IN RE ESTATE OF RHODA GREENWOOD.

WILLIAM J. ARMSTRONG ET AL., APPELLANTS, V. JOHN T. GREENWOOD, EXECUTOR, APPELLEE.

FILED FEBRUARY 6, 1909. No. 15,448.

Executors and Administrators: FINAL ACCOUNT: OPENING. After making his final report, and securing an order approving the same and discharging him from his trust, an executor filed a petition to permit him to account for mortgages which he held in a trust capacity under the will, whereupon legatees objected in general terms to his discharge as executor, for the reason that the charges made by the executor are excessive and not according to law. *Held*, That such objections were insufficient to require the county court to reopen the former proceedings for the purpose of reviewing the expenditures and charges contained in the final report of the executor.

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

John C. Watson, for appellants.

Pitzer & Hayward, contra.

EPPERSON, C.

The appellee was executor of the last will of his deceased wife, and was also by the will appointed trustee of certain property of which his and the decedent's son, an incompetent, was the beneficiary. He filed his petition for discharge and his final report, in which he alleged the expenditure of various sums of money, the greater part of which seems to have been as trustee. No objections were made, and on February 20, 1906, he secured an order approving his final report and discharging him as executor. In July following he filed a petition in the county court, alleging an omission from his final report of mortgages, aggregating $3,000, which he had received in his capacity as trustee. He also alleged the expenditure of $314.85 since the order of his discharge. He

prayed that he be permitted to add said mortgages to his final report, and that he be credited with the items of expenditure and certain other funds which he had delivered to his successor in the trust estate. The appellants, who were given a remainder in property disposed of in the residuary clause of decedent's will, then filed objections "to the discharge of the executor herein, Joseph T. Greenwood, for the reason that the charges made by the said executor are excessive and not according to law." No other objections were made, and the county court permitted the order of February 20 to be opened for correction and modification, for the reasons set forth in the executor's petition, and for no other purpose.

The objections filed by the appellants to the discharge of the executor do not specifically assail the items of expenditure shown by the reports of the executor filed prior to February 20, 1906; nor does it appear from the instrument itself that the appellants attempted to assail such expenditures, all of which had been previously reported and allowed upon a final hearing, from which no appeal was taken. The executor himself only prayed that he might be permitted to report property previously omitted. In such cases we think that the county court has a discretion to say to what extent he should inquire into the former proceedings had. Had the legatees assailed the former final report of the executor, and alleged sufficient reasons for not assailing the same at the time of the hearing thereon, the court should consider the same and correct any errors made. But under the circumstances of the case, wherein such expenditures were not specifically questioned in any objections filed, and no reason shown for not previously objecting, we cannot say that the county court erred in confining his inquiries to the matters presented in the application of the executor. Upon appeal in the district court the issue was confined to the matters tried by the county court. No attempt was made to defeat the later expenditures alleged by the executor, which were proved by the evidence.

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

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

J. MCCAULEY V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1909. No. 15,843.

1. Licenses: VEHICLES USED FOR HIRE. A city charter conferring upon the council power "to levy and collect a license tax on * * * hacks, drays, or other vehicles used for pay within the city, and to prescribe the compensation for the use of such hacks, drays and other vehicles," is insufficient to authorize the city council to exact a license tax from persons the regulation of whose compensation is not permitted.

2. ———: ———. The owner of wagons kept by him for the purpose of renting them to various firms under monthly contracts, each wagon being kept for the exclusive use of the firm contracting for it, the same being under the direction and control of the various firms having monthly contracts for said wagons, and who does not hold himself out as ready to serve any person who may have goods or merchandise to transfer, is not the owner of vehicles used for pay, nor is his compensation subject to control by the city council within the meaning of the charter provision above quoted.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Charles C. Montgomery, for plaintiff in error.

Herbert S. Daniel, contra.

EPPERSON, C.

The plaintiff in error was prosecuted in the police court in the city of Omaha upon a complaint charging that the

plaintiff in error did "hire out and keep for use and hire, and caused to be kept for use and hire for the transportation of goods, a wagon and vehicle without first having obtained a license for said vehicle so used," etc. On appeal to the district court from a judgment of conviction he was again convicted. A trial was had upon an agreed statement of facts, in which it appeared that the plaintiff in error as manager of a corporation maintained and kept horses and wagons which were engaged by various firms under monthly contracts for hauling, each wagon being kept exclusively for the firm contracting for it. The drivers and men employed upon the wagons were in the employ of the transfer company, and the vehicles and men driving them were under the direction and control of the various firms having monthly contracts for said wagons. The wagons are never kept at any of the public stands designated by the board of fire and police commissioners for vehicles licensed in chapter 94 of the ordinances of the city of Omaha. The wagons have painted on them the names of the firms which have the monthly contracts for them, and are never used for the carrying of single loads of goods, nor in any other way except in the ordinary business of delivering mechandise at contract rates by the month.

The ordinance under which the plaintiff in error was arrested declares it unlawful for any person to hire out or keep for use or hire for the transportation of goods, merchandise, fuel, building material, or any other article or thing, any dray, cart, wagon or other vehicle so used. A penalty for a violation thereof is imposed. The provision of the chapter which authorized the ordinance in controversy is section 7677, Ann. St. 1907, as follows: "The mayor and council shall have power to levy and collect a license tax on * * * hacks, drays, or other vehicles used for pay within the city, and may prescribe the compensation for the use of such hacks, drays and other vehicles." At the outset it may be observed that the power vested in the city council is a police power, and

not one giving authority to levy taxes. The charter provision is evidently intended for the purpose of protecting the public, and for this purpose requiring or authorizing the regulation of the business engaged in by draymen or hackmen or others, who, in fact, are common carriers. The evidence is insufficient to show that the plaintiff herein was a common carrier. There can be no doubt but that he is engaged in the business of renting wagons and teams to persons having goods to haul, and that he receives a compensation or profit therefor. But he does not hold himself out as ready to serve any person who may have goods or merchandise to transfer. He engages only to rent or hire his wagons and teams by the month to persons of his own selection, who may choose to accept his terms and enter into a contract with him. We are convinced that the business which he conducts is not such as would authorize the city council to prescribe a compensation which he is entitled or required to receive from his patrons. In *State v. Robinson,* 42 Minn. 107, it was held that the provision in a charter authorizing the city council " 'to license and regulate hackmen, draymen, expressmen, and all other persons engaged in carrying passengers, baggage, or freight, and to regulate their charges thereon,' applies only to those who are engaged in business as carriers of persons or property for hire, and not to those who, not being engaged in such business, merely hire out teams and vehicles to those who have property to transport, the hirer himself using and controlling the team and vehicle." The facts in the above case were very similar to the facts as stipulated in this case, and the provision of the city charter upon which the ordinance was founded, although worded differently, is as comprehensive as that of the Omaha charter.

A former charter of the city of Chicago conferred power upon the city council as follows: "To license, regulate and suppress hackmen, draymen, carters, porters, omnibus drivers, cabmen, carmen, and all others * * *

who may pursue like occupations, with or without vehicles and prescribe their compensation." Although the power is expressed in more specific language than that given to the city of Omaha in its charter, yet the construction placed upon the Chicago charter in *Farwell v. City of Chicago,* 71 Ill. 269, may well apply to the Omaha charter. Therein the court said: "The spirit of the ordinance is to bring the class of carriers therein named under the police regulations of the city. It is designed to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers, and others compelled to employ them, in having their persons or property carried from one part of the city to another. This is a rightful exercise of the police power."

It is incompetent for a municipality to prescribe rates of carriage upon vehicles used as the plaintiff in error uses his. The authority to license is qualified by that clause of the charter provision which permits the city council to fix the compensation. In other words, the city council has no authority, under the charter provision depended upon, to exact a license fee from persons the regulation of whose compensation is not permitted. The ordinance expressly avoids fixing a compensation for the business engaged in by the plaintiff in error, and it is not even contended by the city that the council could exercise such power. Under a charter provision authorizing a license tax to be imposed upon vehicles conveying loads, and to prescribe the rates of carriage, it was held that "to license and to prescribe the rates of carriage, alike apply to the vehicles named; so, it is only such vehicles which are in contemplation as the subjects of license, in respect to which the rates of carriage are to be prescribed." *Joyce v. City of East St. Louis,* 77 Ill. 156. Plaintiff in error did not keep wagons used for hire within the meaning of the charter. The contracts under which he was employed did not apparently make him a bailee of the property transported upon his wagons. His compensa-

tion was in the nature of a rental, and not a charge to be determined upon the circumstances attending each transfer made.

We are satisfied that the judgment of conviction was wrong, and recommend that it be reversed and this cause remanded for further proceedings.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, this cause is reversed and remanded to the lower court for further proceedings.

REVERSED.

CASS COUNTY, APPELLANT, V. SARPY COUNTY, APPELLEE.

FILED FEBRUARY 6, 1909. No. 15,761.

Counties: BRIDGE REPAIRS: "RECOVERY BY SUIT." The words "recovery by suit," as used in the proviso of section 6147, Ann. St. 1907, include a suit instituted by an appeal from the disallowance of a claim by a county board.

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

C. A. Rawls, for appellant.

Ernest R. Ringo and *John F. Stout, contra.*

GOOD, C.

This appeal arises out of the disallowance by the county board of Sarpy county of a claim against said county filed by the county of Cass for one-half of the cost of certain repairs to a bridge over the Platte river between said counties. The county board of Cass county had previously requested the county board of Sarpy county to enter into a joint contract for the repair of the bridge. The county board of Sarpy county refused to enter into such a con-

tract or to have anything to do with making the repairs. Cass county then let the contract and caused the repairs to be made and paid the contractor therefor. The claim which it filed with the county clerk of Sarpy county was for one-half of the cost of the repairs. After the disallowance of the claim by the county board of Sarpy county, Cass county appealed to the district court, and set forth the facts in a petition filed therein. The defendant filed an answer, and the plaintiff replied thereto. The cause came on for trial, and a jury was impaneled. The defendant objected to the introduction of any evidence, upon the ground that the district court had no jurisdiction. The objection was sustained and judgment of dismissal entered. Plaintiff has appealed.

Plaintiff's right to recover is founded upon sections 6146, 6147, Ann. St. 1907. The latter part of section 6147 is as follows: "Provided, that if either of such counties shall refuse to enter into contracts to carry out the provisions of this section, for the repair of any such bridge, it shall be lawful for the other of said counties to enter into such contract for all needful repairs, and recover by suit from the county so in default such proportion of the cost of making such repairs as it ought to pay, not exceeding one-half of the full amount so expended." Defendant contends that, under the proviso quoted, recovery can be had only in an original action in court, and that said proviso does not require the claim to be submitted to the county board for allowance or disallowance, and that the district court could not therefore acquire jurisdiction of the action by an appeal from the county board. It will be conceded that, if the county board was without jurisdiction to pass upon the claim, the district court could not by appeal acquire jurisdiction, and, on the other hand, if the county board had jurisdiction to pass upon the claim, the district court acquired jurisdiction by the appeal. The determination of this case must rest upon the construction placed upon the proviso to section 6147 above quoted.

The word "suit" has received many and varied definitions. It has been defined as a proceeding in a court of justice for the enforcement of a right; an action or process for the recovery of a right or claim; the prosecution or pursuit of some claim, demand or request. Ordinarily the term "suit" is applied to any proceeding in a court of justice by which one pursues that remedy which the law affords him, but it is not always essential that the proceedings should be originally instituted in a court. See 7 Words & Phrases, 6769. In *Gurnee v. Brunswick,* 11 Fed. Cas. 117, it was held that the filing of a claim before a county board was not the commencement of a suit, but that the filing of an appeal in court from an order of the county board allowing or disallowing a claim was the commencement of a suit. We are of the opinion that in the strict sense of the term the filing of a claim against a county with the county clerk is not the commencement of a suit, but is rather a preliminary proceeding that may ripen into a suit. Upon the presentation of a claim against a county to a county board, if the claim is allowed, there is no occasion for further proceeding. If the claim is disallowed, the law permits an appeal to be taken to the district court. The lodging of such appeal in the district court is a proceeding instituted in a court of justice for the enforcement of a right; it is the prosecution of a demand in a court of justice; it is a process for the recovery of a right or claim, and is the institution of a suit for the recovery of a claim. By section 6147, above referred to, the legislature made no attempt to prescribe the method of procedure for the institution of a suit to recover from a delinquent county. By other sections of the statute provision is made for the filing of claims against the county and the audit and allowance thereof by the county board. By section 4441, Ann. St. 1907, county boards are given power to examine and settle all accounts against the county. By section 4455 provision is made for an appeal from the disallowance of a claim. In *State v. Merrell,* 43 Neb. 575, it is said: "All claims against a county

must be filed with the county clerk thereof and presented to the county board, and it alone has power and authority to audit and allow such claims." In *Heald v. Polk County,* 46 Neb. 28, it was held that county boards were invested with exclusive original jurisdiction to hear and determine, to allow or disallow, all claims against their counties. To the same effect is *State v. Vincent,* 46 Neb. 408. In the latter case it was held that the jurisdiction of the district court is appellate only, and that an original action on such demands could not be maintained. In *State v. Stout,* 7 Neb. 89, under an act "to provide for the adjustment of claims against the state treasury," etc., the right to bring an original action against the state was denied, and it was held the only mode by which the courts could acquire jurisdiction in such cases was by an appeal, as provided in section 2 of said act. We apprehend that the legislature in the enactment of section 6147 had in view as one of the methods of instituting suit the general provisions of the statute conferring upon county boards the power to audit and pass upon claims against the county. It might be that the delinquent county, upon the presentation of a claim, would be willing to adjust and settle it. We think that the legislature did not contemplate taking away this power from county boards in this class of cases, but that it intended by the language "recovery by suit from the county so in default" to permit the suit to be instituted by an appeal from the disallowance of claims by the county board. Whether under the language used an original action might be maintained, it is unnecessary to determine. It necessarily follows that the district court erred in sustaining the objection to the jurisdiction.

We recommend that the judgment be reversed and the cause remanded for further proceedings according to law.

EPPERSON, C., concurs.

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.

ROOT, J., not sitting.

SOUTH OMAHA NATIONAL BANK, APPELLEE, V. HARRY E. MCGILLIN ET AL., APPELLANTS.

FILED FEBRUARY 6, 1909. No. 15,683.

1. **Chattel Mortgages:** SUCCESSIVE MORTGAGES: RIGHTS OF ASSIGNEES. Where successive chattel mortgages on a specified number of cattle out of a greater number are given to the same mortgagee, such mortgagee acquires a right of selection, and where the mortgagee assigns the prior mortgage, it only retains the right of selection subject to the right of the first assignee. If it afterwards assigns the second mortgage, the second assignee takes the same subject to the right of the first assignee. *South Omaha Nat. Bank v. McGillin*, 77 Neb. 6, followed.

2. ———: ———: ———. It is immaterial that the second mortgages were renewals of prior mortgages satisfied of record, or that there was an oral agreement between the mortgagor and the mortgagee that the releases placed upon record should not take effect according to their terms.

APPEAL from the district court for Chase county. ROBERT C. ORR, JUDGE. *Affirmed.*

McCoy & Olmstead, Charles W. Meeker, George L. Loomis and *H. C. Maynard,* for appellants.

H. C. Brome, P. W. Scott and *Clinton Brome, contra.*

CALKINS, C.

This case was before this court upon error from a judgment in favor of the defendant, and was reversed for the reasons given in an opinion by BARNES, J. *South Omaha Nat. Bank v. McGillin,* 77 Neb. 6. The second trial resulted in a verdict for plaintiff, and the defendant now

appeals. A reference to the former opinion will disclose the facts presented at that hearing, and the rules of law there applied to the case. The defendant assigns errors in the admission of testimony, and the instructions of the court to the jury, while the plaintiff insists that the rules of law announced in the opinion referred to, applied to the facts developed upon the second trial, required the court to direct a verdict for the plaintiff.

It appears that both plaintiff and defendant claim under mortgages executed by the defendant McClelland to the Shelley-Rogers Commission Company; the mortgage under which the plaintiff claimed being prior in date of execution to those under which the defendant claimed. The defendant contended that the plaintiff's mortgage was given on a specified number of cattle out of a larger number of the same kind and description, and that, the defendant having first secured possession of the property, its lien was superior to that of the plaintiff. The court held that, while such a mortgage is void as to third parties, it gives to the mortgagee the right of selection; that, all the mortgages being given to the Shelley-Rogers Commission Company, it obtained a right of selection under the first mortgage, and if it, after assigning such mortgage to the plaintiff, took another mortgage which gave it a further right of selection from the same description of cattle, this right would be subject to the right of selection which it had assigned in the first mortgage and it could transfer to the defendant no greater right than it itself possessed.

At the second trial the defendant introduced evidence tending to prove that the notes and mortgages were renewals of pre-existing debts contracted before the plaintiff's mortgages were executed, and contended that therefore the lien thereof was prior to that of the plaintiff. The prior mortgages of which the defendant claimed that its mortgages were a renewal had been surrendered and released of record, but the defendant was permitted to prove an oral understanding between the mortgagor and

the Shelley-Rogers Commission Company that the mortgages so released should be considered still in force. The actual date of the transfer by the Shelley-Rogers Commission Company of the mortgages in question to the plaintiff and defendant, respectively, does not appear, but it is stipulated in the record that the same were in each case assigned before maturity. The plaintiff argues that it is to be presumed as a matter of law that the transfer was made at the day of the date of the respective notes, while the defendant denies the validity of that presumption, and contends that, if it would otherwise exist, it is superseded by the stipulation that the notes were transferred before maturity, and that, since this stipulation cannot be construed to mean any specific number of days before maturity, it must be interpreted as meaning just before maturity. It appears from the evidence of Mr. McClelland that the releases were filed after the taking of the new notes and mortgages, and, when these were returned to the Shelley-Rogers Commission Company in the course of a week or two, the old paper would come back and they would be released.

Admitting, for the purposes of the case, the correctness of defendant's contention, it would follow that we must assume that the first note and mortgage assigned to plaintiff, which were dated April 19, 1902, and due November 7, 1902, were transferred to the plaintiff on November 6, 1902, and that the second note and mortgage assigned to plaintiff, dated September 5, 1902, and due April 9, 1903, would have been transferred to plaintiff April 8, 1903. The two notes and mortgages assigned to defendant were dated October 13 and October 30, 1902, and were due April 23 and May 8, 1903, respectively. It would follow from this assumption that, at the time of the transfer by the Shelley-Rogers Commission Company to the plaintiff of the notes and mortgages under which the plaintiff claims, the paper of which it is asserted the notes assigned to defendant were renewals had been satisfied, and that the defendant, when it received from the

Shelley-Rogers Commission Company the notes under which it claimed, took the same long after and with constructive notice of the fact that the securities under which it now seeks to claim were satisfied of record. The mortgages assigned by the Shelley-Rogers Commission Company contained the recital that they were a first lien upon the property therein described, and it is clear that under these circumstances, if the Shelley-Rogers Commission Company had retained this paper, it could not have been permitted to establish the priority of its lien over the paper by it assigned to the plaintiff by showing that the former was in fact a renewal of mortgages which were satisfied upon the record, nor by showing any oral understanding between itself and the mortgagor that the releases placed upon record should not take effect according to their terms. Applying the rule announced in the former opinion that the Shelley-Rogers Commission Company could not transfer to the defendant any greater right than it could have enforced as against the plaintiff, it follows that it is entirely immaterial that the defendant's notes and mortgages were in fact renewals, or that there existed between the Shelley-Rogers Commission Company and the mortgagor an oral agreement that the releases of mortgage filed in the clerk's office should not in fact discharge them.

As the court should have directed a verdict for the plaintiff, it is unnecessary to consider the errors assigned in the instructions and in respect to the testimony submitted to the jury.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

IN RE ANATH P. BARNES.

ANATH P. BARNES, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,736.

Physicians and Surgeons: LICENSES: CONSTITUTILNAL LAW. Chapter 97, laws 1905, providing for the examination and licensing of persons engaged in the practice of veterinary medicine, and forbidding persons not so licensed from assuming the title of veterinary surgeon or the title of any degree conferred by veterinary colleges, does not contravene any constitutional provision.

APPEAL from the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Reversed.*

J. J. Thomas, M. D. Carey, and *C. A. Rawls,* for appellant.

A. L. Tidd, contra.

CALKINS, C.

Anath P. Barnes was charged with a violation of the provisions of chapter 97, laws 1905, entitled "An act to establish a state board of veterinary medicine; to regulate the practice of veterinary medicine, veterinary surgery, veterinary dentistry, or any branch thereof, and to provide for the appointment of examiners and secretaries thereof; to protect the title of those engaged in the practice thereof, and to provide penalties for the violation thereof." Being imprisoned under said charge, he sued out of the district court for Cass county a writ of habeas corpus, alleging the unconstitutionality of said act. The district court sustained his contention, and from a judgment ordering his discharge the state appeals.

The act in question provides for the examination of persons desiring to practice veterinary medicine, surgery or dentistry, and the issuance of a certificate or license to such as shall pass a satisfactory examination in the sub-

jects a knowledge of which is generally required by reputable veterinary colleges. It forbids any person not so licensed to use the title of veterinary surgeon, or the title of any degree conferred by any recognized veterinary college, but specifically provides that nothing therein contained shall prevent any person not assuming such titles from practicing such profession. It is conceded that the legislature had the power under the constitution to provide for such examinations and to prohibit the practice of such profession by all persons not so licensed; but it is insisted that it may not prohibit the use of such titles and leave the unlicensed practitioners free to follow their calling; that the real injury is only done in practice, and not by the assumption of titles, and that, while the right to regulate the practice of veterinary medicine in the interest of the public generally is within the police power of the state, it only takes the public into consideration when it altogether excludes the incompetent person from the practice.

We think that, assuming the legislative power to prohibit veterinary practice by unlicensed persons, there can be no doubt of the inclusion therein of the lesser power of forbidding practitioners from making false representations concerning the character of the preparation made by them for the practice of their profession. We are aware that examinations are imperfect tests of learning, and that degrees afford no guaranty of mature judgment or the possession of practical common sense. We recognize the fact that it is in the school of experience that professional men begin the acquisition of real knowledge; yet the owner of domestic animals requiring the advice or aid of some one skilled in veterinary medicine may well take into account the fact that one practitioner has availed himself of the training afforded by a veterinary college and passed the examination prescribed by the state board, while another has failed to do so; and we think he may properly conclude that, other things being equal, it would be safer to commit the care of his live stock to the one who had

received the training which common experience demonstrates to be desirable, if not indispensable. For one who has had no training of the kind to assume a title which indicates that he is the graduate of a veterinary college, is a species of deceit, which, if practiced with a view of thereby obtaining business, amounts to an attempt to obtain money by false pretenses, which is not only reprehensible, but unlawful. The constitutional right to life, liberty and the pursuit of happiness is not infringed by statutes prohibiting deceit or fraud. The statute in question goes no further than to forbid practitioners of veterinary medicine from deceiving their clientele as to the nature of their preparation for that profession. It leaves the irregular practitioner free to follow his business, upon the sole condition that he uses no deception as to the character of his qualifications, and it does not interfere with the right of any person to employ such practitioner if he chooses to do so. It seems to us less objectionable than a statute unconditionally prohibiting the practice of veterinary medicine by any but persons regularly qualified, and it does not, in our opinion, infringe any right guaranteed by the constitution.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

REVERSED.

