the judgment is void for want of jurisdiction, without being held to have appeared generally. *St. Paul Harvester Co. v. Mahs*..... 336

6. Judgment against corporation *held* void and subject to collateral attack for want of service. *Gibson v. Sexson*.... 475

7. Decree in tax foreclosure that a mortgagee "be foreclosed of all equity of redemption or other interest in said premises," *held* not a bar, in favor of the owner, to a subsequent action by an assignee of the mortgagee to foreclose his mortgage. *Gibson v. Sexson*..... 475

8. An attachment lien is merged in that of the judgment, and ceases to exist when the judgment becomes dormant. *Lincoln Upholstering Co. v. Baker*..... 592

9. A proposed sale of land on execution issued on a dormant judgment will be enjoined at the suit of one who acquired title during the life of the judgment lien. *Lincoln Upholstering Co. v. Baker*..... 592

10. One who intervenes in an action may dismiss his intervention without prejudice, and a judgment in the action will not affect his interest in the matter in litigation. *Lincoln Upholstering Co. v. Baker*..... 592

11. A judgment on service by publication against a resident on whom personal service might have been had is void. *Hayes County v. Wileman*..... 669

12. A void judgment may be vacated at any time on motion by an interested party; sec. 82 of the code, providing for opening judgments within five years, not applying to void judgments. *Hayes County v. Wileman*..... 669

13. A court does not obtain jurisdiction by issuing a summons and leaving a copy thereof at defendant's late place of residence, and a judgment rendered on such service is void. *Minnesota Thresher Mfg. Co. v. L'Heureux*..... 692

14. A judgment void on its face may be collaterally impeached. *Minnesota Thresher Mfg. Co. v. L'Heureux*..... 692

15. An order of revivor does not impart validity to a judgment void on its face. *Minnesota Thresher Mfg. Co. v. L'Heureux*, 692

16. Judgment in partition *held* conclusive though erroneous. *Kazebeer v. Nunemaker*..... 732

**Judgment**—*Concluded.*

17. A judgment in one action will not support a plea in bar in another, unless the same subject matter was involved. *Kazebeer v. Nunemaker* ..... 732
18. Collateral matters which did not properly enter into the final account of a guardian, *held* not concluded by the judgment thereon. *Kazebeer v. Nunemaker* ..... 732
19. Parties to a judgment are not bound by it in a subsequent action unless they were adverse parties. *Wiltrout v. Showers* ..... 777
20. In an action on a note against the maker and another who had agreed to pay it, where no issue was joined as between them, a judgment of dismissal as to such other will not in a subsequent action against him by the maker constitute a defense. *Wiltrout v. Showers* ..... 777

**Judicial Sales.**

The word "reversal" in sec. 508 of the code, providing that reversal of a judgment shall not affect title to lands sold thereunder, contemplates a reversal in any proceeding in any court having jurisdiction. *Kazebeer v. Nunemaker* .... 732

**Jury.**

1. Overruling of a challenge to a juror for cause, *held* not error, where complainant has not exhausted his peremptory challenges. *Olmsted v. Noll* ..... 147
2. In an action for the conversion of the proceeds of a bank check, where the conversion is denied, it is error to refuse a jury trial. *Brockway v. Reynolds* ..... 757

**Justice of the Peace.**

Where a garnishee, summoned under sec. 249 of the code, denies indebtedness, and the justice, without decision or adjournment, excuses him, he loses jurisdiction, and an order afterwards entered requiring the garnishee to pay the amount of the judgment into court is constructively fraudulent. *Johnson v. Samuelson* ..... 201

**Landlord and Tenant.**

1. One who has purchased crops from a tenant has a right during the term to enter and harvest the crop, notwithstanding a provision in the lease against subletting. *Kirkpatrick v. Fonner* ..... 32
2. The execution of a new lease, in which the tenant does not expressly reserve fixtures erected under a preceding lease, does not deprive him of the right to remove them. *Ogden v. Garrison* ..... 302
3. In an action by the wife of a tenant for injuries caused by falling into a cistern, *held* that there was evidence sufficient

**Landlord and Tenant**—*Concluded.*

to submit the question whether defendant had control of the premises when the accident occurred. *Carlon v. City Savings Bank* ..... 582

4. Where a landlord volunteers to make repairs, he will be liable to a tenant injured in consequence of the negligent manner in which they are made. *Carlon v. City Savings Bank* ..... 582

5. A landlord is liable for injuries to his tenant in consequence of the premises being rendered unsafe by an independent contractor. *Doyle v. Franek* ..... 606

Larceny. See CRIMINAL LAW, 32, 33.

1. On a trial for larceny of cattle, *held* not error to refuse to strike certain evidence as to cattle accused was driving to his ranch about the time of the larceny. *Ingraham v. State,* 553

2. Evidence on a trial for larceny of money by a bailee *held* to sustain the verdict. *Cohoe v. State* ..... 744

Libel.

1. In an action for libel *held* proper to show the relations between plaintiff and the author of the libel, to prove that plaintiff was the person referred to. *Dennison v. Daily News Publishing Co* ..... 675

2. Neither the grief of plaintiff's wife on reading a libelous article nor the influence of her grief on plaintiff's mind are elements of damage. *Dennison v. Daily News Publishing Co* ..... 675

3. In an action for libel, where punitive damages are not recoverable, neither evidence of defendant's refusal to publish a retraction, nor that others had published a retraction, is admissible. *Dennison v. Daily News Publishing Co* ..... 675

4. In an action for libel, where no name appears in the article, the editor of defendant's paper should not be required to testify as to whom he "supposed" the article referred. *Dennison v. Daily News Publishing Co* ..... 675

5. In addition to its truth defendant must allege and prove that the publication was with good motives and for justifiable ends. *Wertz v. Sprecher* ..... 834

Limitation of Actions. See MORTGAGES, 3, 4.

Limitations do not run against city warrants payable out of a special fund to be created until the fund is created, and there is sufficient money in it to pay the warrants. *Rogers v. City of Omaha* ..... 118

Malicious Prosecution.

1. In an action for malicious prosecution on a complaint to prevent crime, it is not error to admit in evidence the

**Malicious Prosecution**—*Concluded.*

finding of the magistrate that there was no just cause for complaint. *Jacobson v. Doll* ..... 93

2. A threat to inflict personal violence on a trespasser if he persisted in his wrongdoing will not justify him in prosecuting the author of the threats to prevent such personal violence. *Jacobson v. Doll* ..... 93

**Mandamus.** See INTOXICATING LIQUORS, 10.

1. Mandamus will not lie to compel the convassing board to count primary election ballots rejected by the election board under sec. 5830, Ann. St. 1907, because not indorsed by any of the election officers. *Crosby v. Haverly* ..... 565

2. Mandamus will not lie to compel the canvassing board to count primary election ballots; sec. 5892, Ann. St. 1907, relating to contest of elections providing a speedy means of determining the validity of such ballots. *Crosby v. Haverly* ..... 565

**Marriage.**

Power given by sec. 8, ch. 52, Comp. St. 1899, to judges and clergyman to perform marriage ceremonies is permissive, and not mandatory except as to such officers as are given fees for such ceremonies. *Douglas County v. Vinsonhaler* .. 810

**Master and Servant.**

1. The contract for benefits of the relief department of a railroad company provided: "The word 'disability' shall be held to mean physical inability to work." *Held*, That the words "physical inability to work" meant inability to perform such labor as the injured member was engaged in at the time of his injury, or similar labor equally remunerative. *Keith v. Chicago, B. & Q. R. Co* ..... 12

2. If an injured member of the relief department of a railroad company recovers so as to perform such work as is contemplated in the contract, or similar work equally remunerative, the obligation to pay benefits ceases, but recovery sufficient to enable him to earn smaller wages at other employment is insufficient to release defendants. *Keith v. Chicago, B. & Q. R. Co* ..... 12

3. Pleadings *held* not to tender an issue as to whether plaintiff was a stockholder in defendant company. *Blum v. Nebraska-Iowa Creamery Co* ..... 110

4. Oral statements made by an employee to individual members of the board of directors of a corporation that he is willing to waive certain conditions in his resignation, *held* not sufficient to constitute such waiver. *Blum v. Nebraska-Iowa Creamery Co* ..... 110