ROOT, J., not sitting.

JAMES E. PULVER V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1909. No. 15,875.

1. **Cities: ORDINANCES: POWER TO SUSPEND.** The mayor of a city has no power to suspend the operation of a city ordinance which contains no provision in itself empowering him so to do.
2. **Intoxicating Liquors: ORDINANCES: VIOLATION: INTENT.** Where a licensed saloon-keeper is prosecuted for the violation of a city ordinance forbidding him to keep his place of business open after 11 o'clock P. M., and such act is shown to have been committed by an agent in charge of such business, it is unnecessary to show any guilty intent on the part of the owner, such prosecution being in the nature of a civil action to recover a penalty.

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

J. L. McPheeley, for plaintiff in error.

M. D. King, contra.

CALKINS, C.

An ordinance of the city of Minden regulating the issuance of licenses for the sale of intoxicating drinks made it unlawful for any person licensed to keep his place of business open or sell any liquors after the hour of 11 o'clock P. M., whether by himself or his clerk. The plaintiff in error was convicted in the police court upon a charge of violating this provision of the ordinance, and, having appealed from said conviction to the district court, he was again tried and found guilty. From a judgment imposing a fine of $25 and costs he brings error to this court.

1. It is admitted that the plaintiff in error was a licensed saloon-keeper, and that his saloon, which was at the time in the care of his son, was on the date mentioned in the charge kept open until 11:15 P. M.; but it is urged as a defense to the charge that the mayor of the city gave

permission to the saloon-keepers thereof to keep their places of business open on this particular night until midnight. This fact does not constitute a defense. The mayor has no power to suspend the operation of an ordinance of the city which contains no provision in itself empowering him to do so. *Commonwealth v. Worcester,* 20 Mass. 462.

2. It is further urged that the guilty intent necessary in criminal prosecutions is wanting in this case for two reasons: First, because the party in charge of the saloon acted in good faith upon the authority of the mayor, which he supposed was sufficient; and, second, because the plaintiff in error himself was away from home and did not have any knowledge of nor in any way participate in the act with which he is charged. There is no merit in the first contention. Ignorance of law does not excuse. The intent required in a criminal case is not to break the law, but to do the forbidden act. 1 Bishop, Criminal Law (8th ed.), sec. 300. The second reason is equally untenable, because here the charge is a violation of a city ordinance, not embracing any offense made criminal by the laws of the state. This proceeding, while in form a criminal prosecution, is in fact a civil action to recover a penalty. *Peterson v. State,* 79 Neb. 132. The law of master and servant applies, and the former is responsible for the acts of the latter in the conduct of his business, whether committed with or without his knowledge.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

SAMUEL E. HOWELL V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1909. No. 15,120.

1. **Monopolies:** CRIMINAL INDICTMENT: SUFFICIENCY. To charge a criminal violation of the first section of art. II, ch. 91*a*, Comp. St. 1907, "To protect trade and commerce against unlawful restraints and monopolies," commonly called the "Junkin Act," the indictment or information must allege that the acts complained of were in restraint of trade within this state.

2. ———: CRIMINAL PROSECUTION: INSTRUCTIONS. A number of persons, dealers in coal and other fuels, in the city of Omaha, created and became members of a local organization known as the "Omaha Coal Exchange," and were subsequently indicted under what is called the "Anti-Trust Laws" of this state. Upon the trial of one of the indicted parties the constitution of the exchange was introduced in evidence by the state, and which contained an article prohibiting the members from soliciting trade by the personal appeals of themselves or their agents, but allowing the use of printed postal cards and nonaddressed printed matter inclosed in envelopes, and providing that the exchange should not interfere with prices made between members, or as to whether the same should be at wholesale or retail prices. The court instructed the jury that that article of the constitution was "in itself" a violation of the law of this state, and, if they found that it was in force and carried out by the defendants, the accused was guilty of the crime charged. The instruction is *held* erroneous; that it was proper for the jury to take the article into consideration in arriving at their verdict, but that it did not, of itself, foreclose further inquiry as to defendant's guilt.

3. ———: MEMBERSHIP. It was shown by the evidence that the accused on trial had not, personally, become a member of the Omaha Coal Exchange, but that he was a member and president of another organization which was, itself, a member of the exchange; that he was the president of the Omaha Coal Exchange and chairman of its board of directors, which had the management of its business, and that he acted in both capacities. *Held*, That this constituted him, to all intents and purposes, a member of the exchange and liable criminally to the same extent as though he had personally signed the constitution and been admitted to membership.

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

Hall & Stout and *W. J. Connell,* for plaintiff in error.

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

REESE, C. J.

Plaintiff in error, with more than 50 other persons, was indicted by the grand jury of Douglas county for a violation of that part of art. II, ch. 91*a*, Comp. St. 1907, relating to "Restraints, Monopolies, Rebates," commonly known as the "Anti-Trust Law," or the "Junkin Act." The indictment consists of 9 counts covering 23 pages of closely typewritten matter and is too long to be here set out. The prosecution grows out of the creation and existence of an organization, or, as alleged, a combination of dealers in coal and wood in that county, who organized, set on foot, and continued the organization known as the "Omaha Coal Exchange," the object and purpose of which, it is alleged, was to fix and establish the price of fuels to be sold at retail in the city of Omaha and the nearby country, and to restrain the trade therein. Plaintiff in error was put upon his trial, which resulted in a general verdict finding him "guilty of restraint of trade as he stands charged in the information." A motion for a new trial was filed, which being overruled, a judgment of conviction was entered. The case is brought to this court by proceedings in error. The record is voluminous, consisting of nearly 3,000 pages. There are 159 assignments of alleged errors in the petition. The proper consideration of the time at our disposal forbids a detailed review of the evidence, the instructions, or even to notice all the assignments.

The first count charges the persons indicted with having "unlawfully and feloniously joined themselves together and formed a trust and combination, the purpose and effect of which trust and combination is to restrain trade, to increase prices of coal and other fuels, to prevent com-

petition in the sale of coal and other fuels, to fix the price of coal and other fuels, and to agree not to sell any coal and other fuels below a certain fixed figure, and that said (defendants, naming them) are unlawfully members of said trust and combination, and are unlawfully aiding, advising, abetting, counseling and acting in pursuance to an agreement entered into by the members of said trust and combination, which trust and combination has unlawfully prevented, and does unlawfully prevent, competition in the sale of coal and other fuels, and have unlawfully agreed not to sell coal and other fuels below a certain figure, and have unlawfully prevented the sale of coal and other fuels below a certain fixed figure determined by said trust and combination, with the intent then and there and thereby unlawfully, feloniously and arbitrarily to prevent competition and fix an established price at which said coal and other fuels are sold." This count is attacked upon the ground that it is nowhere charged that the alleged trust, combination, or monopoly was with the intent and for the purpose of fixing and controlling prices of coal and other fuels in this state. The language of the statute under which the indictment was drawn provides: "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal," etc. It is evident that the object of the legislation was and is to make criminal the formation of such conspiracies within this state for the purpose of restraining or controlling trade and commerce within its borders, as there is no authority making such acts criminal when interstate commerce is to be thereby affected. It follows that that count of the indictment must be held incomplete and does not charge the commission of an offense.

The second and subsequent counts, in other respects quite similar to the first, are not obnoxious to the same criticism, for they contain the averment omitted from that count. They are assailed upon other grounds, but as the members of the court are not in entire harmony in their

views upon these questions, and as all agree that the judgment should be reversed for another and independent reason, these counts will not be further noticed.

As may be inferred from what we have already said, the evidence submitted to the jury was very voluminous, consisting of the oral testimony of witnesses and of documentary evidence. Among the latter was the constitution and by-laws of the Omaha Coal Exchange, of which it was alleged and substantially proved that the accused were members. Plaintiff in error, personally, was not a member of the exchange, but was a member and president of the West Omaha Coal and Ice Company, which was a member of said Omaha Coal Exchange. He was elected to the office of president of said Omaha Coal Exchange, held the office and discharged the duties thereof, and was also chairman of the board of directors, to whom was given the general management of the exchange. This, in the opinion of the writer, made him to all intents and purposes, a member of the Omaha Coal Exchange and liable to a criminal prosecution with other members of that organization, if such organization was criminal and in violation of law. He was in the chair, presiding over the meeting of the exchange, at the time of the adoption of the amended constitution and by-laws on April 24, 1903. Among other articles of the constitution then adopted was article 12, which reads as follows: "Soliciting referred to in the by-laws hereafter written shall apply to members of any firm having a membership in this exchange, their agents, clerks and drivers, and shall consist of the personal or verbal introduction of the subject, the personal presentation of a card or other token of business or any other act calculated to effect a sale; but it is understood that printed postals with the address only on one side and nonaddressed printed matter inclosed in addressed envelopes are not within the inhibition of this section. The exchange shall not interfere with prices made between members of the exchange, or as to whether the same shall be at wholesale or retail prices."

The twenty-eighth instruction given to the jury by the court is as follows: "You are instructed that article 12 of the constitution of the Omaha Coal Exchange is in itself a violation of the law of this state; and if you find from the evidence, beyond a reasonable doubt, that article 12 of said constitution of said exchange was in force at any time between July 1, 1905, and the 14th day of September, 1906, and that during that period, or at any time during that period, the defendant and one or more of the defendants in this case were members of said exchange, and that they unlawfully, wilfully, purposely and intentionally conspired or agreed together to carry out the terms of said section of the constitution, in the city of Omaha, county of Douglas, state of Nebraska, then you are instructed that the defendant has been carrying on his business in restraint of trade and in violation of the laws of the state of Nebraska, and you should convict him of the crime set forth in the indictment." After the jury had retired and had been deliberating for some time, they returned and asked for "additional information on instruction No. 28 given by the court on its own motion," when the court gave the following as an additional instruction upon article 12: "In compliance with the request of the jury, the court explains instruction No. 28 as follows: The court instructed the jury in instruction No. 28 that article 12 of the constitution of the Omaha Coal Exchange, if kept in force by agreement of the defendant and one or more other members of the Omaha Coal Exchange at the same time, at any time between July 1, 1905, and September 14, 1906, or if the defendant and one or more members of the Omaha Coal Exchange at the same time carried on their coal business in obedience or compliance with section 12 of said constitution of the Omaha Coal Exchange in Omaha, Douglas county, Nebraska, the defendant would be guilty of doing business in restraint of trade. For the information of the jury the court gives the jury a correct copy of said article 12 of the constitution of the Omaha Coal Exchange. 'Article 12. Soliciting referred to in the

by-laws hereafter written shall apply to members of any firm having a membership in this exchange, their agents, clerks and drivers, and shall consist of the personal or verbal introduction of the subject, the personal presentation of a card or other token of business or any other act calculated to effect a sale; but it is understood that printed postals with the address only on one side and nonaddressed printed matter inclosed in addressed envelopes are not within the inhibition of this section. The exchange shall not interfere with prices made between members of the exchange, or as to whether the same shall be at wholesale or retail prices.' This instruction is to be read in connection with instruction 28 of the original instructions."

We are unable to find anything in the by-laws bearing upon the matter of soliciting. So far as the general criminal character of the Omaha Coal Exchange and its proceedings are concerned, there may be a difference of opinion, but upon this subject the writer entertains no doubt. Some of its acts may not be open to criticism; others are. However, we cannot see that the instruction above quoted should have been given. We are unable to comprehend how that twelfth article, singled out and taken by itself, is "in itself a violation of the law of the state," nor can we see that the additional instruction aided the twenty-eighth. It is not for us, nor was it for the jury, to infer any hidden, ulterior or criminal purpose secreted or concealed in, but unexpressed by, the language of the article when considered "in itself." It is somewhat doubtful if any real purpose or meaning can be found in the language used. It is probable that its purpose was to prohibit members of the exchange from personally, or by its agents or employees, soliciting trade, but permitting it to be done by circulars or other printed matter of the character mentioned. It may be, if such was the purpose of the article, that indulging in personal solicitation of trade might induce active competition, and thereby offer a temptation to underbid and thus depress prices to a figure

below a scale "fixed," but that idea does not appear as matter of law in the language used "in itself." The jury were not informed that the article might be considered by them in arriving at their conclusion as to its purpose or the purposes of the "exchange," but that it was "in itself" a violation of law, thus foreclosing further inquiry.

In the construction of this statute and the article of the constitution copied, we are cited to the decision of the supreme court of the United States in the case of *Hopkins v. United States,* 171 U. S. 578, and by some it is thought to be decisive of this question. In that case the members of the Kansas City Live Stock Exchange, a voluntary incorporated association, had agreed upon certain rules governing the transaction of their business, the tenth of which prohibited the employment of any agent, solicitor, or employee, except upon a stipulated salary, not contingent upon the commission earned, and that not more than three solicitors should be employed at one time by a commission firm or corporation, resident or nonresident of Kansas City. The eleventh rule prohibited the members from sending or causing to be sent a prepaid telegram or telephone message quoting markets or giving information as to the condition of the same under the penalty of a fine. The ground upon which that case was decided was that the business of the Kansas City Live Stock Exchange was not interstate business, and therefore was not subject to control by act of congress under which the suit had been instituted. What the decision would have been had that question been decided otherwise is subject to conjecture. It is true that the court holds that the rules referred to are not violative of the law of congress, but this is based solely upon the fact that the business to which they refer is not interstate commerce. In *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211, 243, the same judge who wrote the opinion in the *Hopkins* case says: "The cases of *Hopkins v. United States,* 171 U. S. 578, and *Anderson v. United States,* 171 U. S. 604, are not relevant. In the *Hopkins* case it was held that the business of the

members of the Kansas City Live Stock Exchange was not interstate commerce, and hence the act of congress did not affect them." The same is stated, in substance, in *Montague & Co. v. Lowry,* 193 U. S. 38; *Swift & Co. v. United States,* 196 U. S. 375; *Loewe v. Lawlor,* 208 U. S. 274. We thus refer to the *Hopkins* case at some length because it is insisted by some to be decisive of this case, which it clearly is not.

For the error in giving the twenty-eighth instruction, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., not sitting.

JOHN A. LUTHER V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1909. No. 15,188.

1. **Intoxicating Liquors:** ILLEGAL SALES. The prohibition by sections 11 and 20, ch. 50, Comp. St. 1907, of the sale or keeping for the purpose of sale of malt liquors without a license so to do applies to all malt liquors sold or kept for sale to be used as a beverage, whether intoxicating or not.

2. ———: ———: EVIDENCE. In a criminal prosecution for the violation of such sections, or either of them, where the charge is of selling or keeping for the purpose of sale any "malt," "spirituous," or "vinous" liquors, and the proof shows that any of said prohibited liquors was sold or kept for sale, the state is not required to allege or prove that the liquors sold or kept for the purpose of sale are in fact intoxicating. It is sufficient to allege and prove the sale or the keeping for the purpose of sale of any of the prohibited liquors in violation of the terms of said sections.

3. **Criminal Law:** INSTRUCTIONS: HARMLESS ERROR. The information alleged in appropriate counts that the accused kept for sale and sold "a certain malt and intoxicating liquor, to wit, malt tonic." The evidence showed that upon analysis the liquor was a malt liquor, containing one and one-tenth per cent. of alcohol, and that it belonged to the "class of beers." The trial court submitted to

the jury the question of the intoxicating properties of the liquor by permitting the accused to call witnesses accustomed in some degree to the use of intoxicants, who testified that they had partaken of the beverage, and that it had no intoxicating effect upon them and was not intoxicating. The state called a witness, who testified that he had purchased and used the drink, and that it had the same effect upon him as produced by drinking beer, but to a less degree. The court instructed the jury, in substance, that in order to convict the accused they must find him guilty of selling or keeping for the purpose of sale the "liquors as charged and described in the information." *Held*, First, that this submitted to the jury the question of the intoxicating properties of the liquor; second, that the action of the court in submitting the question of the intoxicating properties of the liquor was erroneous, but without prejudice, as it was upon the procurement of the accused.

REHEARING of case reported in 80 Neb. 432. *Judgment of district court affirmed.*

REESE, C. J.

This case was decided at the September term, 1907, of this court, and the opinion is reported in 80 Neb. 432. The attorney general filed a motion for rehearing, which was sustained, and the case has been submitted to the court upon carefully prepared briefs and able oral arguments by counsel. The contention of the attorney general is: First, that the proof upon the trial was conclusive that the liquor sold and kept for sale was "malt liquors," and therefore the selling and keeping for sale of the liquors described was a violation of law, and the conviction should be sustained without any inquiry as to the intoxicating or nonintoxicating properties of the liquor; second, that, should the court hold otherwise, the question of the intoxicating quality of the liquor kept for sale and sold was sufficiently submitted to the jury, and that in that event the judgment should be affirmed. It is contended by plaintiff in error: "First, it is not a violation of our liquor law to sell a malt extract, unless the same is shown to be of such an intoxicating character that it may be used as a beverage, and that when used in practicable

quantities it will produce intoxication; second, that the court will not take judicial notice that malt extract is an intoxicating liquor, but that this question is one of fact to be submitted to the jury; third, that the instructions requested by the defendant should have been given, and that the court erred in omitting from the instructions given the element of the intoxicating character of malt extract as one of the material issues to be tried."

It is charged in the first count of the information that plaintiff in error unlawfully kept for the purpose of sale "certain malt and intoxicating liquor, to wit, malt tonic," with intent to sell the same; and in the second count that he unlawfully sold to a person named "certain malt and intoxicating liquor, to wit, malt tonic"; and in the third count that he sold of said liquor to another person; and in the fourth count that he sold the same to a person named; and in the fifth count that he sold the same to yet another person named. The jury returned a verdict finding plaintiff in error guilty on all the counts of the information. The court imposed a fine of $100 upon each count.

It was shown upon the trial that upon the filing of the complaint before the magistrate a search warrant was issued, and the sheriff in making a search of the premises of plaintiff in error found "four full barrels and about a half barrel" of the liquor. There was ample proof that the liquor was kept for sale and sold to be drunk as a beverage, and that a considerable quantity of it had been sold and consumed. The liquor was in bottles, each bottle bearing an illuminated label as follows, omitting names and locality of the brewing company: "——— Brewing Company's NON INTOX. A nonintoxicating malt tonic. Guaranteed to contain less than 2% of alcohol. Brewed and bottled by the ——— Brewing Co., ———, Illinois. Western Branch, ———, Mo." The state chemist was called as a witness on the part of the state, and testified that samples of the liquor had been sent to and analyzed by him, and that the liquor was malt liquor; that all liquors that were brewed from malt were necessarily malt

liquors; and that the liquor contained in the bottles is classed "in the class of beers"; that the quantity of alcohol contained in the liquor was one and one-tenth per cent.; that the quantity of alcohol usually contained in the lager beer of commerce is on average "around 3 per cent." There is no controversy as to the possession and sale of the liquors by plaintiff in error, nor that they were sold and to be sold to be drunk as a beverage. The only contentions are as outlined above. There was no effort to contradict the testimony of the state chemist to the effect that the liquor was a malt liquor, that it contained the percentage of alcohol named, and that it is classed as and among "the class of beers."

It is contended by the state that under our statutes it was not essential that the prosecution should go farther with its proof; that if the liquor was a "malt liquor" and belonged to the class known as beer, the statute having prohibited the sale of "malt liquor," and this court having so often decided that the courts will take judicial notice that beer is an intoxicant, the verdict was right and should be sustained. Chapter 50, Comp. St. 1907, commonly known as the "Slocumb Law," provides in the first section that licenses may be issued for the sale of "malt, spirituous and vinous liquors." In section 6 the issuance of a license to sell "malt, spirituous and vinous liquors" is prohibited, unless the applicant gives the bond required by the section. Section 10 prohibits any licensed person from selling intoxicating liquors to the classes of persons named therein. Section 11 provides that "all persons who shall sell, or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks," without having first complied with the provisions of the act, and obtained a license, shall be deemed guilty of a misdemeanor and punished as prescribed in the section. Section 13 makes it a crime for any licensed person to sell or give away, either by himself or another in his employ, any "malt, spirituous, or vinous liquors," which shall be adulterated. Section 14 makes it a crime to sell or give away

"any malt, spirituous and vinous liquors on the day of any general or special election, or at any time during the first day of the week, commonly called Sunday." Section 20 renders it unlawful for any person to keep for the purpose of sale without license "any malt, spirituous, or vinous liquors," and "any person or persons who shall be found in possession of any intoxicating liquors in this state, with the intention of disposing of the same without license," shall be deemed guilty of a misdemeanor. Section 25 confers upon the corporate authorities of cities and villages the power to license, regulate and prohibit "the selling or giving away of any intoxicating, malt, spirituous and vinous, mixed or fermented liquors within the limits of such city or village." Section 29 renders it "the duty of all vendors of malt, spirituous, or vinous liquors" to keep the windows and doors of their places of business unobstructed.