**Master and Servant**—*Concluded.*

5. In an action for a personal injury, defendant is entitled to a directed verdict where the evidence does not show that the alleged negligence was the proximate cause of the injury. *Benson v. Peters* ..... 189
6. It is a master's duty to exercise reasonable care to provide a reasonably safe place for his servant to work, to keep it reasonably safe, and to inspect the premises. *Riley v. Cudahy Packing Co.* ..... 319
7. Where a master permitted for a year a large steel plate to stand on edge, and it fell and injured a servant, whether the master was guilty of negligence, *held* question for jury. *Riley v. Cudahy Packing Co* ..... 319
8. Where a large steel plate toppled over and injured an employee, *held* not necessary that any witness testify directly as to the cause of its falling. *Riley v. Cudahy Packing Co* ..... 319
9. Under the facts, *held* that the relation of master and servant continued during time allowed for lunch. *Riley v. Cudahy Packing Co* ..... 319
10. Where two parties of workmen were constructing a telephone line, each under a different foreman, the first setting poles and the second stringing wires, *held* that the parties in the separate employments were not fellow servants. *Ault v. Nebraska Telephone Co* ..... 434
11. Printed instruction to linemen to inspect poles, *held* not to relieve telephone company from liability for injuries caused by the breaking of a pole. *Ault v. Nebraska Telephone Co* ..... 434

**Mechanics' Liens.**

The record of a mechanic's lien is not competent evidence either of the time when the material and labor were furnished, or that they were furnished on the building therein described. *Sabin v. Cameron* ..... 106

**Monopolies.** See CONSTITUTIONAL LAW, 2.

1. The prevention of discrimination in particular localities in prices of commodities in general use for the purpose of destroying the business of a competitor is within the police power of the state. *State v. Drayton* ..... 254
2. Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people. *State v. Drayton* ..... 254

**Mortgages.**

1. The district court is without jurisdiction to hear and determine at chambers a suit to foreclose a mortgage. *Shold v. Van Treeck* ..... 99

**Mortgages**—*Concluded.*

2. Where a valid mortgage has been foreclosed, though the proceedings were void, neither the mortgagor nor one claiming under him can assail the title acquired without tendering the amount of the decree and interest. *Currier v. Teske* ..... 315
3. A mortgage is a lien for only ten years from maturity of the debt, unless limitations is tolled by payment or otherwise. *Herbage v. McKee* ..... 354
4. Where the owner of a mortgage barred by limitations asks affirmative relief, the court on plea of the statute and proof may dismiss the suit without compelling payment by defendant. *Herbage v. McKee* ..... 354

**Municipal Corporations.** See CONSTITUTIONAL LAW, 3.

1. Where part of a street is vacated, only property owners whose property abuts on the part vacated are entitled to damages. *Lee v. City of McCook* ..... 26
2. Where a city annexes territory over which there is a highway, the highway becomes a street, and the city council is the only body that can vacate it. *Lee v. City of McCook,* 26
3. A city warrant payable out of its general funds is not invalidated by a recital that it shall be payable out of a special fund which the city is not authorized to create, or a special fund which it has failed to create. *Rogers v. City of Omaha* ..... 118
4. Sec. 7792, Ann. St. 1903, does not authorize a reassessment of property for the benefit of a purchaser at tax sale who fails to recover the amount of special taxes because of illegality of assessment. *Barkley v. City of Lincoln* ..... 181
5. Injunction will lie to restrain a city council from making an unauthorized reassessment and relevy of special taxes. *Barkley v. City of Lincoln* ..... 181
6. In proceedings to disconnect territory from a city under sec. 8978, Ann. St. 1907, it is no defense that the city is indebted on its bonds or otherwise. *Bisenius v. City of Randolph* ..... 520
7. A judgment in proceedings under sec. 8978, Ann. St. 1907, to detach territory from a city will not be reversed in the absence of a showing of mistake of fact or of law. *Bisenius v. City of Randolph* ..... 520
8. Notice to a city *held* sufficient under sec. 7711, Ann. St. 1907. *Ruth v. City of Omaha* ..... 346

**Negligence.**

Contributory negligence *held* not, as a matter of law, the proximate cause of an injury, if danger was discovered in time to avoid the injury by the use of reasonable care. *Zelenka v. Union Stock Yards Co* ..... 511

**New Trial.**

An assignment in a motion for a new trial that a group of instructions is erroneous is bad if any one of them was proper. *Cowperthwait v. Brown*..... 327

**Nuisance.**

A decree limiting the use of a feed yard *held* erroneous where it does not appear that it cannot be used as such without becoming a nuisance. *Francisco v. Furry*..... 754

**Parent and Child.**

1. That children would be better cared for by a stranger is not sufficient to deprive the parent of his right to their custody. *Clarke v. Lyon*..... 625
2. While the unfitness which deprives a parent of his natural right to the custody of his children must be positive, the decree thereof must be considered in relation to the attending circumstances. *Clarke v. Lyon*..... 625
3. The emancipation of a child by his parent may be proved by circumstantial evidence or by an express agreement. *Adams & Burke Co. v. Cook*..... 684

**Parties.**

In a suit brought against a saloonkeeper and the surety on his bond, one not a party to the bond cannot properly be joined as a party defendant. *Sullivan v. Radzuweit*..... 657

**Partition.**

1. A *bona fide* purchased under a decree in partition will be protected by sec. 508 of the code, though the decree is thereafter reversed. *Kazebeer v. Nunemaker*..... 732
2. Failure of plaintiff to file with the clerk documentary proof of title in partition will not deprive the court of jurisdiction. *Kazebeer v. Nunemaker*..... 732

**Physicians and Surgeons.**

1. An order by the state board of health, under sec. 9800 *et seq.*, Ann. St. 1907, revoking a physician's license, may be reviewed in the district court on error under sec. 580 of the code. *Mathews v. Hedlund*..... 825
2. On a hearing before the state board of health to revoke a physician's license for committing a criminal abortion, it is necessary to allege and prove simply that the woman was pregnant. *Mathews v. Hedlund*..... 825
3. A conviction in a court *held* not a condition precedent to proceedings by the state board of health to revoke a physician's license. *Mathews v. Hedlund*..... 825
4. Action of secretaries of state board of health will not be considered in district court, unless the board improperly refused to direct its secretaries to comply with defendant's requests. *Mathews v. Hedlund*..... 825

**Physicians and Surgeons**—*Concluded.*

5. The state board of health has power to correct its record, though error proceedings are then pending. *Mathews v. Hedlund* ..... 825
6. In proceedings to revoke a physician's license, it is within the discretion of the state board of health and its secretaries to receive affidavits. *Mathews v. Hedlund*..... 825
7. Where the state board of health has acted within its jurisdiction, and all jurisdictional facts are sustained by some evidence, its orders will be upheld. *Mathews v. Hedlund*.. 825

**Pleading.** See DEATH, 1, 2. DIVORCE, 4.

1. A general denial puts in issue every material averment in the petition. *Hess v. Dodge*..... 35
2. Where plaintiff in an action to enjoin trespass claims under a lease, an allegation in an answer that the lease has been canceled is new matter which must be denied by a reply. *Stanser v. Cather*..... 136
3. Misjoinder of cause of action against principal and surety with one against the principal alone, *held* waived under sec. 96 of the code, where no objection was made by demurrer or answer. *Raapke & Katz Co. v. Schmoller & Mueller Piano Co*..... 716
4. It is not necessary to offer in evidence a pleading as it stood before amendment by interlineation to make it part of the record. *Raapke & Katz Co. v. Schmoller & Mueller Piano Co*..... 716
5. An affirmative defense must be pleaded. *Wiltrout v. Showers* ..... 777
6. Where petition discloses lack of capacity to sue, such defense will be waived unless raised by demurrer. *Gentry v. Bearss* ..... 787

**Pledges.**

1. A tender of the amount secured by pledge of personalty at maturity of the debt, though not accepted nor kept good, will discharge the lien. *Moyer v. Leavitt*..... 310
2. Where a pledgee of personalty fraudulently represented that he had sold the property, and sent $20 to the pledger, which he retained until he discovered the fraud, *held* that the pledger was not liable for interest on the $20. *Moyer v. Leavitt*..... 310

**Police Power.** See MONOPOLIES.

**Principal and Agent.**

1. Exalting of value by an agent employed to purchase land is not permitted, and, if relied on by the principal, the agent and his co-conspirator are liable in damages. *Wiruth v. Lashmett*..... 375

**Principal and Agent**—*Concluded.*

2. Where an agent authorized to accept the unconditional delivery of notes receives them on conditions he was not authorized to make, the principal does not ratify them by accepting the notes without knowledge thereof. *Watt v. Davidson* ..... 712

3. A vendor who made a written contract for the sale of chattels to be paid in notes does not, by sending blank notes to a bank for the signatures of the purchasers, give the bank authority to accept them under conditions other than those specified in the contract. *Watt v. Davidson*..... 712

4. Evidence *held* to show that plaintiff's representative had authority to make contract for sale of machinery. *Northwest Thresher Co. v. Kubicek*..... 485

**Principal and Surety.**

Sureties on the bond of a president of a national bank *held* not liable for his misconduct after the expiration of the time of his appointment. *First Nat. Bank v. Samuelson*... 532