We have thus quoted from the different sections of the law for the purpose of seeking light upon the legislative intent in the passage of the act under consideration. It is contended by counsel for plaintiff in error that it was the legislative intent to suppress the sale of intoxicating liquors, and that, although the term "malt liquors" is used in the act, yet it was not the purpose to prevent the sale of malt liquors or liquids, unless they contained a sufficient quantity of alcohol to produce intoxication; or, stated differently, that the language used in sections 11 and 20 must be construed to mean as if it read "intoxicating malt liquor." I cannot read the statute in that light. As well might we apply the adjective to the words "spirituous" and "vinous." It is my opinion that the legislature realized and appreciated the fact that malt, spirituous and vinous liquors are equally largely used as a beverage, and are alike injurious to the consumer, if not by producing immediate intoxication when taken in small quantities, by producing the same effect when more is taken, and at the same time creating an abnormal appetite which leads to dissipation and inebriety. At any rate, the law pro-

hibits the sale of "malt liquors" without a license, and we must obey its plain mandate. Alcoholic beverages are under the ban of the law in some form or other in most civilized countries. They are known to be the cause of crime, destitution and pauperism. Malt liquors used as beverages are known to contain that destructive ingredient. It was proved upon the trial of this case that the beverage kept and sold by plaintiff in error contained it. The liquor sold by him was simply an effort to evade the law. The title of the act is "An act to regulate the license and sale of malt, spirituous, and vinous liquors," etc. The whole act is built upon that title. Malt liquors are as much within both the letter and spirit of the law as either of the other classes named. To say that the legislature intended to provide for the regulation and license of *intoxicating* malt liquors would require the same word to be used as defining the other classes, and would be legislating and reading into the statute a word which the legislature clearly intended should not be there. This is not the province of the courts. We are sustained in this view by many adjudicated cases, some of which we cite, without quoting: *Kerkow v. Bauer,* 15 Neb. 150; *Sothman v. State,* 66 Neb. 302; *Peterson v. State,* 63 Neb. 251; *State v. Teissedre,* 30 Kan. 476; *Stout v. State,* 96 Ind. 407; *Briffitt v. State,* 58 Wis. 39; *Commonwealth v. Timothy,* 8 Gray (Mass.) 480; *Commonwealth v. Anthes,* 12 Gray (Mass.) 29; *Eaves v. State,* 113 Ga. 749; *State v. Gill,* 89 Minn. 502; *Commonwealth v. Dean,* 14 Gray (Mass.) 99; *State v. Jenkins,* 64 N. H. 375; *Hatfield v. Commonwealth,* 120 Pa. St. 395; *Commonwealth v. Reyburg,* 122 Pa. St. 299; *Kettering v. City of Jacksonville,* 50 Ill. 39; *State v. Yager,* 72 Ia. 421; *State v. O'Connell,* 99 Me. 61; *State v. Intoxicating Liquors,* 76 Ia. 243. "But if the statute specifically forbids the unlicensed sale of 'malt liquor,' the question of the intoxicating properties of the liquor sold is immaterial; it is only necessary to determine whether it was a malt liquor." 23 Cyc. 60. "Any liquor which is named or plainly included in the statute must be held intoxicating

as a matter of law, without inquiry into its actual properties, and even though, as a matter of fact, it is not capable of producing intoxication." 23 Cyc. 57.

It is claimed that the words "malt, spirituous, or vinous liquors" and "intoxicating drinks," as used in section 11, and "intoxicating liquors," as used in section 20, are used interchangeably, and all mean the same. To this we cannot agree. As we have seen, the statute prohibits the sale of either "malt," "spirituous," or "vinous" liquors in specific terms by name. As said in many of the cases above cited, this is a specific and direct prohibition, but the legislature, recognizing the fact that there are other intoxicants which do not come strictly within the classes named, the words "or any intoxicating drinks," as in section 11, and "any intoxicating liquors," as in section 20, were used to cover all kinds not within the classes named; that, if the charge and proof are that any one of the classes were sold or kept for sale, no proof of the intoxicating property of the liquor was necessary, and that it is only necessary to prove that the liquor sold or kept for sale is one of the classes forbidden. But, should the accusation refer to any other kind of liquor, it should be alleged and proved that the article was intoxicating. This, I think, is the correct interpretation of the statute and without further inquiry the judgment of the district court should be affirmed.

However, there is another feature of this case upon which we all agree, and that is, whether correctly or incorrectly, the district court did submit the question of the intoxicating quality of the liquor to the jury, and that by their verdict the jury answered the question. The averments of the information are that, at the time and place named in the several counts, plaintiff in error kept for sale and sold "certain malt and intoxicating liquor, to wit, 'malt tonic,'" etc. The same language, descriptive of the article sold or kept for sale, is used in each of the five counts in the information. The widest latitude was allowed plaintiff in error in his efforts to prove that the

drinks sold and kept for sale were not intoxicating. A number of witnesses who had partaken of the beverage were called, and testified to the fact of drinking the same, and that no intoxicating effect was felt by them, and that the drink was not intoxicating. One witness who was called by the state testified that he drank of the liquor, and it had the same effect upon him as beer, but in a less degree. The state chemist testified that the intoxicating ingredient was alcohol, and the effect depended upon the individual drinking the liquor, and the lower grade or per cent. of alcohol would produce intoxication in a person who was not accustomed to drinking, while a higher grade would be necessary to intoxicate the individual who was in the habit of drinking the stronger liquors.

The court instructed the jury that the material allegations which the state must prove were that the plaintiff in error kept or sold liquors "as charged in the information"; that in order to convict it was necessary that the proof show that plaintiff in error had the liquors "described in the information" and sold the same. It is not deemed necessary to further refer to the instructions. It is sufficient to say that the instructions, while not as explicit as they might have been, had any upon that point been necessary, yet, when taken in connection with the evidence, were sufficient to submit the question of the intoxicating properties of the liquor to the jury. We are of the opinion, however, that the question was improperly submitted, and that no evidence should have been received upon that subject. The error, however, having been by the procurement of plaintiff in error, and in no sense to his prejudice, he cannot complain.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

LETTON, J., dissenting.

I cannot agree to the main holding in the opinion. It seems to hold that the selling of all malt liquids or

liquors, regardless of whether they contain intoxicating properties, is prohibited. I think that a holding that the sale of malt beverages nonintoxicating in character is a crime, unless a license has first been obtained under the provisions of the liquor law, is an entirely new doctrine in this state, and gives to the law such a new and radically changed interpretation from that which has been followed by administrative, executive and judicial officers of the government for nearly 40 years as to partake of the character of judicial legislation. I venture to say that it has been the uniform practice of public prosecutors in liquor cases ever since the law was enacted to prove, or endeavor to prove, the intoxicating quality of malt beverages, other than beer, ale or such liquors that are of such well-known ingredients and qualities that the court will take judicial notice that they are within the prohibition of the statute. When the legislature prohibited the sale of malt, spirituous or vinous liquors, I think the word "liquors" was used in the ordinary acceptation of the term. The Century Dictionary defines liquor: (1) A liquid or fluid substance, as water, milk, blood, sap, etc. (2) A strong or active liquid of any sort. Specifically—(*a*) An alcoholic or spirituous liquor, either distilled or fermented; an intoxicating beverage; especially, a spirituous or distilled drink, as distinguished from fermented beverages, as wine and beer. (*b*) A strong solution of a particular substance, used in the industrial arts. Webster: (1) Any liquid substance, as water, milk, blood, sap, juice, or the like. (2) Especially, alcoholic or spirituous fluid, either distilled or fermented. A decoction, solution or tincture.

There are many tonic preparations of malt combined with ingredients, such as iron, phosphates or other drugs, and other and nourishing preparations of malt combined with ingredients of food value for the use of convalescents, which are in constant use by the medical profession, and which are sold in drug stores. This opinion, construed strictly, would drive all this class of preparations from

the market, which I think was never intended by the legislature. The object of the law was to regulate the sale of malt "liquors," not malt *liquids*. An examination of the liquor laws of this state as a whole confirms me in the belief that this is the reasonable and proper construction of the statute. The phraseology used in describing the liquors varies with the various sections of the liquor law. Comp. St. 1907, ch. 50. In the first section the county board is authorized to license the sale of "malt, spirituous and vinous liquors." The word "intoxicating" does not appear in this section. Section 5 speaks of the thing to be licensed as "the liquor." It uses no other qualifying words. The form of the license prescribed by this section names "malt, spirituous and vinous liquors," but does not contain the word "intoxicating." The sixth section says that no person shall be licensed to sell "malt, spirituous and vinous liquors" by the county board, etc., unless a bond is given, and provides that a bond shall be given for the benefit of any one who may be injured by the sale of "any intoxicating liquor." No one could recover damages under bond for sale of liquors unless they were intoxicating liquors. Section 8 prohibits the sale to any minor, apprentice, or servant, under 21 years of age of any "malt, spirituous and vinous liquors, or any intoxicating drinks." Section 10 prohibits the sale of "any intoxicating liquors to any Indian, insane person, or idiot, or habitual drunkard." Section 15 provides that the person licensed shall pay damages that result in consequence of "such traffic," and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to, this traffic in intoxicating drinks, so that the words "such traffic" relate to the traffic forbidden in the chapter, and this section construes it to be traffic in intoxicating drinks. Section 16 gives an action to a married woman for damages on account of "such traffic," which we have seen by section 15 is characterized as being traffic in intoxicating drinks, and section 17 gives an action by the county or city on

the bond of the person licensed, when a person shall become a county or city charge by reason of intemperance, against "any person licensed under this act, who may have been in the habit of selling or giving intoxicating liquors" to such persons, and in the proviso to this section any person against whom a judgment shall be rendered under the provisions of the section may recover from any other person who has "sold or given liquor to such person becoming a public charge." Section 18 provides that, in the trial of suits the cause or foundation of which shall be the acts done or injuries inflicted by a person "under the influence of liquor," it only shall be necessary to sustain the action to prove that the defendant sold or gave liquor to the person so intoxicated. Plainly the word "liquor" here, as in all places in the statute, should be read "intoxicating liquor." In the last part of section 18 the words "intoxicating drinks" are used as an exact equivalent of the word "liquor" where it twice occurs in the same section. Section 20 prohibits the keeping of any "malt, spirituous, or vinous liquors" for the purpose of selling without license, and it provides that any one who is found in possession of "intoxicating" liquors with intention of disposing of the same without license shall be deemed guilty.

Unless we consider that the liquors kept for sale must be intoxicating liquors in order to make the act of keeping them unlawful, we must presume that the legislature would forbid the keeping of inoffensive liquors, and in the same section provide that the person who was found keeping intoxicating liquors should be punished, without providing that the person keeping the other forbidden liquors should be punished; in other words, that the legislature would prohibit the keeping of liquors, but provide no punishment therefor, and then provide punishment for keeping intoxicating liquors which it had not specifically prohibited. In this same section the word "liquor" is used seven or eight times without any quali-

fying word, and twice used qualified by the word intoxicating, and so, as in other places in the statute, the word "liquor" is used as meaning "intoxicating liquor." In section 21 the word "liquors" is used five times without any qualifying word, and in section 22 at least five times. In section 24 a permit is authorized to druggists to sell "liquors" without any qualifying word, but I think it clear that "intoxicating liquors" is meant. It is also provided further that no license shall be granted by a village for the sale of any "liquor" within 2½ miles of a military post. By section 26 druggists who have permits are required to keep a register of "all liquors sold or given away by him." This is not limited to malt, spirituous and vinous liquors, and the word "intoxicating" is not used. If the word "liquors" is to be construed in this section as it is in the opinion, the report required of a druggist is much greater than anybody ever supposed, and all medicinal preparations of malt would have to be reported. Section 30*a*, ch. 50, Comp. St., being a part of the act of 1907, speaks of the liquor license authorized under the liquor law as a license for the sale of "intoxicating liquors," and the next section of the same act (30*b*) says that it shall be unlawful for any person engaged in the manufacture of malt, spirituous, or vinous liquors to aid or assist in procuring a license for any person for the sale at retail of malt, spirituous or vinous liquors, and then speaks of these liquors so defined as "said intoxicating liquors," thereby expressly stating that the malt, spirituous and vinous liquors named in the liquor law are intoxicating liquors, and in section 30*g* of the same act it speaks of all of the other acts as "acts relating to intoxicating liquors." The act against treating forbids the giving away of any intoxicating drink. The first section of the act of 1907 (Comp. St. ch. 50, sec. 39), regulating the transportation of intoxicating liquors, makes it unlawful to consign intoxicating liquors from one point in the state to another. If the sale of malt liquors not intoxicating is forbidden by the statute, that should have

been included in this provision, and the fourth section of the same act (Comp. St., ch. 50, sec. 42) forbids the bringing of any malt, spirituous, vinous or intoxicating liquors into any city or incorporated village in which a license has not been granted, etc. It is manifest that the word "liquors" is used in this act also with the meaning of "intoxicating liquors," and that a malt preparation that is not intoxicating would not be included in the meaning given to the word "liquors." If this case had been presented nearly 50 years ago, as it might have been, since the main provisions of the statute were enacted in 1858 (see *Rohrer v. Hastings Brewing Co., ante,* p. 111), a holding that the sale of any malt liquor was prohibited unless the seller was licensed might perhaps have been justified, though this is questionable; but, after half a century of liquor legislation and official construction, it seems to me too late to take this view, and I am firmly of the opinion that the change, if made at all should be made by the legislature.

Cases from other states throw but little light upon the question, since in order to reach the true meaning of each opinion the whole statute must be considered and compared with the statute in this state. But the courts of other states are not in harmony, the holding of the different states depending upon the interpretation and construction of the respective statutes. In Pennsylvania, Illinois and Maine the cases cited by Judge REESE hold specifically that proof of the intoxicating quality of malt liquor is unnecessary. In Minnesota it seems to be held that a charge of selling malt *liquor* implies that the liquor has intoxicating qualities. It is said in *State v. Gill,* 89 Minn. 502, cited in the majority opinion, that whether or not the liquor was really intoxicating is a question of fact for the jury, See, also, *State v. Story,* 87 Minn. 5. If I understand the Minnesota holdings correctly, they are exactly in line with what is and has heretofore been considered to be the law in this state, and are not in harmony with the majority opinion here; and I think the

cases cited from other states do not all support the opinion. The Massachusetts case cited in the opinion merely holds that, where a statute declares that lager beer shall be deemed intoxicating, it cannot be proved not to be intoxicating in a prosecution for selling intoxicating liquors. The Kansas and Wisconsin cases merely hold, as does this court, that the courts will take judicial notice that beer is a malt liquor and intoxicating.

Further, the defendant was charged with selling "a malt and intoxicating liquor, to wit, malt tonic." To charge a sale of intoxicating malt liquor and prove non-intoxicating would be, I think, a fatal variance between the pleadings and the proof. The defendant requested instructions which are set out in the original opinion, 80 Neb. 432, that the state must prove that the malt tonic was intoxicating. Each side introduced testimony concerning the intoxicating character of the liquor in controversy, so that the state concluded that the intoxicating quality of the liquor was a material allegation necessary to be proved to entitle it to a conviction. The trial court therefore erred in refusing to give instructions 1 and 2 requested by the defendant. Perhaps inferentially the jury might conclude from the ninth instruction given by the court that "malt liquor" referred to intoxicating liquor, but it did not supply the instructions asked by defendant.

Under the charge, it was error to refuse these instructions, and the original judgment should be adhered to.

BARNES, J., concurs in this dissent.

JOHN ROSENBERG, APPELLEE, V. U. S. ROHRER, APPELLANT.
JOHN R. FREITAG, APPELLEE, V. U. S. ROHRER, APPELLANT.
JOHN CURRY, APPELLEE, V. U. S. ROHRER, APPELLANT.
PAUL SCHISSLER, APPELLEE, V. U. S. ROHRER, APPELLANT.
FRANK J. NEYLON, APPELLEE, V. U. S. ROHRER, APPELLANT.

FILED FEBRUARY 20, 1909. Nos. 15,980, 15,981, 15,982, 15,983, 15,984.

1. **Intoxicating Liquors: PETITION FOR LICENSE: BURDEN OF PROOF.** In an application for license to sell intoxicating liquors, to which a remonstrance was filed wherein it was claimed that the petition was not signed by the requisite number of freeholders, the burden of proof was upon the petitioner to establish by competent evidence the fact that a sufficient number of the petitioners were freeholders.

2. ———: ———: **EVIDENCE.** In such case, neither the certificate of the register of deeds of the county that the signers were freeholders, nor the testimony of the deputy assessor who made the last assessment, to the same effect, would be competent evidence. The introduction of deeds of conveyance to the signers of the petition, ranging in dates from 1879 to 1907, while competent to prove that the signers had at one time owned the real estate, were therefore admissible, but did not alone establish the fact of ownership at the time of signing the petition, no other competent proof of present ownership being offered.

3. ———: **LICENSE: ORDINANCES.** Under the law governing the traffic in intoxicating liquors within the limits of cities and villages, such traffic can only be legally carried on under ordinances duly passed by the corporate authorities thereof. Until this is done no application can be made and no steps taken toward the procurement of a license to sell liquors within the limits of such coropration (*State v. Andrews*, 11 Neb. 523); but a general ordinance, applicable alike to all cases, fixing the amount of license fee to be charged, and prescribing the procedure to be followed in making the application, the hearing and issuance of the license is sufficient.

4. ———: **PETITION FOR LICENSE: COUNCILMEN: QUALIFICATION.** A petition for a license to A and B, consisting of the requisite number of signers, was signed by a member of the city council by whom the petition was to be heard, and presented to the city clerk. Upon the discovery that the signature of the councilman would disqualify him from acting on the application, his name was

erased, the petition withdrawn, and another was filed asking for a license for B alone, and which was not signed by the councilman. *Held*, That signing the first petition disqualified the councilman, and that the erasure of his name and the withdrawal of the petition did not remove the disqualification.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

J. W. James, R. A. Batty and *H. F. Favinger,* for appellants.

W. P. McCreary and *M. A. Hartigan, contra.*

REESE, C. J.

These cases are appeals from the judgment of the district court for Adams county in affirming the action of the city council of the city of Hastings, whereby licenses to sell intoxicating liquors were issued, severally, to each of the plaintiffs. The causes are separately briefed and presented here, but were argued and submitted at one hearing, and will all be disposed of in this opinion as each case appears to demand under the rules of law deemed applicable. A remonstrance was filed to each petition, some of the grounds of objection being common to all, one of which is that the petition is not signed by the requisite number of freeholders. This placed the burden of proof upon the applicant to show by competent evidence that the signers of his petition were all freeholders. *Lambert v. Stevens,* 29 Neb. 283; *Brown v. Lutz,* 36 Neb. 527.

The question then arises: Was this jurisdictional fact established by competent evidence? In Rosenberg's case, no one of the signers was called for the purpose of proving the fact of the necessary ownership of real estate; but the deputy assessor was called, who testified that he was aquainted with each of the petitioners, naming them, and that the petitioner resided in the proper ward of the city and owned real estate therein. He was then presented

with a deed conveying real estate to the petitioner, and identified the grantee named in the conveyance as the signer of the petition. The deed was then offered in evidence and admitted over the objection of the remonstrant. Thirty-one of such deeds were introduced bearing dates ranging from the year 1879 to that of 1907. Nothing was offered to show that no subsequent conveyances had been made, nor that the grantees named in the deeds had not been divested of their title. Was this sufficient, the fact of the competency of the signers having been denied? That the deeds were competent evidence must, we think, be conceded, for they would tend to establish the fact that the signers were, at one time, freeholders. But was that sufficient proof that they were such at the time they signed the petition in April, 1908? We think not. In *Batten v. Klamm,* 82 Neb. 379, we held that the usual rules of evidence must be applied to the proof introduced to prove that the signers of the petition were freeholders, and that their affidavits were not competent for that purpose. It is said in the opinion: "One reason for the rule is that by the use of affidavits the adverse party has no opportunity to cross-examine the witnesses. This alone, we think, should be a sufficient reason for holding that the affidavits were incompetent. The remonstrators are as much entitled to examine the witnesses upon this question as upon any other issue which may be presented." It is true, as said in *Starkey v. Palm,* 80 Neb. 393, that the statutory requirement as to proof of the possession of a freehold estate in land is not that the evidence be so conclusive as would be requisite to enable the petitioners to recover in ejectment against an adverse claimant, yet the proof should be sufficient to establish, *prima facie* at least, the fact of the ownership of the legal title at the time of signing the petition. The evidence submitted may have been sufficient to prove title at a more or less remote time in the past, but it did not meet the requirements of the law.

There is in the record a certificate by the register of

deeds of Adams county that persons of the same names as those to the petition "are freeholders in the third ward of the city of Hastings," but there is no further or other identification of the parties, and, if there were, the certificate to the conclusion that they "are freeholders," without stating any facts, could not be sufficient. It follows that plaintiff did not show himself to be entitled to the license, and it should not have been issued.

In the case of the application of John Curry, we find the record the same as in the Rosenberg case, except that there is an additional certificate by the register of deeds, which contains no names, but certifies that "30 of the signers of the within petition are freeholders in the Third ward of the city of Hastings as the same now appears of record in this office." This certificate is attached to the petition. As it adds nothing to the force of the evidence, the same rule will have to be applied as in the Rosenberg case.

The record in the Schissler case is the same as in Rosenberg's, and the result must be similar, and therefore no further reference to it need be made.

The case of Neylon presents a like condition, with the exception that it was admitted of record that 15 of the 34 signers to the petition were freeholders of the Third ward of the city of Hastings. The result must therefore be the same.

In Freitag's case competent proof that the signers of the petition were freeholders in the Third ward of the city was either made, or the fact admitted. So far, then, as that question was concerned, the applicant was entitled to the license sought. However, other questions are presented which it is necessary to notice.

It is contended that there is no provision by statute permitting a license to be granted in a city of the class to which Hastings belongs; that the statute simply delegates the powers to the municipality, and that the city can act in a given case only by ordinance. The record shows that a general ordinance was passed in 1903, fixing

the license fee and providing the procedure to be followed, but, as we understand counsel, the claim is made that this is not enough, and that the license in no case can be authorized except by a special ordinance. *State v. Andrews,* 11 Neb. 523, and *Payne v. Ryan,* 79 Neb. 414, are cited in support of the contention. We do not understand those cases to so hold. It is true that provision must be made by ordinance for the issuance of licenses, but that provision may be made by a general ordinance, applicable to all cases, and when that action is taken the council may order licenses to issue when their provisions have been complied with. While the ordinance before us is not as specific as might be desired, yet we think it is sufficient to authorize the issuance of a license when the provisions of law and the ordinance are met. It is also insisted that the ordinance is insufficient for the reason that it does not provide punishment for its violation. This doubtless is unnecessary, as proper penalties may be, and no doubt are, provided in other ordinances.

The record of the hearing before the council presents an anomalous condition. The council consisted of eight members besides the mayor. Four voted in favor of the issuance of the license and four against, which created a tie. The mayor broke the tie by voting in favor of granting the license. Many objections were made by counsel for the applicant to evidence offered by the remonstrant, which were almost invariably sustained by the same vote. The disposition shown by four of the councilmen and the mayor to exclude the evidence offered by the remonstrant, some of which was clearly competent, cannot be commended.

It is shown by the record that Mr. C. L. Alexander was a member of the council at the time of the hearing of the application for the license, and that he had been such member for some time previous; that, a short time before the filing of Freitag's petition, a petition for a license had been presented by William Janssen and John R. Freitag; that said John R. Freitag for whom that petition was

presented is the applicant in this case; that C. L. Alexander, while acting as councilman and holding the office, signed the petition of William Janssen and John R. Freitag for such license, but, learning that the remonstrant, Rohrer, had obtained a photograph of the petition showing his name as one of the petitioners, he had caused his name to be erased, when a new petition was filed praying for a license for Freitag alone, this new petition being the one presented in this case. Upon the hearing of the application for the license, counsel for remonstrant objected to councilman Alexander sitting in the case, for the reason that during the municipal year he had signed a petition for the same petitioner and was therefore disqualified. The objection was overruled, and Alexander voted in favor of the issuance of the license. Had he refrained from voting, the majority would have been adverse to the petitioner, and the license would have been refused. By voting, he created the tie, and the opportunity was presented for the mayor to give the casting vote, which he did in favor of the license, and it was therefore issued.