**Process.** See JUDGMENT, 13.

1. Evidence *held* sufficient to overcome return of an officer. *St. Paul Harvester Co. v. Mahs*..... 336

2. A defendant in foreclosure sued by the initial letters of his name, who does not appear and upon whom personal service is not made, is not bound by the decree. *Herbage v. McKee* ..... 354

**Quieting Title.**

1. Remaindermen *held* entitled to decree quieting their title as against the owner of a life estate who claimed to own the fee. *Tarnow v. Carmichael*..... 1

2. The venue of a suit to quiet title to real estate as against the apparent lien of a void judgment is governed by sec. 51 of the code, and must be laid in the county in which the real estate is situated. *Johnson v. Samuelson*..... 201

**Quo Warranto.**

1. In *quo warranto* to determine the right to an elective office, relator need not state that he received the highest number of votes, but it is sufficient to allege facts from which such conclusion may be drawn, nor need he allege that the votes were canvassed and returned as required by law. *State v. Loer*..... 602

2 In *quo warranto*, where relator's right to a public office is based on the fact that a legislative act is unconstitutional, it is not necessary to allege that fact, where the supreme court has previously so determined. *State v. Loer*..... 602

**Railroads.**

1. Whether defendant company, after discovery of the dangerous position of decedent, could by reasonable care have prevented the injury, *held* question for jury. *Zelenka v. Union Stock Yards Co* ..... 511
2. The mere killing of an animal by a railroad company, *held* insufficient to establish negligence. *Starke v. Chicago, B. & Q. R. Co* ..... 800

**Receivers.**

Appointment of receiver at an earlier date than specified in the notice, *held* void and subject to collateral attack. *Gibson v. Sexson* ..... 475

**Reformation of Instruments.**

1. Evidence *held* to support a finding to reform a contract of employment. *Blair v. Kingman Implement Co* ..... 344
2. Evidence *held* to warrant reformation of contract of employment to express the meaning given it when executed. *Blair v. Kingman Implement Co* ..... 344
3. Reformation of a contract to show that employee was employed in a certain capacity, *held* not prejudicial. *Blair v. Kingman Implement Co* ..... 344

**Replevin.**

In replevin, possession as evidence of ownership must be considered with the other evidence. *First Nat. Bank v. Adams*, 801

**Sales.**

1. Where a contract is executory, one party can stop performance; his only liability being for damages for breach of contract. *Backes v. Schlick* ..... 289
2. Where the vendor in an executory contract for the sale of goods receives notice from the vendee that he will not accept delivery, he cannot deliver the goods and recover either the price or damages for breach of contract. *Backes v. Schlick* ..... 289
3. In making a contract by correspondence, a letter of acceptance must be placed in the mail beyond control of the sender, before assent becomes effectual. *Northwest Thresher Co. v. Kubicek* ..... 485
4. Where an order for machinery gives vendor the right to accept it or not, and no time for acceptance is fixed, vendee has the right, up to the time of acceptance, to countermand the order. *Northwest Thresher Co. v. Kubicek* ..... 485
5. In an action for the price of hay, where defendant had refused the hay, claiming false weight, evidence *held* sufficient to support verdict for plaintiff. *Allen v. Rushfort* .... 663

**Sales—*Concluded.***

6. Title to entire crop of hay *held* to pass before price was paid. *Allen v. Rushfort* ..... 663
7. In an action for the price of hay, verdict *held* not excessive. *Allen v. Rushfort* ..... 663

**Schools and School Districts.**

In a suit to enjoin a school district from changing a schoolhouse site and appropriating money for a schoolhouse on a new site, an allegation that plaintiff is a resident taxpayer and qualified voter of the district is material. *Hess v. Dodge* ..... 35

**Set-Off and Counterclaim.**

The maker of a note may set-off a cause of action against a firm accruing after maturity of the note, and while the firm owned it, as against the firm or any of its members. *Fish v. Sundahl* ..... 541

**Soldiers' Home.**

A rule requiring members of a soldiers' home to pay a percentage of pension money for the benefit of the home, *held* not such an abuse of official discretion as would warrant the interference of a court. *Howell v. Sheldon* ..... 72

**Specific Performance.**

1. A vendee in a contract for the sale of land, who voluntarily relinquishes his rights therein, and leases the land from the vendor, cannot maintain specific performance. *Swanson v. James* ..... 42
2. Equity will not always enforce a specific performance, but will be governed by the merits of each case. *Lopeman v. Colburn* ..... 641

**States.**

1. Where a river forms a state boundary, that boundary follows any gradual change in the channel, but, where a new channel is formed suddenly, the boundary remains in the middle of the old channel. *Rober v. Michelsen* ..... 48
2. Where by the process of erosion and accretion land was transferred from Nebraska to Iowa, *held* that an avulsion did not restore it. *Rober v. Michelsen* ..... 48
3. The legislature cannot authorize the courts to quiet title to lands of a sister state. *Rober v. Michelsen* ..... 48

**Statutes.**

1. The act of April 1, 1901 (laws 1901, ch. 11), amending sec. 19, ch. 10, Comp. St. 1899, relating to official bonds, *held* void, because not germane to the original act. *Prowett v. Nance County* ..... 400

**Statutes**—*Concluded.*

2. Where a state adopts a statute from another state, it also adopts the construction placed upon it by the courts of such state. *Gentry v. Bearss* ..... 787
3. That officers have construed laws 1877, p. 215, as not requiring county judges to report fees for marriage ceremonies may be considered in construing a statute alleged to give the right to such fees. *Douglas County v. Vinsonhaler* ..... 810

**Subrogation.**

A third party guaranteeing payment of a note *held* not entitled on payment by him to have the note delivered with a guaranty of the payee made to any indorsee of the note. *Home Savings Bank v. Shallenberger* ..... 507

**Taxation.** See JUDGMENT, 6, 7.

1. An occupation tax of a percentage of the gross earnings of a telephone company whose franchise is also taxed, *held* not to tax the same property twice. *Nebraska Telephone Co. v. City of Lincoln* ..... 59
2. Occupation tax on telephone companies, *held* not void because not uniform as to persons or property. *Nebraska Telephone Co. v. City of Lincoln* ..... 59
3. Amount stated to which purchaser at a state tax sale for less than the amount of the decree is entitled on redemption. *Honnold v. Valley County* ..... 221
4. A purchase at a tax foreclosure sale by one whose duty it was to pay the taxes operates as payment only. *Gibson v. Sexson* ..... 475
5. Taxpayer *held* not to have made such a tender as would arrest the running of interest. *State v. Several Parcels of Land* ..... 570
6. In a suit to enjoin collection of taxes because of excessive valuation, decree reducing the same *held* not to render the taxes on the valuation so decreed void, and that they drew interest as if no suit had been brought. *State v. Several Parcels of Land* ..... 570
7. On an appeal to the district court from a county board of equalization, the court is without jurisdiction to consider any questions other than those presented to said board. *Reimers v. Merrick County* ..... 639
8. In redeeming from a judicial tax sale, the purchaser is entitled to the amount paid, with interest. *Douglas v. Hayes County* ..... 577
9. Redemption from a judicial tax sale must be made or tendered within two years from the sale. *Douglas v. Hayes County* ..... 577

Taxation—*Concluded.*

10. Where a purchaser at tax sale refuses to allow redemption, one wishing to redeem must tender the amount necessary therefor, unless the purchaser waives tender. *Douglas v. Hayes County* ..... 577
11. Refusal of purchaser at tax sale to receive less than an amount larger than that due is a waiver of a tender. *Douglas v. Hayes County* ..... 577
12. Where a purchaser at tax sale refuses to allow redemption on legal terms, a cause of action therefor arises in favor of parties interested, which may be brought at any time before limitations run. *Douglas v. Hayes County* ..... 577
13. The owner who conveys land by warranty deed after a sale for taxes has such an interest in the land as entitles him to redeem. *Douglas v. Hayes County* ..... 577
14. The owner of stock of a domestic investment company is not required to list it for taxation under sec. 10927, Ann. St. 1907, but it is to be assessed under sec. 10955. *Bressler v. Wayne County* ..... 758

Telegraphs and Telephones.