The question is: Was Alexander disqualified by having signed the previous petition? Upon this inquiry we are of the unanimous opinion that he was disqualified; that his vote was void; and that, such vote changing the result, no valid license could issue. In *Vanderlip v. Derby,* 19 Neb. 165, two of the members of the village board had signed the petition, and it was held that they were disqualified. The same was held in *State v. Weber,* 20 Neb. 467; *State v. Kaso,* 25 Neb. 607; *Foster v. Frost,* 25 Neb. 731, and *Powell v. Egan,* 42 Neb. 482. In the latter case the members of the board had signed the petition, but it was afterwards withdrawn, their names erased and others substituted, and the petition refiled. It was held that the erasure of the names and the substitution of others did not remove the disqualification. In the opinion it is said: "The reason of the rule is that the village board acts judicially (*Hollembaek v. Drake,* 37 Neb. 680), and that by the petition for a license a signer declares, if not his

interest in the issuing thereof, at least his conviction that a license should issue, and of the existence of facts warranting the issuing of the license. He cannot, therefore, sit in judgment upon these questions and occupy the position of a disinterested person. The general principle is conceded by the defendant in error, but he contends that when the petition was withdrawn and the names of three of the trustees 'erased and withdrawn' from the application their disqualification was removed, and they were not forbidden to act upon the petition when refiled, it being then in effect a new application. To so hold would be a veritable 'clinging to the bark.' The disqualification of signers does not ultimately depend on the fact that their names appeared as petitioners. It is based upon the fact that they were interested parties, or at least parties who have prejudged the case, and of this their signing the petition is conclusive evidence. The withdrawing of the petition and mechanical erasure of their names and the refiling of it with other names in their places did not alter the fact and did not avoid the principle upon which their disqualification is based."

We think it must be conceded that the rule above stated must be applied with full force to this case. In the former petition the councilman certified (to himself) that Janssen and Freitag "are men of respectable character and standing," and he "therefore pray(s) that a license to sell malt, spirituous and vinous liquors during the municipal year 1908" issue to them. This certificate and prayer are not in any sense weakened in effect by the fact that another name is coupled with the present applicant. He had already decided and certified that Freitag is a proper party to receive the license. What more or what greater advantage could any litigant desire, if untrammeled by conscience, than would be offered in such a case? In so far as the trier of fact in such a case would be concerned, the favored litigant would be certain of the decision, for "the court" would already be convinced as to the proper solution of the ultimate issues.

We are not surprised that the attorneys representing the petitioner should, in their justification, state to the mayor and council that they had no knowledge of the existence of the former petition with the name of the councilman attached until the close of the case, when they, with commendable candor, called for and introduced the petition in evidence.

It is contended by the appellee that this court is without jurisdiction to entertain this appeal, for the reason that the statute does not provide for the proceeding. An unusually able argument was made at the bar of this court in support of this contention. It is not deemed necessary for us to enter upon this inquiry at any great length, for the reasons that ever since the enactment of what is familiarly termed the "Slocumb Law," in 1875, it has been the practice of the court to review such cases. This has become a part of the jurisprudence of the state, and it cannot now be departed from. It follows that the district court erred in its judgment in each of the cases, and they are severally reversed and the causes remanded to that court, with directions to reverse the judgment and decision of the city council, order the licenses canceled, and that the costs be taxed to the petitioners.

JUDGMENT ACCORDINGLY.

ABRAHAM L. HOOVER ET AL., APPELLEES, V. JAMES M. DEFFENBAUGH ET AL., APPELLANTS.

FILED FEBRUARY 20, 1909. No. 15,510.

1. Waters: WATER RENTALS. The plaintiffs, proprietors of a hotel in the city of Lincoln, in the year 1898 installed their own water system to supply their hotel, which had thertofore been connected with the water mains of the city by a service pipe three-fourths of an inch in diameter, on which the water commissioner had placed a meter to register the amount of water used. The

city water was thereupon turned off at the curb, but was turned on from time to time, with the knowledge and consent of the water commissioner, to enable the plaintiffs to repair their pump, and in 1901 was not again turned off, but was left in that condition until some time in September, 1904, when in making some alterations to the hotel the meter was disconnected without plaintiffs' knowledge, and so remained until August 18, 1905. On the discovery of that fact, the city demanded from the plaintiffs the payment of what it called a "flat rate," based on the number of taps or faucets in the building from September, 1898, to August 18, 1905, amounting to the sum of $6,203.75, and threatened, in default of immediate payment of that amount, to turn off the city water from their hotel. *Held*, That such demand was unreasonable and unjust, and that the city was not entitled to enforce the same.

2.———: ———: INJUNCTION. Plaintiffs brought suit to restrain the city from turning off the water, and offered to pay for the amount of water actually used and consumed during the time the meter was so detached. *Held*, That although the amount of water actually used during that time was not susceptible of exact measurement, yet it could be approximately obtained by a comparison of the amount of water used after the meter was replaced, and the evidence of disinterested witnesses as to its previous use, and that the amount so found by the district court was reasonable and just, and upon payment thereof to the defendants the plaintiffs were entitled to an order restraining them from cutting off the city water from their hotel.

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

John M. Stewart and *T. F. A. Williams*, for appellants.

Hall, Woods & Pound and *Charles O. Whedon, contra.*

BARNES, J.

This is a suit in equity brought in the district court for Lancaster county by Abraham L. Hoover and Stephen C. Hoover against the city of Lincoln and its water commissioner, J. F. Deffenbaugh, to enjcin them from turning off the supply of city water from the Lindell Hotel, and for an accounting of the amount due from the plaintiffs to the city of Lincoln for water used from Septem-

ber, 1904, to the 18th day of August, 1905, which amount the plaintiffs offered to pay. The plaintiffs had judgment, and the defendants have appealed.

The petition sets out, in substance, that the plaintiffs are the owners and proprietors of the Lindell Hotel; that prior to December 10, 1907, they obtained their water supply from the city water main on the M street side of the hotel; that about that date they put in a water system of their own, obtaining their water from a well on their own premises by pumping and piping it through the hotel; that to provide for a supply of water in emergencies, in case of accident or injury to the plaintiffs' plant, they had their water system connected with the city main by a pipe three-fourths of an inch in diameter, and the defendants duly installed a meter thereon, as required by the city ordinance of the city of Lincoln; that, by means thereof, the water which passed from the city main into their hotel, and every part thereof, was duly registered and measured; that in September, 1904, the location of the pipe connecting the two systems, by reason of certain improvements then being made in the hotel, had to be changed, and in so doing, without the knowledge or consent of the plaintiffs, the meter was disconnected by some person or persons unknown to the plaintiffs, and that they had no knowledge of that fact until the 18th day of August, 1905; that all the city water registered down to the time of the removal of the meter, and which was all the city water used by the plaintiffs during said period, amounted at ordinance rates to a sum not exceeding $40; and that after such removal, and down to August 18, 1905, in case of emergencies or of accident to the pumping machinery in plaintiffs' water system, their employees occasionally and without plaintiffs' knowledge used small quantities of city water, the exact amount unknown, but no more was used than in the years 1897 to 1904, when the said meter was in place; that on August 18, 1905, the city water was shut off, a meter was installed September 1, 1905, and the water was turned on

again to be used pending a settlement; that plaintiffs have been and now are ready and willing to pay the city the full amount due it according to its rates in force therein for all water taken from said city mains and used in and about their hotel building down to the said 18th day of August, 1905; that the city insists that the plaintiffs pay a flat rate, regardless of the amount of water used, based on the number of taps or faucets in the building from September, 1898, to August 18, 1905, amounting to the sum of $6,203.75. The petition further alleged that the defendant Deffenbaugh threatens "and is about to turn off the city water from plaintiffs' hotel, and prevent them from using the same, or getting any benefit or advantage from or by reason of the system of waterworks operated by the city for the benefit of all the citizens and inhabitants thereof"; that by reason thereof, in case of accident or injury to the plaintiffs' water system, their hotel would be left wholly without water, and it would be impossible to operate the same in such case without the use of city water; that, if plaintiffs are deprived of such use in case of emergency, they will be put to great hazard and loss, and their business will be destroyed; that they will be compelled to close up their hotel and cease operating the same, and thereby suffer great and irreparable loss and injury; that the said defendant Deffenbaugh on or about the 1st day of March, 1906, served a notice upon the plaintiffs, demanding that they pay to him for the said city, the exorbitant and unreasonable sum of $6,203.75, and that unless such sum was paid on or before 4 o'clock on the 2d day of March, 1906, he would turn off the city water and cut their hotel off from all access thereto; that the plaintiffs are solvent, ready, and willing to pay any sum reasonably due for city water actually taken and used in said hotel. The petition concluded with a suitable prayer for relief.

The defendant city and its water commissioner answered plaintiffs' petition, first, by certain admissions and special denials, and for affirmative defense to the

plaintiffs' action, by way of cross-petition, alleged, in substance, that on and prior to the 1st day of September, 1898, the plaintiffs' hotel was connected with the defendant city's water mains by means of a supply pipe extending from such water mains in the street into plaintiffs' building; that the connection of said supply pipe was constructed so as to be served by means of turning a stopcock at the water main in the street; that on the last named date the defendants, at the request of the plaintiffs, turned off said stopcock in the street, and disconnected and shut off the water from the plaintiffs' hotel, and the same was not between said date and the first day of September, 1905, turned on or connected by defendants with their knowledge and consent; that the plaintiffs without the knowledge and consent of defendants or any of them, and with intent to defraud the city of Lincoln, wrongfully and fraudulently in violation of the ordinance of the city caused the said stopcock to be turned so as to allow the water from defendants' mains to run into the supply and surface pipe connecting with plaintiffs' hotel, and thereby caused their hotel to be supplied with water from defendants' mains, and by means of said connection caused their said hotel to be supplied with all of the water used by plaintiffs in and about their hotel from defendants' mains from September 1, 1898, to August 18, 1905, without the knowledge or consent of the defendants or any of them; that after the 1st day of September, 1898, and after defendants had disconnected and turned off the water from the plaintiffs' hotel, the defendants, having no reason to believe that plaintiffs were using water from the city main, made no inspection or reading of the meter through which such water would properly pass in entering said hotel; that such meter by means of plaintiffs' wrongful and fraudulent manipulation, and by reason of its becoming out of repair, failed to register and preserve for reading the amount of water passing through the supply pipe connecting the water mains with plaintiffs' hotel, and failed to register and preserve for reading the amount

of water so actually used by plaintiffs; that afterwards, and on or about the — day of September, 1904, the plaintiffs removed the said meter wrongfully and fraudulently, without the knowledge of the defendants or any of them, connected their supply pipe direct with the water mains, and fraudulently and surreptitiously drew all of the water used in their hotel until on or about the 18th day of August, 1905, when defendants incidentally discovered the wrongful and fraudulent connection, and disconnected the same and turned off said water; that prior to the last named date defendants had no knowledge and no reason to believe, and could not by the exercise of reasonable diligence have discovered, plaintiffs' said wrongful and fraudulent acts in making the connection with the water mains and their subsequent use of the water therefrom; that after the discovery of such wrongful and fraudulent connection on the 18th day of August, 1905, the plaintiffs duly installed a meter under the ordinance of the defendant city.

The defendants also set out the city ordinances in force from and after the year 1895, defining the powers and duties of the water commissioner, and prescribing water rates, together with the rules governing its use. The answer further alleged that there was due from the plaintiffs from September 1, 1898, to August 18, 1905, the sum of $7,035.57; that under the ordinance there was due in addition to said amount a penalty of 10 per cent. interest, and 7 per cent. per annum from the time when the same became due, amounting in the aggregate to $10,000, which it demanded from the plaintiffs, and prayed that it be permitted to turn off the water from plaintiffs' hotel and sever the connection of said hotel with the city water mains unless plaintiffs paid that amount. Defendants also prayed that an account might be taken of the amount due the defendants under its ordinances on account of the plaintiffs' connection with the city water mains, and *"for the water used,"* for judgment therefor; that the

judgment be made a lien upon the plaintiffs' real estate, and that the injunction prayed for by the plaintiffs' petition be denied, and for general equitable relief.

The plaintiffs for reply to defendants' cross-bill alleged that on August 23, 1899, they paid to the city the sum of $3.15, being the full amount then due according to the meter which the city had installed to measure the amount of city water used by them in their hotel. They also averred their willingness to pay for whatever amount of water was used by them at regular meter rates of 15 cents a thousand gallons as provided by the city ordinance of 1895, and denied each and every allegation in the answer or cross-petition that was not by their reply expressly admitted.

Upon a trial of the issues above stated the district court found, in substance, that the plaintiffs from the 1st day of September, 1898, to the 1st day of September, 1905, maintained their own water supply for their hotel, with the exception of a short time on different occasions when it was necessary to remove their pump for repairs, and on a few other occasions when a small amount of water was used for priming their pump or other purposes; that the meter on the water connection was, on or about the 1st day of September, 1904, in lowering a floor of one of the rooms of plaintiffs' hotel, temporarily removed from its place; that the same had not been replaced when its removal was discovered on the 18th day of August, 1905; that the plaintiffs had no knowledge of the removal of the meter, and that, if the same was out of repair prior to its removal, plaintiffs had no knowledge thereof, and were without fault or negelect on that account; that it was the duty of the city authorities to inspect their meter and keep it in repair; that plaintiffs never concealed or attempted to conceal the use of the city water, and at all times believed that such water as they used was being registered by the meter placed upon their water connection; that they were ready and willing at all times to pay for any water used at the rate of 15 cents a thousand gal-

lons for all water consumed by them; that the value of the city water used by them during the said period amounted to $180; that on or about the time this suit was begun defendants threatened to turn off the city water from the hotel unless plaintiffs would pay the sum of $6,203.75; that said demand and threatened action was unjust, arbitrary and illegal; and thereupon rendered a decree requiring plaintiffs to pay to the defendants the sum of $180; that each of the parties should pay their own costs, and that upon the payment of the sum so found due to the city the injunction was ordered to be made perpetual. From that judgment, the defendants, as above stated, have appealed.

A careful reading of the bill of exceptions satisfies us that the plaintiffs maintained the allegations of their petition by clear and convincing evidence. It also appears that in 1901, at the plaintiffs' request, the city water which had been turned off from their hotel in 1898 was turned on again, after notice to the defendants, in order to enable the plaintiffs to repair their pump; that it remained in that condition until August 18, 1905; that up to some time in the month of September, 1904, the meter theretofore mentioned and installed by the water commissioner was in place between the water main and plaintiffs' water system, so that all of the city water used by them flowed through the said meter; that without intentional fault on the part of the plaintiffs the meter was disconnected some time during the month of September, 1904, and remained in that condition until the 18th day of August, 1905; that from and after the last named date the meter was again installed, and that plaintiffs did not and could not obtain any water from the city other than that registered by said meter at any other time than the period above stated; that, when the mistake and the absence of the meter was discovered, plaintiffs offered to pay for any and all city water used by them, and offered to adjust the matter and settle with the city therefor on any fair, reasonable and equitable basis, but said over-

tures and offers were rejected. We therefore have no hesitancy in saying that the facts found by the district court are fully sustained by the evidence, and, for that reason, we adopt such findings as our own.

On the other hand, the defendants failed to establish their affirmative defense, and it would seem from their present contention that they are fully aware of that fact, for they now submit two principal questions for our determination: First. What constitutes the consideration for which the plaintiffs should pay? Second. At what rate should they be required to make payment to the city?

Referring to the question first above stated, it is contended by the defendants that the city is entitled to charge, collect and receive, without regard to the amount of water used by plaintiffs, a special or additional compensation for what they style "readiness to serve." In support of this contention defendants have cited the case of *Cox v. Abbeville Furniture Factory,* 75 S. Car. 48, 54 S. E. 830. That was a case where the water company furnished a furniture company with water for use in its special private system of fire protection without an agreement fixing the liability therefor. It appears that the furniture factory was situated some distance away, and across a certain railroad track, from the regular mains of the water company, and by an agreement the company laid a private main from its regular system, extending across the railroad track to the factory, where it connected the main with the special system of fire protection, called "automatic sprinklers." In an action to recover the value of the service, it was held that the water company was not obliged to furnish water without charge to be used in a special private system of fire protection instituted by a private corporation for the security of its own property; that, where a water company furnished water for such use without an agreement fixing the liability therefor, it was entitled to reasonable compensation for such protection whether water was used or not; that the term "minimum charge," as used in water supply

contracts where the meter system obtains, usually signifies rate of compensation for expense and labor of being ready to supply water at will of the consumer, though the supply had not been used at all. In the case at bar there is no contention that the plaintiffs are afforded any special fire protection other and different from that enjoyed by all other property owners of the defendant city. They maintain no automatic sprinkler system, and the only water service they ever had up to the 1st day of September, 1905, was such as was afforded by an ordinary pipe three-quarters of an inch in diameter connecting their hotel with the city mains. This is no other or different service from that given to stores, residences, hotels and ordinary private consumers. The defendants having furnished no specific protection to the plaintiffs other and different from that to which the citizens of the city of Lincoln were entitled in common, their only liability for what is called by defendants "readiness to serve" is the payment of 50 cents a month, which is the minimum charge fixed therefor by the ordinance of 1895.

Under the last assignment, the defendants contend that the amount of water actually furnished to and used by the plaintiffs is wholly immaterial; that, having wrongfully removed the meter furnished by the city, they are guilty of fraud, and the city is therefore entitled to charge, collect and receive what they call a "flat rate" from September, 1898, to September, 1905, regardless of whether any water was used or not. In support of this contention defendants cite the case of *Krumenaker v. Dougherty,* 77 N. Y. Supp. 467. That was a case where the plaintiff's premises were found to be supplied with a properly metered service pipe, and also with an unmetered service pipe, through which water had been illegally drawn; the pipes being so arranged that by closing a stopcock water could be obtained through the unmetered pipe without any disturbance of the meter. On a disconnection of the unmetered pipe for several days the amount of the water registered was much greater than before. The

owner denied any illegal use of water, but offered to compromise a bill tendered him for water illegally used. The bill tendered was for an unjust and exorbitant amount, accompanied with a threat to turn off the water from the plaintiff's premises. He thereupon commenced a suit in equity, alleged the facts, offered by his bill to pay for the amount of water actually consumed, and prayed for an injunction restraining the defendant from turning off the water. It was held that the plaintiff was guilty of an illegal appropriation of water; that it was proper to determine the amount for which the plaintiff was legally liable for such illegal use by a comparison of the quantity which the meter had registered with amounts registered during a week when the unmetered pipe was disconnected, taken together with the volume of the user's business; and that, upon a failure to pay the amount so found due for water illegally taken through the unmetered pipe, the city was entitled to cut off the plaintiff's water supply. It will thus be seen that it has been decided in a suit like the one at bar that the amount of water used is what the plaintiffs should be charged with, and that amount, although not susceptible of an exact measurement, can be approximately obtained by comparison.

Finally, our attention is directed to the case of *Gordon & Ferguson v. Doran,* 100 Minn. 343. That was a case where a property owner had installed what is called the "automatic sprinkler system," and had connected it at his own expense with the water mains, and was not entitled to take water in any case, except of fire. It was held that he obtained a beneficial use of water not common to the public in general, and the water board was entitled to make a reasonable and impartial charge for the valuable and special privilege thus conferred; that the board would not be permitted to enforce illegal rates by severing the connection from such sprinkling devices, and that courts will interefere by injunction or otherwise to protect the public and individuals entitled to water service against unreasonable charges or discriminations made by public

utility corporations or bodies. If the decision in that case has any bearing at all upon the questions involved in this controversy, it seems to favor the plaintiffs' contention that they are entitled to the injunctive process of the court to restrain the city from enforcing what they allege to be an unjust, unreasonable and exorbitant demand by cutting off the city water from their hotel.

It is also claimed by the defendants that the meter installed by the city on the service pipe entering the plaintiffs' hotel, when they established their own water system in 1898, failed to register the amount of water passing through it; that it was dead, or, in other words, out of commission, and the plaintiffs had thus been enabled to surreptitiously obtain water from the city mains. The evidence fails to establish this contention. It appears that up to the year 1900 the water commissioner looked after the meter in question, and from time to time obtained its readings, and from such readings presented a bill to the plaintiffs in August, 1899, which was duly paid. It would seem, however, that this bill was for such a small amount that thereafter the city failed to read the meter. It was shown, however, that at one time a person charged with that duty went to the hotel, where he was informed that he could find the meter by following the water pipe; that he refused to look for it, and went away without making any attempt to find it. Now, if the meter was dead, that fact could have been easily ascertained by the city by the ordinary and usual test, and, if defendants really believed that the meter was out of commission, we are unable to see why they did not make such a test, so as to be able to prove that matter to a reasonable certainty.

It was evidently the opinion of the trial court that both parties to this action were to some extent, in the wrong, and therefore in an action in equity it was improper to enforce any of the unjust and inequitable demands presented by the defendants. It appears that the district court compared the amount of water used for three months after both meters were installed with the testi-

mony of disinterested witnesses who knew the facts relating to its previous use, and by adding thereto the minimum charge for readiness to serve obtained the amount which the decree required plaintiffs to pay as a condition for the relief prayed for by their petition. So far as we are able to ascertain, this might reasonably have been a less amount. The witnesses for the defendants, engineers and assistant engineers, who were employed at the plaintiffs' hotel during all of the time in question, who are not now so employed, and who appeared in many instances to be hostile to the plaintiffs, testified that there was a stopcock on the surface pipe, between the meter and the city main, by which they could turn on or shut off the city water, and which they used for that purpose when it was necessary to take such water to prime the plaintiffs' pump, and while it was undergoing repairs; that they had strict orders not to use city water, except such as was necessary for those purposes, and that they obeyed their orders implicitly.

We therefore adopt the finding of the district court as to the amount and value of the city water used by plaintiffs, and for which they should be required to pay as a condition for the relief prayed for by them, as our own.

A careful examination of the record satisfies us that the judgment of the district court is fully sustained by the evidence, is a just and equitable one, and it is therefore in all things

AFFIRMED.

JAMES P. MAHONEY ET AL., APPELLANTS, V. FRANK SALSBURY ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,554.

1. **Quieting Title: DEEDS: ATTACHMENT: PRIORITIES.** D. in good faith purchased a tract of land of W., paying him in full the agreed price therefor. W. thereupon executed and delivered to D. his warranty deed for said land, leaving the name of the grantee

therein blank, with the understanding that, if one M. should desire to take the land and immediately repay D. the purchase price, his name was to be inserted in the deed as grantee; but, if M. should fail to take the land, then D. was to insert his own name therein. M. failed to pay for the land at the time agreed upon, and the name of D. was inserted therein as grantee. *Held*, That the deed when thus completed conveyed the land to D., and his title thus obtained was paramount to the liens of attachments subsequently levied thereon.

2. Deeds: RECORDING: PRIORITIES. A prior unrecorded deed, passing the legal title to the real estate in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before any deed based upon such attachment or judgment. *Harral v. Gray*, 10 Neb. 186.