1. Provision for an annual payment to a city in franchise ordinances of telephone companies, while termed a "privilege tax," is in the nature of compensation for the use of the streets. *Nebraska Telephone Co. v. City of Lincoln* .... 59
2. The exaction of a percentage of the gross earnings of its business in an ordinance granting a franchise to a telephone company is a tax on the occupation of conducting a telephone business. *Nebraska Telephone Co. v. City of Lincoln* ..... 59
3. Such provision is legislative and subject to repeal. *Nebraska Telephone Co. v. City of Lincoln* ..... 59
4. A franchise to occupy the streets of a city by a telephone company is not identical with the occupation of the company. *Nebraska Telephone Co. v. City of Lincoln* ..... 59
5. An occupation tax measured by the gross receipts of a telephone company within a city is valid, though the receipts include tolls and rentals collected for messages over lines lying in part beyond the city limits. *Nebraska Telephone Co. v. City of Lincoln* ..... 59
6. A telephone subscriber *held* properly restrained from interfering with the company's wires. *Red Line Mutual Telephone Co. v. Pharris* ..... 371
7. The words "all road crossings," as used in sec. 11963, Ann. St. 1907, providing for placing telephone wires 20 feet above road crossings, refers to private as well as public roads. *Weaver v. Dawson County Mutual Telephone Co* .... 696

**Telegraphs and Telephones**—*Concluded.*

8. A telephone company is guilty of negligence for placing its wires only 13 feet above a road crossing and permitting them to become slack; sec. 11963, Ann. St. 1907, requiring them to be placed 20 feet above a road crossing. *Weaver v. Dawson County Mutual Telephone Co*..... 696

9. A person traveling a road crossed by a telephone line need not look to see if there is danger before passing under the wire. *Weaver v. Dawson County Mutual Telephone Co*.... 696

10. A rule of a rural telephone company that rent must be paid six months in advance *held* reasonable. *Buffalo County Telephone Co. v. Turner*..... 841

11. An exorbitant and illegal claim by a rural telephone subscriber will not justify him in demanding service without prepayment of rent. *Buffalo County Telephone Co. v. Turner* ..... 841

12. A telephone subscriber *held* not entitled to any deduction for reasonable delay in making repairs. *Buffalo County Telephone Co. v. Turner*..... 841

**Tenancy in Common.**

An action by a tenant in common to have his share set apart to him is in effect an action in partition, and not maintainable unless he is entitled to present possession. *Mathews v. Glockel*..... 207

**Trial.**

1. Where a jury returns two verdicts, one a directed verdict for one defendant and another against other defendants, they will be considered as one, where no objection is made to their form until after the discharge of the jury. *Olmsted v. Noll*..... 147

2. Where, on cross-examination of the head clerk of a benefit society, plaintiff asked him to attach to his deposition a copy of the by-laws of the order, *held* that he could not afterwards object that no showing had been made of their legal adoption. *Crites v. Modern Woodmen of America*.... 298

3. In an action for the recovery of money only, a verdict for plaintiff for a certain amount in cash and three notes is erroneous. *Wiruth v. Lashmett*..... 375

4. A party cannot ordinarily complain of nondirection of the jury, unless he has requested an instruction in point. *O'Connor v. Padget*..... 95

5. It is reversible error to instruct on a question not raised by the pleadings nor applicable to the evidence. *Sabin v. Cameron* ..... 106

**Trial**—*Concluded.*

6. A judgment will not be reversed because an instruction is ambiguous, where the charge as a whole correctly defines the law. *Ault v. Nebraska Telephone Co* ..... 434
7. Instructions should be considered together, and if so considered they fairly submit the case, it will not be reversed. *Zelenka v. Union Stock Yards Co* ..... 511
8. It is error to direct a verdict on an issue of fact on which the evidence is conflicting. *Doyle v. Franek* ..... 606
9. Where witnesses to prove rental value of premises have been cross-examined concerning rental value of other premises, an instruction that the latter evidence is to be considered only as to the weight of their opinions, *held* not erroneous. *Raapke & Katz Co. v. Schmoller & Mueller Piano Co* ..... 716
10. An instruction, which, if standing alone, might be erroneous, may not be so when considered with the other instructions. *Allen v. Chicago, B. & Q. R. Co* ..... 726
11. Where intent is to be ascertained from disputed circumstances, inferences to be drawn are for the jury. *Continental Lumber Co. v. Munshaw & Co* ..... 783
12. It is prejudicial error to submit question of plaintiff's contributory negligence where there is no evidence thereof. *Clingan v. Dixon County* ..... 808