3. Attachment: MOTION TO DISSOLVE: TITLE TO REALTY. The question of the ownership of real estate cannot be adjudicated on a motion to dissolve an attachment. The issue of fact in such a proceeding is not whether the attachment debtor owns the property, nor whether his grantee has an unimpeachable title or interest therein.

APPEAL from the district court for Butler county: ARTHUR J. EVANS, JUDGE. *Reversed with directions.*

L. C. Burr and *T. J. Doyle,* for appellants.

Aldrich & Fuller, contra.

BARNES, J.

Plaintiffs brought this action in the district court to quiet title to a tract of land situated in Butler county. Defendants Salsbury, Lemon and Brown answered, setting up certain proceedings and judgments in attachment, in which they were plaintiffs and the defendant Joseph Wells was the defendant, by which they alleged that they had obtained liens upon the land in question which were prior and superior to the rights of the plaintiffs. Defendant Wells answered, claiming to be the owner of the premises, and alleged that he had been induced by duress, coercion and fraud practiced upon him by the plaintiffs and others to convey the land in question to the plaintiff Doyle, and prayed that his conveyance

be set aside and held for naught, and that the title to said land, as against the plaintiffs, be quieted in him. The district court rendered a decree in favor of the plaintiffs and against defendant Wells dismissing his cross-petition, and in favor of the defendants Salsbury, Lemon and Brown sustaining their attachment proceedings, and dismissing the plaintiffs' action as to them. From that part of the decree the plaintiffs have appealed. Wells prosecutes no cross-appeal, and therefore the *bona fides* of the sale and conveyance by him to the plaintiff Doyle is as between them not now an open question.

The testimony contained in the bill of exceptions we think fairly establishes the following facts: That on and prior to April 15, 1905, the defendant Joseph Wells was the owner of the northeast quarter of section 19, in township 13, range 2 east of the sixth P. M., in Butler county, Nebraska, together with certain other land; that he resided at that time in Denver, Colorado, and prior to that date had corresponded to some extent with plaintiffs about a sale of his land to the plaintiff Mahoney; that Doyle, acting in the capacity of agent for Mahoney, accompanied by one L. C. Burr, went to Denver to see Wells about the matter, and on the date last above mentioned purchased the land from Wells, paying him therefor $4,550 in cash, and assuming mortgages, interest and taxes, which were liens on the land, amounting to $6,250; that Wells thereupon executed and delivered to Doyle a warranty deed to said premises, complete in all respects, except the name of the grantee, which was left in blank. It appears that it was understood by Wells that the name of the grantee was to be left in blank solely for the reason that Doyle was not certain that Mahoney would complete the purchase according to their previous agreement, and, having paid his own money for the land, it was deemed best, in case of delay on the part of Mahoney or of his failure to complete his proposed purchase, for Doyle to take title to the land himself. Doyle returned from Denver to Lincoln on the 16th day of April, 1905, bringing

the deed in question with him. On Monday, April 17, he went to Greeley, Nebraska, to attend court, and instructed Mr. Burr, who was familiar with the transaction, to close the deal with Mahoney, if he was prepared to take the property and pay for it on that day, and insert his name in the deed, but, if for any reason Mahoney failed to complete his purchase at that time, to insert Doyle's name in the deed as grantee, and send it to Butler county for record. It further appears that Mahoney came to Lincoln on the 17th day of April, but was unable to complete his purchase at that time; that Burr on that date inserted Doyle's name in the deed as grantee, and the same was thereafter forwarded to the county clerk of Butler county for record, and was recorded on the 22d day of April following.

On the 20th day of April defendants, Salsbury, Lemon and Brown commenced attachment suits in the district court for Butler county against the defendant Joseph Wells, and on the day following said attachments were levied upon the 160 acres of land in question herein as the property of defendant Wells. The attachment suits were commenced on claims not then due, and the grounds therefor, as set forth in the affidavits, were that Wells was a nonresident of this state, and that he had sold, incumbered and disposed of his property with intent to defraud his creditors. Wells appeared by the plaintiff Doyle as his attorney, and moved to dissolve the attachments. In support of his motions, he set forth by affidavit the *bona fides* of the transaction by which he conveyed the land in question to the plaintiff Doyle on the preceding 15th day of April. The motions to dissolve were overruled, and no other or further appearance was made in the attachment suits. Judgments were rendered therein against the defendant Wells, and the attached property was ordered to be sold. On the 1st day of May, 1905, Mahoney procured the money necessary to purchase the land in question, and paid the same to Doyle, who thereupon conveyed it to him by a warranty deed. Thereafter the plaintiffs com-

menced this action to restrain the defendants Salsbury, Lemon and Brown from proceeding further in said attachment suits, from selling the land under the orders of attachment above mentioned, and to quiet their title to the same as against the defendants, said attachment creditors.

It further appears that at the time of the execution and delivery of the deed in question defendant Wells also executed and delivered to the plaintiff Doyle the following instrument in writing: "Roy Parks: For value received I have this day sold, assigned and set over to Thomas J. Doyle of Lincoln, Nebraska, all my right, title and interest, claim and demand in and to the lease under which you occupy the above named premises, and you not having paid me any rent due under said lease for the year 1905, or subsequent thereto, you will please pay the same and all thereof to him, and recognize him as your landlord, and any and all courtesies you may extend to him will be thoroughly appreciated by yours truly, Joseph Wells." On the 17th day of April, 1905, Doyle communicated to Parks, who was in possession of the land in controversy as a tenant, the fact of his purchase and the assignment of the lease to him, and from that time on was recognized by Parks as the owner of the premises.

It is contended that the deed executed by Wells to Doyle on the 15th day of April, 1905, with the name of the grantee in blank, was for that reason void and conveyed no title to Doyle; that, therefore, the land still belongs to Wells, and is subject to sale under the orders of attachment. This contention might be sustained if it were shown that Doyle had no authority to insert the name of the grantee in the deed, but we are satisfied from the evidence that Doyle had such authority. Not only is that fact testified to by him and by Burr, but all the circumstances surrounding the transaction point unerringly to the fact that it could not then be determined with certainty whether Mahoney would complete the purchase

according to his agreement, or whether it would be necessary for Doyle to take title to the land himself, and therefore the deed was executed in blank as to the name of the grantee. Doyle having authority to insert the name of the grantee in the deed, when that act was performed by Burr, and Doyle's name was inserted, the deed became complete in all respects and conveyed an absolute title to the land to Doyle. *Field v. Stagg,* 52 Mo. 534; *Van Etta v. Evenson,* 28 Wis. 33; *Devin v. Himer,* 29 Ia. 297; *Swartz v. Ballou,* 47 Ia. 188; *Campbell v. Smith,* 71 N. Y. 26; *Phelps v. Sullivan,* 140 Mass. 36.

In *Devin v. Himer, supra,* the grantor in a deed omitted the name of the grantee, not knowing the full name, and left a blank therefor. The deed in this condition was delivered by him to the grantee, who thereafter by his attorney filled the blank with his name, and it was held that it was a sufficient execution and delivery of the deed.

In *Reed v. Morton,* 24 Neb. 760, we held that, where a wife executed a deed of her real estate, leaving the name of the grantee, the amount of consideration and the date blank, and delivered it to her husband for the purpose of enabling him to sell and convey said real estate, such deed, duly filled up, in the hands of a *bona fide* grantee, who purchased the land from the husband, and paid the consideration therefor, should be sustained. We think the rule announced in the foregoing cases is upheld by the great weight of authority, and the defendants' contention on this point cannot be sustained.

It appears, however, that this deed was not recorded until the day following the levy of the attachments, and it is therefore contended that the liens of the attachments are paramount to the title conveyed to Doyle by said deed. In *Harral v. Gray,* 10 Neb. 186, we held: "A prior unrecorded deed, passing the legal title, made in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before any deed based upon such attachment or judgment." This rule is supported by *Mansfield v. Gregory,* 11 Neb.

297, and *Hubbart v. Walker,* 19 Neb. 94. In *Uhl v. May,* 5 Neb. 157, a case where the legal title to the real estate was in the judgment debtor, and such real estate was in the possession of another party, it was held that the lien of the judgment attached only to the interest of the judgment debtor therein, and that possession of land is notice to all the world, not only of the possession itself, but of the right, title and interest, whatever it may be, of the possessors. We find that the rule announced in *Harral v. Gray, supra,* was approved in *Naudain v. Fullenwider,* 72 Neb. 221, and seems to be the settled law of this state. It follows that, if the deed from Wells to Doyle was made in good faith and for a valuable consideration, then it takes precedence, though unrecorded, over any lien which the defendants Salsbury, Lemon and Brown obtained by reason of their attachment proceedings.

It is contended, however, that the deed in question was not made in good faith, and that Doyle never purchased the land in controversy. We fail to understand how any such contention can be made in face of the evidence contained in the record. That Doyle paid the entire purchase price for the land to the then owner Wells on the 15th day of April, 1905, is not questioned or disputed. It is not claimed that this was not the fair market value of the land, and, at most, it can only be claimed that he was not acting for himself, and did not purchase the land, but was simply negotiating to purchase the same for the plaintiff Mahoney. The evidence does not sustain this claim. Doyle evidently purchased the land outright, and, when the transaction was completed, Wells no longer had any interest therein. If this be true, then the deed given to Doyle, as soon as his name was inserted therein as grantee, conveyed the title to him, and he was not only the owner of the land, but was in possession of it by and through his tenant, Roy Parks, for at least four days prior to the levy of the attachments in question herein. At the time of the commencement of those suits Wells had parted with all the interest he ever had in the land,

and had in fact conveyed it to the plaintiff Doyle. It is insisted, however, that the judgment of the district court should be affirmed, because Mahoney had notice of the commencement of the attachment suits on the 20th day of April, 1905, and before he purchased the land from Doyle. If, as we have held, Doyle was at that time the owner thereof, and had the legal title thereto, notice to Mahoney could in no manner affect his rights, and, when Mahoney purchased and took title from Doyle, he obtained the same title and interest that Doyle had thereto.

It is also contended that the sale of the land in controversy from Wells to Doyle was made fraudulently, with intent to cheat and defraud his creditors. We find no evidence in the record tending to establish this fact. Much evidence was introduced by the defendants by which they attempted to show that in the transaction complained of Doyle, together with others, conspired to cheat and defraud the defendant Wells out of his land. No evidence was introduced showing or tending to show that Doyle was aware of the fact that Wells was owing any debts other than those which he assumed as a part of the purchase price of the land in question, and the other claims which Wells secured by a mortgage upon another eighty-acre tract of land. So far as Wells is concerned, it is not shown that he had any intention or desire to defraud his creditors or any of them; that his purpose in making the sale to Doyle was to pay debts and obtain $5,000 to invest with other property he had in purchasing a half interest in a store in Denver. It further appears that Wells since that time has paid a part at least of one of the debts which was the basis of the attachment suits. The fact that the business in which Wells engaged afterwards turned out to be unprofitable is not sufficient of itself to establish the claim that the sale to Doyle was made with intent to defraud creditors.

Finally, it is contended that the *bona fides* of the sale from Wells to Doyle was determined in the attachment suits, and is now *res judicata*. In other words, that plain-

tiffs are bound by the judgments in those cases, and are now estopped to claim that their title is superior to the attachment liens. It appears that neither of the plaintiffs were parties to those suits; therefore it would seem clear that they are not bound by the proceedings therein. But it is contended that because the plaintiff Doyle appeared as attorney for the defendant in those actions for the purpose of securing a dissolution of the attachments, and filed affidavits relating to the sale of the land from Wells to himself, he became privy thereto, and is bound by the orders overruling the motions to dissolve. We think the question of the *bona fides* of the transaction between plaintiff Doyle and defendant Wells relating to the sale and purchase of the land in question was not a point, nor could it have been made a point, in issue in the attachment suits. In *Kimbro v. Clark,* 17 Neb. 403, it was said: "The question of the ownership of the real estate cannot be adjudicated by the intervention of the holder of the title, that question not being involved in any degree in the action. In such case a judgment against the maker of the promissory note, and an order that the attached property be sold, will not debar the holder of the legal title from afterwards claiming title to the real estate." In *South Park Improvement Co. v. Baker,* 51 Neb. 392, it was held: "The issue of fact in a proceeding to discharge an attachment is not whether the attachment defendant owns the property, nor whether his grantee has an unimpeachable title or interest therein." In *Kountze v. Scott,* 49 Neb. 258, it was said: "A debtor who had transferred all his interest in property subsequently attached, to one who is not a party to the attachment suit, cannot, in his own name and right, be permitted, on motion for a dissolution of the attachment, to establish the validity of his transfer." See, also, *Meyer, Bannerman & Co. v. Keefer,* 58 Neb. 220. It seems clear from the foregoing authorities that the plaintiffs are not bound by the proceedings in the attachment suits, and

the defendants' contention on this point cannot be sustained.

From a careful examination of the whole record, we find that the plaintiffs have shown themselves entitled to the relief prayed for by their petition, and we find generally in their favor upon the issues joined. It follows that so much of the judgment of the district court as dismissed their petition and refused them any relief should be, and the same hereby is, reversed, and the cause is remanded, with directions to the district court to render a decree quieting their title to the real estate in controversy, as prayed for by their petition.

JUDGMENT ACCORDINGLY.

ANDREW J. PETHOUD, APPELLEE, V. GAGE COUNTY; B. C. BURKETT, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,557.

1. **Counties**: CONTRACTS. G. county was engaged in litigation in the district court involving fraud in bridge contracts. The county board adopted a resolution authorizing the county attorney to call to his assistance competent persons to examine the bridges and check up the claims which had been allowed and were pending on bridge contracts in that county for the preceding four years. He called to his aid one P., who was at that time county surveyor. The services were performed, and P. filed a claim with the county board for payment therefor. His account was allowed. B., a taxpayer, appealed from the order of allowance to the district court. The claimant there had judgment. On appeal to this court, *held*, that the transaction was not within the inhibition of section 4469, Ann. St. 1907, and that the claimant was entitled to recover the value of his services.

2. **Case Distinguished.** *Wilson v. Otoe County*, 71 Neb. 435, distinguished.

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

A. D. McCandless, for appellant.

E. O. Kretsinger, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Gage county.

It appears that in the year 1906 certain actions were pending in the district court for that county relating to frauds in bridge building, in which the interests of the county were at stake; that on the 16th day of June of that year the county board duly adopted a resolution authorizing the county attorney to take such steps and employ such means as were necessary for the purpose of checking up all claims, either pending or which had been settled, and examining all bridges that had been constructed for the county during the preceding four years. Thereupon the county attorney requested the plaintiff, now the appellee, and another to perform such work. The services were duly performed, and the plaintiff presented a bill to the county board for the time spent in the field while making his examinations, which was allowed and paid. He thereupon prepared and furnished to the county attorney for the use of the county in conducting said litigation a written report of the conditions found by him, and presented his claim therefor, amounting to $67.50, to the county board, which was also allowed. The objection interposed to the claim was that the plaintiff at the time he performed the services was the county surveyor of Gage county. From the order of allowance one Burkett, as a taxpayer, appealed to the district court. A trial in that court resulted in a judgment for the plaintiff, and Burkett has brought the case here for review.

The defense in the district court was based on the provisions of section 4469, Ann. St. 1907, which reads as follows: "No county officer shall in any manner, either directly or indirectly, be pecuniarily interested in or re-

ceive the benefit of any contracts executed by the county for the furnishing of supplies, or any other purposes; neither shall any county officer furnish any supplies for the county on order of the county board without contract."

Appellant now rests his case, to use his own language, "upon the single question: Is the county surveyor a county officer within the meaning of the section above quoted." Our attention is directed to certain authorities defining the term "county officer," and the case of *Wilson v. Otoe County,* 71 Neb. 435, is cited as requiring a reversal of the judgment of the trial court. That was a case where the plaintiff, who was the county attorney of Otoe county, while holding that office, followed certain litigation from the district court of his county to this court, and where he also prepared and filed a petition for the defendant in an action which it brought in another county, but did not conduct the litigation which followed. His action was brought to recover the reasonable value of his services in the matters above mentioned. The district court sustained a demurrer to his petition, and rendered a judgment for the defendant. This court affirmed that judgment, and, by so much of that decision as was material to that controversy, held that a contract between a county and one of its officers whereby such officer undertakes to perform extra-official services, for which the county undertakes to pay him a compensation in addition to the fees or salary allowed him by law is in violation of the section above quoted, and will not support an action for such extra compensation. We approve of the rule thus announced, and generally of the reasoning contained in that opinion, and it is not our purpose at this time to in any way weaken the force or effect of that decision. It appears, however, that the district court was of opinion that the nature of the plaintiff's office and the services rendered to the defendant were such as did not fall within the inhibition of the statute. In a written opinion filed by the trial court in this case it was said: "If the county desires the services of the county surveyor, it obtains the

same in the same manner as does any private citizen, and pays the compensation fixed by law to all alike. The surveyor is independent of the county. He owes no duty to the county which he does not also owe to every other citizen of the county. He has no part in the management of the county or its affairs. He can aid no other officer of the county in the matter of contracts or official services. He is not one of the cogs in the wheel that turns the affairs of the county. He is simply an official designated by law to do a certain class of work for the public. In name he is a county officer, but in the sense in which the term is used in the section of the statutes above quoted he is not a county officer. His office brings him within the technical letter of the statute, but his official functions leave him clearly without its spirit and purpose. The case of *Wilson v. Otoe County*, 71 Neb. 435, holds any contract between the county and one of its officers whereby such officer undertakes to perform *extra-official* services, for which the county undertakes to pay him compensation in addition to the fees and salary allowed him by law, clearly void. But here the officer contracting with the county receives from the county no fees or salary except as he receives them from every other citizen of the county for similar services performed, and it is clear to my mind that the legislature never intended the prohibition contained in this section should extend to officers situated as the county surveyor is in this action." The foregoing meets with our entire approval. It may be further said that the claim in this case was not for extra-official services performed by the plaintiff as county surveyor, but was for work and labor performed by him as an individual, which had no reference to and was no part of the duties of his office. The work could have been performed by any one possessing the requisite qualifications, and it is quite probable that the reason the county attorney called the plaintiff to his assistance was because of his qualifications, and regardless of the fact that he was at the time the county surveyor. That the county attorney found plaintiff quali-

fied to assist him in his work was merely a coincidence, and it is quite clear that, if the services had been performed by another not the county surveyor, no question would have been raised as to the county's liability therefor. We are not prepared at this time to hold that the mere fact that plaintiff was the county surveyor prevented him from performing work and labor for the county, which was no part of his official duties, and could have no reference whatever to his official position.

We are of opinion that the facts of this case are not within either the letter or the spirit of the statute; that they are not akin to any mischief which the statute was intended to prevent; that this case should not be ruled by *Wilson v. Otoe County, supra;* that the judgment of the district court was clearly right, and it is therefore

AFFIRMED.

ANNA W. SHEIBLEY, ADMINISTRATRIX, APPELLANT, V. GEORGE L. NELSON, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,364.

Abatement: ACTION FOR LIBEL. Under the provisions of sections 455 of the code, a pending action for libel does not abate by the death of the plaintiff.

APPEAL from the district court for Cedar county: ANSON A. WELCH, JUDGE. *Motion to revive sustained.*

W. E. Gant, for appellant.

J. J. McCarthy and *J. V. Pearson, contra.*

LETTON, J.

This is an action for libel. The result of a trial in the district court was a judgment dismissing the plaintiff's action. From this judgment the plaintiff appealed to this court. After the appeal had been duly lodged the plaintiff

died, and the cause is now pending upon a motion to revive the same in the name of his personal representative. The defendant objects to the revivor, and contends that the cause of action is strictly personal in its nature and does not survive, and that the pending action abated with the death of the plaintiff. The provisions of the code of civil procedure which relate to the subject of survivor and abatement of actions are as follows:

"Section 454. In addition to the causes of action which survive at common law, causes of action for *mesne* profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought notwithstanding the death of the person entitled or liable to the same.

"Section 455. No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant."

The latter section has heretofore been considered by this court in *Webster v. City of Hastings,* 59 Neb. 563. This was an action for personal injuries occasioned by the negligence of the city. The plaintiff had an action for damages pending at the time of his death. The court said, SULLIVAN, J.: "The section quoted declares, in plain terms, that suits instituted to redress a particular class of wrongs, among them being certain injuries to the person and reputation, shall abate by the death of the defendant, but that no other pending action shall abate for any cause. * * * To sustain the contention of counsel for the city, that the death of a party abates all pending actions except those brought for the vindication of some right covered by the provisions of section 454 of the code, would be to annul completely the provisions of section 455." See, also, *Cleland v. Anderson,* 66 Neb. 252. This section has also been considered by the supreme court of Ohio in the case of *Alpin v. Morton,* 21 Ohio St. 536; it

having formed a part of the Ohio civil code at that time. The court says: "This section does not enlarge the number of causes of action which survive where no action has been commenced. But if the action is *pending,* for whatever causes, it prevents its abatement by the death of either party, unless it be an action for one of the causes enumerated in the section, and as to them it does not abate, except by the death of the defendant. It seems to have been the purpose of the section to provide that the defendant in no case whatever should gain a case by the death of his adversary, although if the plaintiff's case be one of those enumerated he may be defeated by the death of the defendant." *Baltimore & O. R. Co. v. Joy,* 173 U. S. 226.

Section 463 of the code provides: "Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names."

In *Schmitt & Bro. Co. v. Mahoney,* 60 Neb. 20, it was held that the provisions of this section are applicable to cases pending in the supreme court. Construing these sections together, we think it clear that the pending action did not abate by the death of the plaintiff and that the case should be revived in the name of his administrator. The motion is therefore

SUSTAINED.

IDA M. HIGGENS, APPELLEE, V. SUPREME CASTLE OF THE HIGHLAND NOBLES, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,506.

1. **Appeal:** PLEADING: OVERRULING MOTION: HARMLESS ERROR. If the petition in an action upon a policy of insurance or a benefit certificate purports to set out a full copy of the instrument upon which the action is predicated, and the recitals of the copied portion show that the whole contract is not contained in the petition, a motion to require the plaintiff to set forth the whole contract is proper and should be sustained. But where it is shown that the missing portion is in the possession of the defendant, then the rule, "less particularity is required where the facts are within the knowledge of the adverse party," applies, and the error, if any, in overruling the motion is without prejudice.
2. **Pleading:** REPLY: AMENDMENT AFTER TRIAL. In a trial to the court without the intervention of a jury, after all the evidence had been taken and the case submitted, the plaintiff was given leave over objection of defendant to file an amended reply, pleading an additional defense to the new matter in the answer "to conform to the proof." No request was made for further time or to be permitted to introduce further proof. *Held*, That the matter of allowing the amendment was within the discretion of the district court, and that no abuse of this discretion has been shown.
3. **Insurance:** PLEA OF FORFEITURE: BURDEN OF PROOF. The burden of proof is upon the defendant to establish a plea of forfeiture in an action upon an insurance policy or a benefit certificate, and in this case the evidence is examined, and *held* to sustain the judgment of the district court.