**Trusts.**

1. Equity will permit the beneficiary of a trust fund to pursue it and enforce his rights against it wherever identified. *Tarnow v. Carmichael* ..... 1
2. In a suit to foreclose a mortgage, mortgagor *held* estopped to claim a life estate in the homestead, and that the amount paid by the purchaser for the interests of the remaindermen became a trust fund, for which the mortgagor is entitled to credit. *Tarnow v. Carmichael* ..... 1
3. Where property is conveyed directly to a corporation for its use, no trust for the benefit of others arises, though the conveyance contains a condition for its use in a manner from which third parties may be benefited. *Clarke v. Sisters of Society of the Holy Child Jesus* ..... 85
4. Conveyance *held* not to create a trust for the benefit of third parties, but to be a gift to a corporation for use in the purposes for which it was created on conditions subsequent, and on abandonment by the grantee it reverted to the heirs of the donor who had died in the meantime. *Clarke v. Sisters of Society of the Holy Child Jesus* ..... 85

**Vendor and Purchaser.**

1. The doctrine of *caveat emptor* will not be applied to assist one in getting or keeping that to which he is not entitled. *Tarnow v. Carmichael* ..... 1
2. The promise of a vendor of certain lands to procure for the purchaser the outstanding title of remaindermen in another tract of land, *held* without consideration. *Tarnow v. Carmichael* ..... 1
3. Where a contract for the sale of real estate provided that on default of vendee the money theretofore paid thereon "is to be declared forfeited," *held* that it was incumbent on vendor on vendee's default to declare a forfeiture to entitle him to the money. *Walker v. Burtless* ..... 211
4. A purchaser is chargeable with notice of the right of a tenant in actual possession. *Ogden v. Garrison* ..... 302
5. An assignment of a land contract signed and acknowledged by the husband alone is sufficient to transfer all his interest in the land. *Nortnass v. Pioneer Townsite Co* ..... 382
6. A contract between vendor and vendee is not affected by any secret intention of the vendee to use the premises for unlawful purposes. *Nortnass v. Pioneer Townsite Co* ..... 382
7. To convert an offer into a contract to sell real estate, the vendee must accept the offer as made. *Lopeman v. Colburn* ..... 641
8. Acceptance of an offer to sell land, fixing a place other than the residence of the vendor or the place named in the offer for the payment of the consideration and delivery of the deed, is not an unconditional acceptance which binds the vendor. *Lopeman v. Colburn* ..... 641

**Venue.** See QUIETING TITLE, 2.

**Waste.**

A tenant is guilty of waste who drills holes into a brick wall and drives wooden pegs therein to attach a sign. *Hayman v. Rownd* ..... 598

**Waters.**

1. A landowner is not answerable to an adjoining proprietor for causing surface water to flow on the premises of the latter to his damage, unless guilty of negligence. *Arthur v. Glover* ..... 528
2. A landowner may drain ponds which have no natural outlet by discharging the waters thereof into a natural surface-water drain over the land of another, if he does so in a reasonable manner and without negligence. *Arthur v. Glover* ..... 528

**Waters**—*Concluded.*

3. Two or more adjoining landowners may join in the construction of a ditch on the premises of one of them to drain a pond situated partly on the lands of all. *Arthur v. Glover*, 528

**Wills.**

1. The certificate required by sec. 160, ch. 23, Comp. St., is not essential to the validity of the probate of a will. *Kolterman v. Chilvers* ..... 216
2. Where a probate court has jurisdiction to probate a will, all presumptions are in favor of the regularity of its proceedings. *Kolterman v. Chilvers* ..... 216
3. In probate proceedings the county court is a court of record, and its judgments are entitled to the presumptions which attach to the records of such courts. *Kolterman v. Chilvers*, 216
4. Ch. 31, laws 1895 (Ann. St. 1907, sec. 4815), cures any defects created by a county judge entering judgment of probate of a will in a record other than the record book referred to in subd. 1, sec. 32, ch. 20, Comp. St. 1885. *Kolterman v. Chilvers* ..... 216
5. On appeal from an order of the county court correcting an order admitting a will to probate, where the district court considers evidence and passes on an issue of fact, its judgment will not be reviewed in the absence of motion for new trial. *In re Estate of Swan* ..... 742

**Witnesses.**

1. A communication to an attorney, where the relationship of attorney and client does not exist, is not privileged. *O'Connor v. Padget* ..... 95
2. Cross-examination *held* not confined to questions asked on direct examination, but to the subject matter. *Zelenka v. Union Stock Yards Co* ..... 511
3. On cross-examination of a fraudulent grantee, the creditor is entitled to considerable latitude to ascertain whether the grantee was controlled by the debtor in making the purchase. *Adams & Burke Co. v. Cook* ..... 684