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

W. C. Saul and *John C. Watson,* for appellant.

A. L. Timblin and *Roddy & Bischoff, contra.*

LETTON, J.

This is an action to recover upon a benefit certificate issued by the defendant to Edgar O. Higgens in favor of the plaintiff, who is the beneficiary named in the certificate

and is the widow of the applicant. The answer pleaded a forfeiture of the right to recover on the certificate by reason of false representations which it alleged were made by the applicant; the representations being that in reply to the question, "Have you ever been rejected for life insurance or benefit?" the applicant answered "No," while the truth was that prior to the date of the application he had been rejected by the Modern Woodmen of America. A reply was filed, denying every allegation in the answer. At the trial a jury was impaneled and sworn, but at the close of plaintiff's testimony the defendant asked for a continuance in order to produce an absent witness, claiming to have been surprised by the evidence offered by the plaintiff. The application was granted by the court and the cause continued. Afterwards it was agreed in open court that a jury be waived, that the jury be discharged, and that the trial proceed to the court. The taking of evidence was completed, and the case was taken under advisement. Later, and before judgment, the plaintiff was given leave to file an amended reply "to conform to the facts already in proof," to which the defendant excepted. An amended reply was filed, pleading that the contract was to be construed under the laws of Iowa, that under the laws of that state a mutual benefit association cannot set up any alleged false answers in the application as a defense to a suit on the certificate unless a true copy of the application is attached to the certificate, and that the defendant failed to attach a true copy. It was further alleged that the applicant truthfully stated all the facts inquired about to the association through its agent, one G. L. Williams, who was the state agent or manager for the state of Nebraska, that the application was written by Williams, who was specially informed of the prior rejection of the applicant by the Modern Woodmen; that, if any false answers were contained in the application, they were made by the defendant or defendant's agents; that the copy of the application attached to the certificate and sent to the assured showed the question as to the assured's

prior rejection to have been correctly answered in the affirmative, and that neither the assured nor the plaintiff had any knowledge that a false answer had been entered in the application until the original application was produced in court by the defendant. A motion was made to strike this reply from the files, which was overruled, and judgment was rendered in favor of the plaintiff for the amount claimed.

1. The first point made by the defendant is that the court erred in overruling the defendant's motion to require the plaintiff to set out a copy of the application referred to in the petition. The petition purports to set forth the certificate *in hæc verba*. The certificate recites: "The application of said member for which this certificate is issued is hereby referred to and made a part hereof." If the petition in an action upon a policy of insurance or benefit certificate purports to set out a full copy of the instrument upon which the action is predicated, and the recitals of the copied portion show that the whole contract is not contained in the petition, a motion to require the plaintiff to set forth the whole contract is proper and should be sustained. But where, as in this case, it is shown that the missing portion is in the possession of the defendant, and that it is upon matter contained in the missing portion that the defendant relies as constituting a defense, then the rule "less particularity is required where the facts are within the knowledge of the adverse party," applies, and the error, if any, in overruling the motion is without prejudice.

2. The next point made is that the court erred in granting leave to the plaintiff to file an amended reply after the case had been submitted. It is contended that the amended reply changed the issues, and that it introduced a new cause of action which should have been set forth in the petition. We cannot agree with this contention. The petition pleaded the issuance of the certificate and the death of the assured. The answer admits the issuance of the certificate, but pleads a forfeiture by reason of a false

answer to a certain question. The original reply was a general denial. As a part of her evidence in chief, the plaintiff offered certain sections of the statutes of Iowa, to which the defendant objected as incompetent, irrelevant and immaterial, and not the best evidence, which objection was overruled. These sections contained the provisions referring to the duty to attach a copy of the application to the certificate, and providing that, if an association neglects to comply with this requirement, it shall not be permitted to plead or prove the falsity of any such representation in an action on the certificate. As the pleading then stood, this evidence was immaterial, and the amendment was necessary to bring it within the issues. The amendment as to the Iowa law was a matter of defense to the alleged forfeiture, and was not a proper part of the petition. The allowance of the amendment was within the discretion of the court, and no abuse is shown. At the time the amendment was made, if the defendant had been surprised or anywise prejudiced by its allowance, it might have requested the court to continue the case and to permit it to introduce further proof, but it did not so request. The trial was to the court, and it would have been easy to comply with such a request if it had been made. We cannot see that the defendant was prejudiced by the filing of the amended reply.

But, even if the pleading of the Iowa statute and all the evidence on this point had been omitted from the case, we think the judgment of the district court upon the main defense of false representations is fully justified. The evidence showed that the application was taken by one Williams, who was the manager of the association for the state of Nebraska, and that the application, with the exception of the signature and that portion in the handwriting of the examining physician, was written by him. The plaintiff swears that she was present during a portion of the time that Mr. Williams was preparing the application, and that she heard him ask her husband the question, "Have you ever been rejected for life insurance

or benefit?" and that her husband answered "Yes." She further testifies that her husband told Williams he had been rejected by the Modern Woodmen, and he thought that would prevent him from getting into any other order; that "Mr. Williams told him that wouldn't make any difference in that order, and he says, 'Where that answer is,' to that question in there, 'that isn't necessary and it don't have to be answered by you.'" The evidence shows that this application was sent to the head office in Iowa, that a copy of it was made and attached to the benefit certificate, and that the certificate was delivered to the assured by Williams personally. This copy is all in the handwriting of the clerk who made it, except that in the blank after the answer to the question referred to the word "Yes" is written, instead of the word "No," as appears in the original application. This portion of the copy bears traces of erasure and alteration, and from its appearance it would seem that whatever word, if any, had been originally written in the blank had been obliterated, and the word "Yes" written in, at first lightly, and afterwards in a heavier hand and with blacker ink. Mrs. Higgens testifies it is now in exactly the same condition as it was when delivered to them by Williams. The clerk of the local Modern Woodmen camp, who was a witness called by the defendant, testifies that in a conversation he had with Mr. Higgens in relation to his rejection by the Modern Woodmen Higgens said: "That it didn't make much difference anyway; that he was going into the Highland Nobles anyway. * * * He said he had told them he had been rejected, but it didn't seem to make any difference to them." The evidence of Mrs. Higgens was uncontradicted and unimpeached. In this condition of the evidence, we have on one side the original application in Williams' handwriting signed by Higgens, which shows the word "No" when the copy shows "Yes." On the other we have the testimony of Mrs. Higgens that Williams was distinctly informed that her husband had been examined and rejected by the Modern Woodmen, the testimony of a

witness for defendant that Higgens said he had informed the Highland Nobles of this fact, and the further circumstance of the alteration in the copy of the application which was delivered to the assured, and which, the testimony seems to indicate, was made by Williams after he received the copy, and before he delivered it to the assured. Williams was not upon the witness stand, and there is nothing to show why he was not called.

The burden of proof was upon the defendant to show that the answer was made by the applicant as written in the application; that it was false in some particular material to the risk; that it was intentionally made by the assured; and that the insurer relied and acted upon the statement. *Kettenbach v. Omaha Life Ass'n,* 49 Neb. 842. It has been repeatedly declared by this court that a forfeiture will not be declared in an action upon an insurance policy because of misstatements in a written application where it appears that the application was written by the agent of the insurer, and that the facts were truthfully stated by the applicant. *German Ins. Co. v. Frederick,* 57 Neb. 540; *Home Fire Ins. Co. v. Fallon,* 45 Neb. 554; *Fidelity Mutual Fire Ins. Co. v. Lowe,* 4 Neb. (Unof.) 159. In the latter case it appeared that certain answers to questions in the application were misstatements of fact. The application was written out by the agent upon statements made by the plaintiffs, who testified that the answers had been truthfully made while the agent testified that they were made as written in the application. The application was signed by the applicant and delivered to the agent, who transmitted the same to the company. The trial court instructed the jury that, if the facts with reference to the total incumbrances, were correctly stated to the agent, and the statements in the application were written by the agent after this communication was made to him, the policy would not be void. This instruction was upheld by this court in an opinion by Mr. Commissioner KIRKPATRICK, which examines and reviews many authori-

ties upon the point from this and other states. 1 Bacon, Benefit Societies and Life Insurance (3d ed), sec. 153.

We think that the evidence upon this point alone fully justifies the judgment of the district court, and it is therefore

AFFIRMED.

MARY S. KEELING, APPELLEE, V. PETER POMMER ET AL., APPELLANTS.

FILED FEBRUARY 20, 1909. No. 15,543.

1. **Trial**: VERDICT. A jury brought in a sealed verdict, which, upon being opened, was found to be defective in form. On the direction of the court, they again retired to the jury room and returned a verdict in the same amount and against the same parties as before, but in proper form. *Held*, That the failure to receive the first verdict and the receiving of the second was not erroneous.

2. **Intoxicating Liquors**: DAMAGES. In an action brought by a wife to recover damages under the statute governing the sale of intoxicating liquors where the husband died as a result of the traffic, loss of means of support is not the only damage for which a recovery may he had, but the wife may recover the cost of the necessary medical attendance paid by her and funeral expenses necessarily incurred by her in procuring the burial of her husband, when such items of damage are alleged and proved.

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

Strode & Strode, for appellants.

J. C. McNerney, R. D. Stearns and *Rose & Comstock, contra.*

LETTON, J.

This is an action brought by Mary Keeling for herself and her minor child to recover damages for loss of support and for expenses incurred by her for medical attendance

and funeral charges occasioned by the death of her husband, which she alleges was caused by the excessive use of intoxicating liquors sold to him by the defendants Peter Pommer and Levi D. Munson. The action is against the liquor dealers and the sureties upon their respective bonds. The jury found in favor of the defendant Levi D. Munson, and against the defendant Pommer and his surety. The proof shows that Alfred M. Keeling, the husband of plaintiff, was in his lifetime a painter and paper-hanger by trade, earning about $75 a month; that he had been a user of intoxicating liquor for some time, but that between April 16, 1905, and the time of his death in June, 1905, he became addicted to the excessive use of such liquors to such an extent as to aggravate and intensify the ravages of the disease from which he was suffering, to break down his recuperative powers and to eventually cause his death, which, the testimony shows, was caused from alcoholic cirrhosis of the liver. The jury returned a verdict for $1,200 in favor of the plaintiff, but she was required to remit $75 of the amount, and judgment was returned for $1,125. It appears that the case had been submitted to the jury in the evening, with the direction that they might return a sealed verdict if they agreed in the nighttime. The jury agreed and returned into court next morning with a sealed verdict, finding against Pommer and his surety for "one thousand dollars damage and two hundred funeral expenses." The court, after reading the verdict, returned it to the jury, instructing them that it was not in proper form; that they should again retire, and that whatever amounts they should find against the defendant should be added together and the aggregate sum only given in the verdict. The defendants waived the giving of this instruction orally, but objected "to sending the jury out again to return another and different verdict than the one already returned by the jury," and asked that the verdict be received and the jury be discharged. The jury retired, and afterwards came into court with their verdict, finding for the plaintiff in the sum of $1,200.

1. The first point made by the defendants is that the court erred in refusing to receive the first verdict and in receiving the second. We think there was no error in this. It is the duty of the court to see that its proceedings are conducted in a proper and orderly manner, and, if through some oversight or mistake, a verdict is not in proper form when it is brought into court, it is incumbent upon the court in the proper discharge of its duties to see that the jury render a verdict correct in form. The defendants were in nowise prejudiced by this action of the court. The form of the verdict alone was changed, and not its substance. *Rogers v. Sample,* 28 Neb. 141.

2. The next point made is that the verdict includes $200 for funeral expenses, that funeral expenses do not constitute a proper element of damages to be considered by the jury, and that the court erred in receiving evidence of such expenses. It is also argued that, if these charges are allowable at all in this class of actions, they should be set forth as a separate cause of action from the damages alleged to have been sustained for loss of means of support. The petition pleads specially that the plaintiff incurred expenses for medicine and for doctors' attendance during her husband's last illness, and for funeral charges after his death to the amount of $200. Even if these constitute a separate cause of action, it does not appear that any motion was ever made to require plaintiff to separately state and number her causes of action, and it is too late now to make this objection.

The question whether evidence of these expenses should have been admitted and whether they constitute proper elements of damage is more serious. Under a statute of Wisconsin, which gives a right of action to a wife who has been injured in person or property or means of support in consequence of intoxication, and a right to recover the damages sustained from the party causing the intoxication, it was held, where the husband's intoxication made him unable to attend to his business, and his wife had to employ another man to do his work, and to hire men to

aid her in taking care of him, and was obliged to employ and pay a physician for medical attendance upon him, that all these expenses were valid claims against the defendant. *Wightman v. Devere,* 33 Wis. 570. To the same effect are *Thomas v. Dansby,* 74 Mich. 398; *Coleman v. People,* 78 Ill. App. 210; *Horn v. Smith,* 77 Ill. 381. The statutes of this state provide that a married woman may maintain a suit for all damages sustained by herself and children on account of such traffic. The language is broad and sweeping in its provisions. It is said by defendants that in *Gran v. Houston,* 45 Neb. 813, this language is used by this court, speaking of the Slocumb law (ch. 50, Comp. St. 1889): "The action accorded by this act for the death caused by intoxication is not an action proper for the death, but for the loss of means of support resulting from the death." In that case, however, the petition counted solely upon loss of support, and the question whether other expenses necessarily incurred were recoverable was not involved. In the case of *Murphy v. Willow Springs Brewing Co.,* 81 Neb. 223, this case with others in this court on the same subject were examined, and it was held that loss of means of support is not the only damage for which a recovery may be had in such an action. We are fully satisfied that, under the statutory provision that a married woman may recover "all damages sustained by herself and children on account of such traffic," the reasonable expenses of medicine and medical attendance are proper elements of damage, and we see no reason why funeral expenses should not follow in the same category if the wife is compelled to pay them by the necessities of the situation. It appears that the widow was obliged to pay these expenses from her own resources. The evidence shows that she requested the undertaker to make the expenses as low as possible. It was as necessary for her to give her husband's body decent burial as it was to provide him with medical attendance, and, there apparently being no estate, she was justified in paying the charge. What-

ever sums she paid for medical attendance or for funeral expenses were necessarily taken from her meager store. We presume that the idea of the trial judge in requiring the remittitur of $75 was to bring the amount of the recovery strictly within what the proof showed.

3. Complaint is made of the refusal to give certain instructions requested by the defendant Munson. Since the other defendants did not join in the request for such instructions, they were not prejudiced by their refusal. If they had desired such instructions given to the jury, they should have requested them.

4. It appeared that beer had been prescribed by the attending physician during the last sickness, and that the plaintiff had received and receipted for the beer and permitted her husband to drink the same. An instruction was requested by the appellants that such sale and delivery would not make them liable for damages resulting to the plaintiff under the pleadings in this case. The refusal of this instruction is complained of. We think the instruction is misleading in its nature, and that, if it had been given and a judgment for the defendants had resulted, it would have been prejudicially erroneous as against the plaintiff. If the evidence on behalf of the plaintiff had been confined to the sale and delivery of beer prescribed by the physician the instruction might have been applicable; but this was not the case. The evidence showed other sales by the defendant, Pommer, during the time alleged in the petition, and the defendants' theory as to this defense was submitted to the jury in an instruction given on the court's own motion. There was no error in the refusal of this instruction. One or two other errors are assigned, but none of any importance.

In the whole record we find no prejudicial error, and the judgment of the district court is

AFFIRMED.

JAMES SEGEAR, APPELLANT, V. GEORGE WESTCOTT, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,564.

1. Appeal: PLEADING: AMENDMENT. If the identity of the cause of action or ground of defense is preserved, a petition or answer may be amended on appeal to the district court.
2. ———: TAKING CASE FROM JURY: WAIVER. At the close of the evidence each party requested a directed verdict in his favor, and neither party requested a submission of the case to the jury. The court thereupon dismissed the jury and decided the case upon the law and the evidence. *Held*, That plaintiff cannot complain upon appeal of this action by the trial court.

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

J. W. Eller, for appellant.

Lambert & Winters, contra.

LETTON, J.

The facts in this case were stated in a former opinion, 77 Neb. 550. The provisions of the lease under which the plaintiff held possession of the land gave the lessor the right to dispose of a portion of the premises. Defendant's contention is that under this provision a street had been opened by the city over the land, which street he used during the time for which the plaintiff alleges he is indebted to him under an agreement to pay a monthly rent for the use of a private way over plaintiff's premises. At the second trial, after both parties had introduced their evidence and rested, the plaintiff moved the court to instruct the jury in his favor for the amount claimed, and the defendant moved the court to instruct the jury for the defendant. These motions were submitted together, whereupon the court upon its own motion discharged the jury and held the case for argument and further disposition, to which discharge and disposition of the case each party objected

and excepted, but neither requested that the case be submitted to the jury under instructions. The case was then argued and submitted to the court, which took the same under advisement, and afterwards during the term found generally for the defendant and rendered a judgment dismissing the case, from which judgment the plaintiff has appealed.

An amended answer was filed in the district court, which, the plaintiff claims, changed the issues from those tried in the county court, and at the first trial in the district court. We think that there is no merit in this contention. While the exact language is not used in both answers, the identity of the defense is preserved. The plaintiff claimed the right of recovery for the use of a private way across his premises to the Missouri river. The defendant admitted the use of the private way for a certain period, alleged payment therefor, and claimed that a public way was created across the premises to the river which he used thereafter, and that he was not indebted to the defendant for such time as he used the public way. The matter in controversy was the same and the defense was substantially identical with that alleged in the county court. This is all that is necessary. *Myers v. Moore,* 78 Neb. 448; *North & Co. v. Angelo,* 75 Neb. 381.

It is next contended that the court erred in dismissing the jury and rendering judgment. We think that the mere fact that the court discharged the jury and thereupon rendered a judgment under the circumstances in this case is of no great moment. It was irregular, but not prejudicial. Where a verdict is directed by the court, the action of the jury is ministerial in its nature. The rendition of the verdict is at most a mere form, for, if the jury should return a verdict contrary to the direction, it would be the duty of the court to immediately set the same aside. The result in this case is no different than it would have been had the court directed the jury to return a verdict for the defendant. The general rule is that, where at the conclusion of a trial both parties request a directed verdict, they

thereby, in effect, waive the jury and consent that the case may be determined by the court. The reason for the rule is clearly stated by Sanborn, J., in *Phenix Ins. Co. v. Kerr,* 129 Fed. 723, as follows: "Where each of the parties to a trial by jury requests the court to charge them to return a verdict in his favor, he waives his right to any finding or trial of the issues by the jury, and consents that the court shall find the facts and declare the law. An acceptance of these waivers and a peremptory instruction by the court in favor of either party constitutes a general finding by the court of every material issue of fact and of law in favor of the successful party. The case is then in the same situation in which it would have been if both parties had filed a written waiver of a jury and it had been tried by the court. Each party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence, and the only questions which the instruction presents to an appellate court are, was the court's finding of facts without substantial evidence to sustain it? And was there error in its declaration or application of the law?" *United States v. Bishop,* 125 Fed. 181; *Bowen v. Chase,* 98 U. S. 254; *Beuttell v. Magone,* 157 U. S. 154; *Laing v. Rigney,* 160 U. S. 531; *Chrystie v. Foster,* 61 Fed. 551; *Stanford v. McGill,* 6 N. Dak. 536; *Provost v. McEncroe,* 102 N. Y. 650; *Sturmdorf v. Saunders,* 102 N. Y. Supp. 1042; *Aber v. Twitchell,* 116 N. W. (N. Dak.) 95; *Larson v. Calder,* 16 N. Dak. 248. We cannot add to the lucidity of this exposition. There was no error in the proceedings of the court in this regard.

The only remaining question is whether there is sufficient evidence to sustain the finding of the court. The evidence is conflicting in its nature, and it is difficult to determine from the description given by the witnesses whether or not the road to the dumping ground used by the defendant after the public way was opened was confined to the dedicated strip. We are satisfied, however, that there is sufficient evidence in the record to uphold

the findings of the district court; his findings in a law case being entitled to the same weight and conclusiveness as the verdict of a jury.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. FRANK DOBNEY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,469.

1. **Carriers: DISCRIMINATION.** A railway company so distributed its freight cars that empty cars were ordinarily retained on the division where they had been unloaded until they could be reloaded with outgoing freight. It also preferred shippers of live stock, grain and all kinds of merchandise over the shippers of hay located at noncompetitive points on its railway, and, during a hay blockade at its terminals in Chicago and Omaha, withheld cars for the shipment of hay to other points until the congestion at said terminals was relieved. *Held* an unlawful discrimination against the shippers of hay.

2. ———: **SHORTAGE OF FACILITIES: RIGHTS OF SHIPPERS.** L. applied to the district court for, and secured, a peremptory writ of mandamus, which directed the railway company to furnish 50 cars, at the rate of at least 5 cars a day for his use. There was a general shortage of cars and locomotives available for the use of the patrons of the carrier, but the railway company had exercised diligence to provide adequate equipment for the transaction of its business. *Held*, That L. was only entitled to a just division of the empty cars that should have been apportioned by defendant to the station where L. was engaged in business.

3. **Costs.** Although the order of the district court should be reversed, yet, as defendant was in fault to some degree, and it had exclusive possession of the facts which would instruct plaintiff concerning the form of his demand and the limit of his rights, the court in the exercise of its discretion will tax the costs of the proceeding to the carrier.

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

B. T. White, C. C. Wright and *B. H. Dunham,* for appellant.

M. F. Harrington, contra.

ROOT, J.

Appeal from a judgment of the district court for Holt county peremptorily ordering defendant to furnish empty cars for the use of plaintiff in shipping hay.

1. Defendant argues that the district court did not have jurisdiction to entertain the application of plaintiff, nor to issue a writ to compel defendant to furnish cars, for the reason that the state railway commission, by virtue of sections 10649 *et seq.,* Ann. St., 1907, has exclusive original jurisdiction in the premises. The point has been considered and determined adversely to defendant in *State v. Chicago & N. W. R. Co.,* p. 524, *post.*

2. It is most strenuously argued that to permit the district courts to issue writs in cases like the one at bar will substitute the judgment of courts for that of the managers of railways in the control of the business affairs of the carriers and cause inextricable confusion, to the great detriment not only of the railway company, but the public as well. There is much force in the argument, and, but for our understanding that defendant has discriminated against the shippers of hay in a very considerable section of the state, we would not sustain the district court in any particular. The respondent made a very complete, and, we believe, truthful disclosure of its resources and methods of providing shippers with cars.

It appears that respondent operates 9,000 miles of railway situated in many different states, but forming a connected system. Fifteen hundred miles of said railway are west of the Missouri river. Defendant owns 51,000 box cars and 1,425 locomotives. In five years next preceding the institution of this suit defendant steadily and largely increased the number and capacity of its cars and locomotives. Conditions have been such that from twelve to

eighteen months would intervene between the placing of orders for equipment and the delivery thereof, because of the congested condition of business and the inability of the manufacturers to meet the demands of trade. In the year preceding the hearing respondent had increased its tractive power 26 per cent., and its business for that time had developed 23 per cent. The locomotives and cars of respondent are distributed among the various operating divisions into which its railway is divided, and the apportionment is under the supervision of one man located in Chicago. It is the policy of defendant, as far as practical, to so control traffic that cars unloaded at any particular station or the stations comprising any division are retained at such points or on that division, to be reloaded with merchandise or other property, to be shipped out of that territory, and thereby obviate the movement of empty cars. Defendant's railway west of the Missouri river traverses territory that may, for the purposes of traffic, be separated into divisions of distinct character. The stations on the branches south of the Platte, on the Bonesteel line, and from Norfolk east to the Missouri river, export principally grain, flour, dairy products and live stock. Most of this territory is well settled, and the incoming freight during part of each year fills nearly enough cars to move the outward bound cargoes. From a point some distance west of Norfolk to Long Pine the principal exports are hay and live stock. West of Long Pine great quantities of potatoes are grown and shipped. From the stations further west many range cattle are transported. The country surrounding Stuart, where relator resides, and for a considerable distance in all directions, especially westward, along defendant's railway, is devoted principally to the production of hay. This territory is rather sparsely settled, and the incoming loaded cars furnish but a fraction of those necessary to transport the hay shipped therefrom. No other railway has been constructed near enough to Stuart to compete with respondent, and its monopoly in the matter of transporting the products of that

territory to market is fixed and absolute. About the middle of September the shipment of range cattle commences, and from that date till the early days of November respondent enjoys a remarkable business of that character, aggregating sometimes 600 cars a week. This traffic is largely interstate. To accommodate this business not only cars, but locomotives are sent from defendant's various divisions to the cattle country, with a consequent diminution of facilities for the movement of other freight during that time.

Defendant receives more for the transportation of merchandise, live stock and grain than for the carriage of hay. Because of the bulky character of hay, even when compressed into bales for shipment, it cannot be either loaded or unloaded as expeditiously as the cereals; nor is provision made for its storage in quantities, as in the case of coal, but the supply in any market is augmented continuously, and the demand therefor responds with celerity to any marked increase in the use thereof. Hay, when shipped, is unloaded from the railway team tracks and distributed generally with but little delay to the consumer. Whenever the demand for this article slackens in the cities the team tracks of the various terminals will become congested, and loaded cars devoted to the shipment of hay will remain idle for some time. With this knowledge, defendant has gauged its conduct toward shippers in the hay districts in Nebraska with reference to conditions existing in its Omaha and Chicago terminals, so that, whenever its hay tracks in those cities are filled with loaded cars, it assumes that the same facts exist at all other points where hay might be shipped or consumed, and places an embargo on the traffic, which is not raised until the accumulation of hay in Omaha or Chicago has been greatly reduced. Therefore if a patron desires to ship to markets other than said cities, even though there is an active demand for his product, it is extremely difficult to secure cars for his purpose while said embargo is in force. It also appears that respondent when pressed for cars

gives preference to shippers of merchandise, grain and all kinds of live stock over the dealers in hay. It also appears that from the 1st to the 16th days of October, 1907, both inclusive, there were requests at stations on defendant's Lincoln line for 565 empty freight cars; there were at said stations 264 empty cars and 227 in the process of unloading. During the same time at the stations upon the Superior line 366 cars were demanded; there were 480 empties and 316 were being unloaded. At stations on the Bonesteel line upon said days patrons asked for 906 empty cars; there were 329 empty cars on hand and 439 were being unloaded. At the stations from Norfolk Junction to Long Pine there were calls during said time for 1,739 empty cars; 363 were furnished and 329 were being unloaded. The foregoing figures are the aggregate of daily reports, so that the cars that were reported one day as being unloaded would probably be included in some succeeding day's report of empty cars. It will therefore be noticed that but 35 more empty cars were furnished in 16 days to all of the 20 stations in the 133 miles of road from Norfolk Junction to Long Pine, which includes Stuart, than were unloaded on that division during that time, and that there was a shortage of over 1,300 freight cars at said stations in those 16 days. During that period there was an excess of 120 empties on the Superior line. It is further shown that there has been a shortage of cars for the shipment of hay in September and October in 1904, 1905 and 1906, with like results.

The record fairly warrants a deduction that defendant has employed reasonable diligence to supply itself with equipment to transact its business; that because of the lack of competition it has a monopoly of railway transportation from Stuart and several other like stations in the "hay belt" on its line of railway; that it is more profitable for respondent to have the traffic in hay distributed throughout the year, so that cars used for that purpose may be supplied from freight cars loaded with articles that are shipped into the "hay belt"; that preference is

given shippers of live stock, grain and merchandise over those offering hay for transportation; that in case of a hay blockade on the team tracks in Chicago and Omaha empty cars are withheld and are not supplied to Nebraska hay shippers, without regard to the destination of their consignments; that in case of extreme demand for motive power and empty cars during the range cattle shipping season the "hay belt" is discriminated against as compared with other territory tributary to defendant's railway; that this discrimination is induced by the determination of respondent to handle all of the traffic it can control with the greatest economy in the management of its business and resulting profit to itself; that defendant could have distributed the empty cars under its control in Nebraska in October, 1907, so as to have given relator some relief, and without in any manner interfering with interstate traffic. On the other hand, relator first requested the use of three cars a day, and then, as a foundation for this action, increased his demand to five cars a day until 50 cars were thus supplied, and the order of the trial court is that cars be ordered in that manner. Relator was not entitled, under the circumstances, to all of the relief he demanded. He should have received a just division of the cars that ought to have been apportioned to the station of Stuart, and that number should have been greater than was furnished by defendant. The time has long since passed within which defendant was to comply with the order of the district court, and to affirm the judgment now will not impel the performance of any duty. As defendant was somewhat in fault, and the facts were all in its possession, and but few of them known to plaintiff, it should pay the costs of this case in any event. *State v. Chicago, B. & Q. R. Co.*, 71 Neb. 593; code, sec. 675*d*.

The judgment of the district court, therefore, is reversed, but a judgment will be entered taxing all of the costs in this court and in the district court to the defendant.

REVERSED.

STATE, EX REL. WILLIAM LUBEN, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,472.

1. **Carriers: REFUSAL TO FURNISH CARS: REMEDY.** Chapter 90, laws 1907, will not in every instance afford a shipper an adequate remedy against a railway company that unlawfully neglects and refuses to furnish cars for the transportation of his goods and chattels.

2. **Mandamus: CARRIERS: REFUSAL TO FURNISH CARS.** In an action in mandamus to compel a railway company to furnish cars for a shipper, the proof established that the relator desired to ship his hay in car-load lots; that he had repeatedly requested the carrier to furnish him cars for said purpose, and that it had failed to do so. No reasonable excuse was shown for such conduct. *Held*, That a peremptory writ of mandamus in favor of the shipper and against said corporation was proper.

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

B. T. White, C. C. Wright and *B. H. Dunham*, for appellant.

M. F. Harrington, contra.

ROOT, J.

William Luben applied to the district court for Holt county for a peremptory writ of mandamus to compel defendant to furnish him at Emmet, a station in said county on defendant's railway, 5 cars for the shipment of hay, and thereafter 41 additional cars at the rate of 1 car a day, Sundays excepted. An alternative writ was issued. In its return defendant challenged the jurisdiction of the court over the subject matter of the action; alleged that there was an unusual demand for freight cars to market perishable products; that it had assigned a fair proportion of its available cars for the hay trade, and is willing to allow relator his just proportion of the cars allotted to

Emmet, and that to do more will discriminate in plaintiff's favor and against defendant's other patrons; that to supply all cars demanded of it for the transportation of hay would congest and glut its terminal facilities and the market, and hinder and delay the movement of freight. The court, after hearing the evidence, issued a peremptory writ. The evidence discloses that plaintiff possessed sufficient hay to fill the cars referred to in the alternative and peremptory writs. Defendant did not introduce evidence to sustain the allegations in its return. The writ, therefore, was properly allowed, unless, as argued by defendant, the railway commission law enacted by the legislature in 1907 has deprived the district courts of jurisdiction to order a carrier to furnish cars to a shipper.

The statute (section 10649 *et seq.,* Ann. St., 1907) purports to vest said commission with "power to regulate the rates and service of, and to exercise the general control over all railroads, express companies * * * and any other common carrier engaged in the transportation of freight or passengers within the state." Section 10650. Section 10658 provides that a complaint may be made to said commission concerning any default of a carrier, whereupon a notice shall be given the latter, a hearing had, and then the commission may enter such an order as may be just and reasonable, and a copy thereof shall be served on the railway company, to become effectual within ten days thereafter, unless a later date shall be named in the order. If the carrier refuses to comply, the commission, or any person interested, may apply to the district court for the enforcement by summary proceedings of said order, and an appeal may be taken from the district to the supreme court. The statute does not purport to vest the commission with exclusive jurisdiction.

Independent of the commission law or any other special statute, it was defendant's duty to furnish reasonably adequate provisions for the transportation of freight offered it for shipment over its railway, and to serve its patrons without discrimination. *State v. Chicago, B. & Q. R. Co.,*

71 Neb. 593. And the courts will compel by mandamus the discharge of that duty in a proper case. *State v. Chicago, B. & Q. R. Co., supra.* Any other remedy is not adequate, unless it will furnish the aggrieved party relief upon the very subject matter of his application. *State v. Stearns,* 11 Neb. 104; *Hopkins v. State,* 64 Neb. 10; *Fremont v. Crippen,* 10 Cal. 211; *Babcock v. Goodrich,* 47 Cal. 488. In cases like the one at bar proceedings before the commission will not afford that relief. The order, if made by the commission, is simply a step incident to an action in the district court, which may be anticipated and restrained by the carrier for an indefinite time by an action in a court distant from the residence of the complainant. *State v. Chicago, St. P., M. & O. R. Co.,* 19 Neb. 476, has not been overlooked. That case involved an application of the first railway commission statute, and related to a controversy between individuals and a railway company concerning the location of an additional station. There was reasonable ground for difference of opinion as to whether another station was necessary, and the subject was a proper one for the commission to investigate. There is no room for argument that a shipper is entitled to receive cars without discrimination. The delay of a few months or several years in the construction of an additional railway station will not work any great hardship, but the very business existence of the shipper is staked upon the use of facilities for the transportation of his product or merchandise, and he is entitled to a hearing upon this point in a forum that has power to make its orders effective. The question of jurisdiction is therefore resolved against respondent.

The judgment of the district court is therefore

AFFIRMED.

NERIAH B. KENDALL, TRUSTEE, APPELLANT, V. THOMAS ULAND ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,532.

1. **Forcible Entry and Detainer:** SUPERSEDEAS BOND: LIABILITY. In an action upon a supersedeas bond given in justice court to stay a writ of restitution in forcible entry and detainer proceedings, plaintiff is not entitled to recover according to the terms of a lease for the same premises between said parties for the year preceding the unlawful detention, but only a reasonable rent for said period.

2. ———: ACTION ON BOND: EVIDENCE. Proof of the tenant's reasons for refusing to yield possession of said premises is not relevant in such an action, and allegations with reference thereto will upon defendant's motion be stricken from the petition.

3. ———: ———: ———: PLEADING. In such an action a lease between the parties for the year next preceding the unlawful detention is relevant evidence on behalf of the plaintiff, although it provides for rent in kind, and he may also prove the value of the crops received by him thereunder, but allegations in the petition concerning such facts may be stricken therefrom as an attempt to plead evidence.

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

Charles O. Whedon and *J. A. Brown*, for appellant.

Halleck F. Rose, W. B. Comstock and *A. L. Chase, contra.*

ROOT, J.

Action upon a supersedeas bond given in justice court on appeal from an order of restitution, and also upon a bond for waste given in the district court on appeal to this court from a judgment affirming the aforesaid judgment in justice court. The tenant paid plaintiff $550, which he averred was in excess of the rental value of said premises for one year. Judgment for defendants, and plaintiff appeals.

1. In the original petition plaintiff alleged that the tenant defendant had unlawfully, forcibly, and with intent to defraud refused to surrender possession of the demised premises at the expiration of a written lease which terminated in February, 1905; that said lease was for one-half of the crops grown upon the farm; that the value of the landlord's share of the 1904 crop amounted to over $1,200, and the fair value of one-half of the crops grown on said land in 1905 was $1,325; that there were many opportunities to rent said farm for 1905, and but for the acts of defendants plaintiff would have rented it for said season for one-half the crops grown thereon. A copy of the bond is set out in the petition, and a claim made thereon for the alleged rental value of the premises, to-wit, $1,325, less the credit aforesaid. The cause of action upon the waste bond does not seem to be seriously contended for, and will not be given further notice. The court on defendants' motion struck from the petition the allegations relating to renting upon shares and concerning the alleged fraudulent conduct of the principal in the bond, and compelled plaintiff to file an amended petition omitting those statements. The condition in the bond is in the language of the statute that the principal therein "will satisfy the final judgment and costs and will pay a reasonable rent for the premises during the time he shall unlawfully withhold the same." The tenant's motives in unlawfully refusing to yield possession of the demised premises will neither excuse his conduct nor increase the landlord's recovery on a bond like the one in suit. The averment that the landlord had an opportunity to rent the land for a share of the crop in 1905 is immaterial, and the allegations concerning the value of the crops received as rent in 1904 are, at the most, statements of evidence, and were improperly included in the petition.

2. Upon the trial the court excluded the lease between the parties for 1904, and refused to permit plaintiff to show the amount of crops grown on the farm in said year, or the prices obtained therefor, or that plaintiff had ordi-

narily leased the land for share rent, and confined the proof on the subject of damages to a description of the farm, the improvements thereon and qualities of the soil, supplemented by opinions of witnesses concerning the fair cash rental value of the land during the period defendants unlawfully detained possession thereof, and instructed the jury that by "reasonable rental value is meant the reasonable rental value in cash of the land occupied, estimated as of the time when the bond sued upon was given, to wit, February 15, 1905." Plaintiff asserts that defendants should be held to the same liability as a tenant holding over, and that the terms of the 1904 lease will control the instant case; otherwise the tenant will be given the benefit of his own wrong. Plaintiff at all times subsequent to February, 1905, has refused to recognize his former tenant in any other capacity than a wrongdoer, and he cannot recover from him as a tenant holding over. *Rosenberg v. Sprecher,* 74 Neb. 176. The defendants, however, are liable upon their undertaking, and that is to "pay a reasonable rent for the premises during the time he shall unlawfully withhold the same." Now, rent is a certain profit issuing yearly out of lands and tenements corporeal as a compensation for the use thereof. *State v. McBride,* 5 Neb. 102. It may be paid in money, services, or in products of the soil. 1 Woodfall, Landlord and Tenant, p. *438; *Whithed v. St. Anthony & Dakota Elevator Co.,* 9 N. Dak. 224, 81 Am. St. Rep. 562. And in the case at bar plaintiff, as near as possible, should be indemnified for the tenant's wrongful conduct, but the inquiry must be confined to the value of the term enjoyed by him at plaintiff's expense. Testimony of experts as to the fair rental value of the land is helpful, but it is not the only relevant evidence. It is generally held that, if conditions continue unchanged, a lease for a fixed rental between the parties for an antecedent year for the same land is competent evidence. *Vincent v. Defield,* 105 Mich. 315; *Fogg v. Hill,* 21 Me. 529. And any other evidence concerning the pecuniary advan-

tage to be derived from the use of the land during the disputed term would have some bearing as to what one would be likely to pay therefor. *Baldwin v. Skeels,* 51 Vt. 121. Although the lease did not provide for a cash payment or the delivery of any certain number of bushels of grain, it was relevant as tending to shed some light on the controversy, and should have been received in evidence. The testimony offered to prove the value of the rent share of the crop received by plaintiff for 1904 was also competent. *Shutt v. Lockner,* 77 Neb. 397. We do not wish to be understood as holding that the terms of said lease or the value of the crop received for 1904 would control the verdict, but those facts should have gone to the jury to be considered in connection with the other evidence to establish "a reasonable rent for the premises during the time he" (the tenant) unlawfully withheld the same.

3. There are some other errors assigned, but we conclude that upon a second trial of this case the parties will not have just cause for complaint, and they will not be further noticed.

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

REVERSED.

FIRST STATE BANK OF PLEASANT DALE, APPELLEE, V. JOHN BORCHERS, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,545.

1. **Notes: DEFENSES.** The fact that the circumstances surrounding the purchase of a negotiable promissory note before its maturity were sufficient to excite the suspicion of a prudent man concerning the instrument will not defeat a recovery. The proof must establish that the purchase was made with knowledge of the facts concerning the execution of the note, that plaintiff believed that there was a defense to the instrument, or that he acted in bad faith or dishonestly.

2. ———: ———: INSTRUCTIONS. Defendant having testified that he was induced to sign a negotiable instrument upon the representation of the payee, which he relied on, that it was a copy of an agreement for the use of a farm gate, and that he could not read the English language, it was not error to instruct the jury, the evidence being considered, that it was defendant's duty to read the instrument or have it read to him, and, if he could not himself read the writing, to "otherwise learn the contents," so that he might not be imposed on and cause an innocent purchaser to suffer, and that it was for the jury to say from all of the facts and circumstances of the case whether defendant had been negligent in the care exercised by him to learn the contents of the note.

3. Payment. If a purchaser of a negotiable instrument gives the holder an ordinary bank draft therefor, payment is complete as soon as said draft has passed beyond the buyer's control.

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

Willard E. Stewart and *George A. Adams,* for appellant.

Hall, Woods & Pound and *R. H. Smith, contra.*

ROOT, J.

Action on a negotiable instrument by an endorsee thereof. Plaintiff prevailed, and defendant appealed.

The defense is that defendant's signature to the note in question was procured by fraud and deceit, and upon the payee's representation that it was a copy of an agreement relative to an option to purchase a farm gate; that defendant cannot read the English language, and relied on the payee's statements; also a denial that plaintiff was a *bona fide* purchaser. The testimony tends very strongly to prove that the payee did cause defendant to believe that he was merely signing a writing concerning a gate. The payee, on the day that the note was executed, sold it for nearly par to one Laune, and indorsed the note: "Without recourse. R. H. Browning." Laune sold the note to plaintiff about the 13th of July, 1905, and received $100 therefor.

1. The first complaint is that the court refused to give instruction numbered "V" requested by defendant, but gave its instruction numbered "V." They are as follows:

"Where to an action on a promissory note by an indorsee thereof the defense interposed is fraud, or illegality in the inception of the note, or in procuring its execution, the burden of proof is upon the plaintiff to prove that he is a *bona fide* holder; that is, that he purchased and paid for the note without knowing that the maker claimed any defense thereto, and that he made such purchase before the note became due for a valuable consideration, and that such purchase was made in the usual course of business, without any notice of facts or circumstances which would prompt an ordinary prudent make (man) to investigate, or make inquiry, which if followed up, or made, would have led to knowledge of such defense."

"The mere fact that circumstances at the time of the purchase of the note may be such as to excite suspicion in the mind of a prudent man is not sufficient to impugn the title of an innocent purchaser. The proof must go to the extent of showing that the purchaser purchased with knowledge of such facts and circumstances as shows want of honesty or bad faith on his part in the purchase of the note."

We have condemned an instruction that requires a purchaser of negotiable paper before maturity to follow up by inquiry any suspicious fact or circumstance relative to the note that may come to his attention at or before the date of his purchase. *First Nat. Bank v. Pennington,* 57 Neb. 404. To constitute bad faith, the buyer must have had knowledge of infirmities in the note, or have had a belief based on circumstances known to him that there was a defense thereto, or the evidence must tend to prove that the purchase was made under such circumstances as indicate bad faith or a want of honesty on the part of the indorsee. *Dobbins v. Oberman,* 17 Neb. 163; *Myers v. Bealer,* 30 Neb. 280; *First Nat. Bank v. Pennington, supra; Phelan v. Moss,* 67 Pa. St. 59, 5 Am. Rep. 402; *Second*

Nat. Bank v. Morgan, 165 Pa. St. 199, 44 Am. St. Rep. 652. Instruction "V" requested by defendant is not a correct statement of the law, nor is instruction "V" given by the court erroneous.

2. It is urged that instruction numbered "VII," given by the court, is erroneous. The portion criticised is as follows:

"Touching this, you are instructed that it is the duty of one signing his name to an instrument to read it, if he can read it, or to bring such ability to read as he possesses into use, so far as it may enable him to identify the character of the instrument, or, if he cannot read at all, to otherwise learn the contents of the instrument he is signing, so that he may not be imposed upon by fraud or sign a note that may cause innocent purchasers thereof to suffer. He is chargeable with any neglect in failing to perform this duty. Whether or not the defendant was guilty of any neglect in signing the note the way he did is a question of fact for you to determine from all the facts and circumstances of the case, taking into consideration the evidence as it may bear upon the question to what extent the defendant was illiterate, and whether or not he was without negligence in the care exercised by him to know the contents of the instrument before he signed it."

Counsel complains that the court did not in said instruction inform the jury that, if plaintiff was not an innocent purchaser, he could not take advantage of the negligence of defendant in not ascertaining the nature of the writing signed by him. The court, however, did not tell the jury that plaintiff could recover if defendant was negligent without regard to the *bona fides* of the bank. In instruction numbered "II" the jurors were told that plaintiff could not recover unless it purchased the "note in good faith before maturity, and for a valuable consideration, in the usual course of business." It is also argued that defendant was placed under the necessity of proving a greater degree of diligence than the law imposes, but we cannot agree with counsel. *Dinsmore & Co. v. Stimbert,*

12 Neb. 433; *Ruddell v. Fhalor,* 72 Ind. 533, 37 Am. Rep. 177; *Fisher v. Von Behren,* 70 Ind. 19, 36 Am. Rep. 162; *Bedell v. Herring,* 77 Cal. 572, 11 Am. St. Rep. 307; *Williams v. Stoll,* 79 Ind. 80, 41 Am. Rep. 604; *Lindley v. Hofman,* 22 Ind. App. 237; *Mackey v. Peterson,* 29 Minn. 298.

3. Upon defendant's request the court had instructed the jury that, if plaintiff before he paid for the note in suit learned that defendant claimed that it had been obtained by fraud, it ought not to have paid therefor; that it must use ordinary care to stop payment of the draft, and that it would not be a purchaser in good faith. The jury evidently requested further instructions, and the court then added to said instruction the words "if he failed to exercise such ordinary care," and then further instructed: "Touching this twelfth instruction, you are further instructed that by it is meant only that, if the plaintiff should get notice that the defendant claimed that the note was obtained by fraud and that he had a defense to that note before he had completed the purchase of the same, then it would become his duty not to complete the purchase. If, however, on the other hand, the evidence should show that at the time he learned of the defendant's defense to the note he had already purchased the same, so that as between the plaintiff bank and the owner of the note, Laune, the bank was then holden for the payment of the consideration, then in such case the bank would still be an innocent or *bona fide* purchaser. If at the time of receiving the notice the sale was so far completed by giving Mr. Laune credit on his passbook for that amount by the Columbia National Bank, so that as between Laune and the Columbia National Bank the purchase was completed, then in such case the plaintiff, being liable for the amount, although the draft was not yet cashed, and he must stop its payment, would be an innocent holder." In connection with his criticism of this amendment, counsel argues that the evidence disclosed that plaintiff had knowledge before paying for the note

that defendant claimed a defense thereto. The first purchaser from the payee offered the paper for discount to a bank in Lincoln where he kept an account, but the cashier stated that the instrument had originated in territory tributary to plaintiff, and it must be given the first opportunity to buy. About July 4 plaintiff's cashier, Ackerman, talked with the cashier of the Lincoln bank about the note, and again on the 10th of that month. Ackerman noticed that the note was indorsed "without recourse," and asked the reason, and whether there was anything wrong with it. The Lincoln man said that it had been deposited by one of their best customers, and that he had every reason to believe that it was all right. Ackerman then said to send it to him, and, if the signature was genuine, he would purchase the paper. The note was sent to plaintiff, and Ackerman compared the signature thereto with defendant's genuine signature. July 13, Laune inquired of the Lincoln bank what had been done with the note. Ackerman was communicated with over the telephone, and replied that plaintiff would take it and sent a draft to said bank for $100. The Lincoln bank was plaintiff's correspondent, and credit was given Laune and plaintiff's account charged July 14. Ackerman testified that his first knowledge that defendant claimed a defense to the note was acquired August 7, whereas defendant asserts that he told him in the forenoon of the 13th of July that the instrument was procured by fraud. There is considerable evidence in the record corroborating both Ackerman and defendant, sufficient to support a finding for one party or the other, but it was for the jury to settle the issues of fact upon the conflicting testimony. The qualification to the instruction was not erroneous in the light of the testimony. If, as indicated by plaintiff's evidence, Laune was credited on the books of the Lincoln bank with plaintiff's draft before it had notice of any infirmity in the note, the consideration for said purchase was as completely beyond

plaintiff's control as if it had paid currency to Laune therefor.

The official reporter read for plaintiff the testimony of an absent witness who had testified on the former trial of the case. It was shown that the witness was in Seward county, and that an unsuccessful attempt had been made to procure his presence. Defendant also caused the reporter to read the testimony of an absent witness, and we are satisfied that the judgment should not be reversed because the witness was not produced in court.

Defendant was evidently imposed upon by the payee of the note, but he has had a fair trial before a jury on all of the disputed facts. The instructions were complete and fair, and now that the jury has found that plaintiff purchased the note in question before its maturity in the usual course of business *bona fide* for a valuable consideration, and without notice of any infirmity therein, the judgment should be and is

AFFIRMED.

NEBRASKA CENTRAL BUILDING & LOAN ASSOCIATION, APPELLEE, V. GERTRUDE C. MCCANDLESS ET AL., APPELLEES; GRACE E. WAISNER, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,553.

Mortgages: VALIDITY. M., an attorney at law, was indebted in a considerable sum for money of a client which he had converted to his own use. A representative of that client went to the home of M. in his absence and stated to his wife, who was there alone, that her husband had used large sums of money that belonged to said client, who was also a niece of M., and that, unless she executed a mortgage on her homestead, said representative would forthwith commence "proceedings." M.'s wife was in ill health, nervous, excitable, and unaccustomed to transact any kind of business, and believed and understood from the statements made to her that the proceedings referred to were criminal prosecutions, and she, acting under the pressure of a desire to save her husband, agreed to sign the mortgage. She went that night to

the train to meet her husband, and insisted that he should at once go to his office and with her execute said mortgage. She prevailed, and the instrument was executed. *Held*, That in the light of the facts, notwithstanding she had the benefit of the presence and protection of her husband at and just before the time she signed the mortgage, she was not a free agent in that particular, and as the rights of third persons had not intervened, and she had not received any consideration for signing the mortgage, that a court of equity would not enforce its provisions.

APPEAL from the district court for Gage county: JOHN B. RAPER, JUDGE. *Affirmed.*

N. K. Griggs, Samuel Rinaker and *Metz, Sackett & Metz,* for appellant.

E. N. Kauffman, A. D. McCandless and *O. E. Kretsinger, contra.*

ROOT, J.

Cross-action to foreclose a mortgage. Defense that the property described in the conveyance was the separate property and homestead of the mortgagor, a married woman, and that said instrument was secured by "force, fraud, terrorism and coercion exerted upon her in the absence of her husband," by an attorney who represented the mortgagee. There was judgment for the defendant, and the mortgagee, Grace E. Waisner, appeals.

There are some undisputed and many controverted facts in the case. The evidence is clear that the lots described in the mortgage constitute the homestead and separate property of Mrs. McCandless; that she is a married woman, and with her husband has occupied said property as a homestead for some 15 years last past; that the lots are not worth to exceed $2,500 and are incumbered by a *bona fide* prior mortgage for $800. Mr. McCandless is an attorney at law, and preceding the execution of the contested mortgage, as such lawyer, had received a large sum of money for his client, Mrs. Waisner, and was owing her on said account an indefinite sum of

money approximating $7,000. The mortgagee had made her home with Mr. McCandless when she was a girl, and was in some degree related to him. Mrs. Waisner, who now resides in Wyoming, sent an attorney from that state to Nebraska to settle with McCandless and collect the debt or procure security for its payment. In December, 1905, said lawyer interviewed McCandless, and they seem to have agreed upon a balance of $7,000 as due Mrs. Waisner. It may be that this sum was subject to a deduction for an attorney's fee, but the record is not clear on this point. The Wyoming attorney was willing to accept in full settlement from McCandless seven of his notes for $500 each, one of which would mature every year for seven years, but insisted that payment thereof should be secured. To this point there is practical agreement in the evidence, but from thence forward the witnesses are in sharp conflict. The Wyoming attorney testified that McCandless said that he owned no property other than his home, and would incumber it to secure said notes if his wife would sign the mortgage, and that he would try and induce her to do so when she returned home; she being away on a visit at the time. The attorney then went to Illinois, and within ten days sent a telegram of inquiry to McCandless, and, upon receipt of an answer that security would not be given, returned at once to Wymore, where McCandless resides, and, not finding that gentleman at home, went to his residence and talked with Mrs. McCandless. The lady was then 55 years of age, in ill health, highly nervous, and totally inexperienced in business affairs. Mr. McCandless had not informed his wife about his transaction with the Wyoming lawyer, and the latter informed her that her husband had used money that belonged to a client; that he was surprised that McCandless had not informed his wife about the arrangement for a mortgage; that he must be insane, or, as the attorney says, "foolish," not to have the mortgage executed, and that, if it was not given, he would at once commence "proceedings." The woman testified that she

understood the word "proceedings" to refer to a criminal prosecution against her husband, whereas the attorney insists that he did not intend to convey that idea, but referred, and intended to refer, to a civil action only, and that neither the woman nor the court would be justified in giving any other construction to the language employed.

In the instant case we are not dealing with legal or lay definitions of a word, but whether this woman understood, and had reasonable ground to believe, it was used with reference to a criminal prosecution. The language used by the attorney indicates a discriminating mind, but one can read between the lines a veiled threat, a purpose to convey a sinister meaning, that he did not intend to content himself with recourse to a civil action to compel her husband to make restitution for the money he had wrongfully and, possibly, criminally converted to his own use. Her future conduct is incompatible with any understanding other than testified to by her. Mr. McCandless returned about 8 o'clock that evening. It was a cold, wet, disagreeable night in January. She had never before in their married life gone to the depot to meet him, and yet this night she appeared there improperly clothed for the street, in a highly excitable and nervous condition, and insisted that the mortgage should be given forthwith. Her husband went with her to his office, where they found the vigilant collector waiting for them. The husband and wife testified that Mr. McCandless did all in his power to dissuade her from signing the mortgage, but that she insisted that it be done, and finally the instrument was executed. The attorney representing Mrs. Waisner testified that during the time he called upon Mrs. McCandless in the afternoon she was cool and collected, perfectly willing to give the mortgage, and remained in the same condition during the conference at the office, and that both husband and wife were satisfied with and desired to execute said instrument. It is undisputed and significant that all parties remained in the office over two hours, a

fact inconsistent with the mere writing of a mortgage and seven notes; all conditions whereof having been agreed upon beforehand. If Mrs. McCandless desired to give the mortgage solely as a matter of justice and for the pecuniary advantage of her husband, she would scarcely have made a trip in the storm and darkness to the depot that night, without regard to her clothing or appearance, or have insisted strenuously, over her husband's objections, that the mortgage be given. Her statement in the office that, "I would not have you arrested or charged with a crime for forty such homes as that," her mental distress at the time and complete prostration the succeeding day, all tend strongly to prove that she was acting under great pressure and the fear that her husband was in imminent danger, and that the mortgage must be given for his protection.

Although the circumstances of this case are unusual, and the woman had the benefit of the presence and protection of her husband at the closing scene of the drama, staged by the representative of Mrs. Waisner, we are not satisfied that the mortgage represents the free consent of the mortgagor. "The consent by which agreements are formed ought to be free. If the consent of any of the contracting parties is extorted by violence, the contract is vicious, * * * and the person whose consent is extorted, or his heirs, may procure it to be annulled by letters of rescission." 1 Pothier (Evans), Obligations, p. 115. And cases may occur where one party to a contract in terror, under threats short of duress, does not act with a free will, and, if it is made to appear to a court of equity that he was not a free agent, that court will protect him. 1 Story, Equity Jurisprudence (13th ed.), sec. 239; Bispham, Principles of Equity (6th ed.), sec. 230. In the instant case the rights of third persons do not intervene, the wife received no consideration whatever for her act, nor has Mrs. Waisner lost anything by the receipt of this mortgage. She may have scaled down her claim against McCandless, but, if it was in consideration of the giving

of the mortgage, she would not be bound by that reduction. As said by Lord Chelmsford in *Williams v. Bayley,* 35 L. J. Ch. (Eng.) 717, in a case quite in point: "A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract which should be based upon the free and voluntary agency of the individual who enters into it." In that case a son had forged his father's name to bills which he thereafter discounted. At a meeting attended by the officers of the bank and the father the statement was made by one of the former to the latter: "We do not wish to exercise pressure on you if it can be satisfactorily arranged." No demand was made for security, but the father through his solicitor negotiated with said creditors and ultimately adopted the signatures to the forged bills and gave said bankers title deeds to a colliery owned by him. He also had a considerable deposit in his own name with said bankers. The son soon thereafter absconded and was declared a bankrupt. The bankers refused to honor the father's check against his own deposit, and litigation ensued which involved all features of said transaction. The vice chancellor held that the father was improperly influenced and driven to sign the agreement by his fears, which were worked upon by the appellants *"making him see that they had acquired the power of prosecuting his son."* The decision of the vice chancellor was sustained in the house of lords, wherein it was held that neither a distinct threat to prosecute, nor a promise of immunity to the son, was necessary to deprive the father of the exercise of that free will essential to uphold his contracts of suretyship. *Williams v. Bayley,* 35 L. J. Ch. (Eng.) 717, L. R. 1 H. L. 200, 12 Jur. (n. s.), 875, 14 L. T. 802. In *Lomerson v. Johnston,* 47 N. J. Eq. 312, a creditor of the husband had gone to the latter's wife, and by stating that her husband had been guilty of embezzlement and could be put in jail therefor, but without directly stating that a criminal prosecution would be instituted, secured a mortgage from her upon her separate

property. *Held,* That the instrument was void at her election, because the pressure exerted had destroyed the mortgagor's free agency so that she did not act according to her free will. See, also, *Eadie v. Slimmon,* 26 N. Y. 9, 82 Am. Dec 395; *Bell v. Campbell,* 123 Mo. 1; *Bryant v. Peck & Whipple Co.,* 154 Mass. 460; *Hargreaves v. Korcek,* 44 Neb. 660; *Pride v. Baker,* 64 S. W. (Tenn.) 329.

In the instant case the representative of Mrs. Waisner did not in positive and direct language state that he would cause her husband to be prosecuted if the mortgage was not given, but he first disclosed to her that he possessed the power to institute or cause to have instituted a criminal prosecution against her husband, and then told her that, if the mortgage was not signed, he would commence proceedings against her husband, and thereby excited in her mind extreme apprehension for his safety, and we believe secured the execution of the instrument in suit. We think the district judge who saw and heard all of the witnesses whose evidence appears in the record was justified in concluding, as he did, that the mortgage was secured from Mrs. McCandless by working on her fears, that it was not the result of her free will and voluntary action, and that the mortgagee was not entitled to the assistance of a court of equity to enforce its provisions.

The judgment of the district court therefore is

AFFIRMED.

ALBERT HELWIG, APPELLEE, V. GEORGE N. AULABAUGH, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,502.

1. **Master and Servant: CONTRACT: EVIDENCE.** A contract of employment may be proved by letters exchanged between the parties in due course of mail.

2. **Evidence: LETTERS.** Where the genuineness of a letter has not been questioned, it may be introduced in evidence on competent testi-

mony that it was received in due course of mail in reply to a letter mailed to the writer.

3. **Trial:** INSTRUCTIONS: WAIVER. The right of a litigant to have a particular issue of fact submitted to the jury by an instruction may be waived by conduct showing that he neither requested such an instruction nor raised the question in his motion for a new trial.

4. **Master and Servant:** DISCHARGE: DAMAGES. It is the duty of an employee who has been wrongfully discharged in violation of his contract to make reasonable efforts to avoid loss by securing other employment.

5. ———: ———: ———: INSTRUCTIONS. In a suit by an employee to recover damages for his wrongful discharge in violation of a written contract, an undenied allegation of the petition, stating the amount plaintiff subsequently earned elsewhere, when established by uncontradicted evidence, presents no issue of fact for the determination of the jury.

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

T. W. Blackburn, for appellant.

Isidor Ziegler, contra.

ROSE, J.

This is an action by an employee against his employer for damages for breach of the contract of employment. The material facts alleged in the petition may be summarized as follows: By exchange of letters in due course of mail plaintiff was hired for a year as a cutter and workman in defendant's furriery in Omaha, upon the following terms: From August 1, 1905, to September 4, 1905, plaintiff was to receive $16.25 a week; from September 4, 1905, to January 20, 1906, $25 a week; and from January 20, 1906, to August 1, 1906, $16.25 a week. Plaintiff entered upon the duties of his contract and continued in defendant's employ for a period of seven months, or until March 5, 1906, when he was wrongfully discharged in violation of his contract and deprived of

his wages of $16.25 a week from March 5, 1906, to July 31, 1906, amounting to $346.66. An unpaid balance of $10 increased his claim to $356.66. Between March 5, 1906, and August 1, 1906, plaintiff, though ready and willing to perform his part of the contract in full, obtained employment elsewhere and received as compensation $55.50, and was unable to obtain other employment or earn a greater sum. The prayer was for judgment for $301.16, or the difference between what he should have received under his contract and the amount earned after he was discharged.

In the answer defendant admitted plaintiff was in his employ for seven months, but alleged he left it voluntarily March 3, 1906, confessing his inability to perform his duties, was paid in full for his services, and never afterwards returned or offered to return to defendant's employ. In addition the answer alleges: "Defendant denies each and every allegation in said petition contained, save and except as same may be admitted or pleaded to in this amended and substituted answer. * * * Defendant admits that after plaintiff left defendant's employ he was engaged in other employment, but defendant does not know with whom he was employed, when, where or how long he was employed, or what compensation he received." The allegations of defense are denied by a reply. The trial resulted in a verdict and judgment for plaintiff for $308.14. Defendant appeals.

The question of the making of the contract was not submitted to the jury by an instruction, and this is assigned as error on the ground that it took from the triers of fact an issue raised by the pleadings. In this connection it is argued that the letters were erroneously admitted in evidence and that the existence of the contract was not established. It was shown by competent testimony that the letters from defendant were received in due course of mail in answer to letters written to him by plaintiff, and that in pursuance of defendant's correspondence plaintiff came from Minneapolis to Omaha on

transportation inclosed in one of the letters, and worked for defendant seven months, receiving weekly the stipulated wages. The letters were properly admitted in evidence. *People's Nat. Bank v. Geisthardt,* 55 Neb. 232. Defendant offered no evidence to question the genuineness of the letters or to dispute the testimony relating to them, and they showed the contract to be as pleaded in the petition. There was, therefore, no disputed question of fact as to the making of the contract to submit to the jury, and the action of the court in this respect was without error.

Another point earnestly presented by defendant is the failure of the court to instruct the jury that it was incumbent on plaintiff to prove he was ready and willing to carry out his contract, notwithstanding he was wrongfully discharged. It is insisted this fact was in issue, with evidence on both sides, and ought to have been submitted to the jury by an instruction. Defendant did not ask for such an instruction, but insists that it should have been given without a request. The record shows he did not except to the failure of the court to give such an instruction or raise the question in his motion for a new trial. This was a waiver of the error, if any. *Barney v. Pinkham,* 37 Neb. 664; *Sanford v. Craig,* 52 Neb. 483.

Complaint is also made that the law of avoidable consequences required the court to instruct the jury that a discharged employee must not only be ready and willing to perform his contract, but that he must be willing to accept other work, if he can procure it. Plaintiff by his petition and the trial court by instructions recognized the rule that it is the duty of an employee who has been wrongfully discharged in violation of his contract to make reasonable efforts to avoid loss by securing other employment. Plaintiff alleged in his petition that after he was discharged he obtained employment of various kinds at different places, stating the names of his employers and the amount received from each. He then alleged

the total sum so received was $55.50, and that he "was unable to obtain other employment or earn a greater sum." The trial court was justified in assuming this allegation was not denied by the averments already quoted from the answer, or by any other allegations thereof. In addition, the allegation was established by uncontradicted evidence. There was, therefore, no fact in issue as to plaintiff's diligence in seeking other employment, or as to the amount earned by him elsewhere, and there was no occasion to submit those questions to the jury. The court did instruct, however, that the sum of $55.50 should be credited on any sum due from defendant to plaintiff. The action of the trial court was also in harmony with the doctrine that the burden is on an employer who discharges his employee in violation of his contract of employment to show in mitigation of damages that the latter by the exercise of due diligence in securing other employment might have reduced the loss. *Wirth v. Calhoun,* 64 Neb. 316; *Bissel v. Vermillion Farmers Elevator Co.,* 102 Minn. 229.

Complaint is also made of other rulings and instructions relating to evidence, but a careful examination of each shows that defendant has not presented a record disclosing any reversible error.

It follows that the judgment must be

AFFIRMED.

HANNAH EASTWOOD ET AL., APPELLEES, V. JACOB KLAMM ET AL., APPELLANTS.

FILED FEBRUARY 20, 1909. No. 15,538.

1. **New Trial:** VERDICT: EVIDENCE. In an action by a wife and minor children against three retail liquor dealers for loss of support occasioned by the sale of intoxicating liquors to the husband and father of plaintiffs who is an habitual drunkard, where the jury return their verdict in favor of the plaintiffs as against two of such defendants and in favor of the third, that fact alone is not

sufficient to establish the fact that the jury were governed by partiality or prejudice, and affords no ground for setting aside the verdict of the jury if the evidence is sufficient to sustain the verdict as to the two defendants against whom the jury find.

2. **Intoxicating Liquors: EVIDENCE: REVIEW.** And where in such an action the court admits testimony to the effect that when the husband and father was sober he was kind, but when intoxicated he was unkind and quarrelsome, and that during the time the husband was incapacitated from earning a living the wife was compelled to perform menial labor and to accept aid from the county, *held* not error.

3. ———: ———: ———. And in such a case where the evidence shows that the husband, while in a state of intoxication produced by liquors furnished him by defendants, fell and broke a leg, it is not error to permit the plaintiffs to testify that by reason of such injury the husband "is not able to work like he did before he received such injury."

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

Strode & Strode, for appellants.

John M. Stewart and *George A. Adams, contra.*

FAWCETT, J.

This is an action for damages by Hannah Eastwood for herself and as next friend for her three minor children against Jacob Klamm, John V. Helm and one William Splain, who were retail liquor dealers in the city of Lincoln, and the American Bonding Company as their bondsmen. The action was brought under the provisions of chapter 50, Comp. St. 1907. The petition alleges substantially that prior to 1902 John Eastwood, the husband of Hannah and father of the other plaintiffs, was an able-bodied man and skilled mechanic, and gave his family, who were entirely dependent upon him, a comfortable support; that during the time from 1902 to 1904 he became addicted to the immoderate use of intoxicating liquors, which was contributed to by the defendants; that by reason thereof his ability to earn a living became

greatly impaired; that the moneys which he had previously accumulated to the amount of about $600 had been dissipated and his income squandered; that finally on February 14, 1904, while in a state of intoxication, contributed to by the defendants, the said Eastwood fell and fractured his leg, and received injuries from which he was compelled to remain in bed for nine weeks and was confined in the house for six months, during which time he was totally unable to work or earn a living or contribute anything to the support of the family; that such injuries to his leg have caused him to become a permanent cripple, and thereby has permanently impaired his ability to support his wife and children; that by reason thereof plaintiff Hannah Eastwood has been compelled to go out and perform menial labor to support herself and their said minor children; and that the defendant American Bonding Company is the surety upon the bonds of the other defendants as retail liquor dealers. The first three defendants admit the business in which they are engaged, the giving of the bond, and deny all of the other allegations in plaintiffs' petition. The answer of the bonding company admits the giving of the bonds, and denies all of the other allegations. There was a trial to the court and a jury, which resulted in a verdict in favor of the plaintiffs against all of the defendants, excepting defendant William Splain, and from a judgment on such verdict this appeal is prosecuted.

In their brief defendants present two assignments only: "(1) The court erred in finding against the defendants Jacob Klamm and John V. Helm and the surety on their bonds and in favor of the defendant William Splain. (2) The court erred in admitting evidence that was incompetent, immaterial and irrelevant over the objection of the defendants."

In support of the first assignment, they set out a portion of the testimony given by John Eastwood and his son Richard as to the purchase of liquors at the saloon of defendant Splain on the night when John Eastwood

received the injury above referred to, and then state that it was upon the testimony of the same two witnesses that the jury found against defendants Klamm and Helm. Counsel then argue that, if the jury believed that the testimony of these two witnesses relating to the purchase of intoxicating liquors at Splain's saloon was unworthy of belief, then there is no reason why they should have credited that testimony and based a finding thereon against the defendants Klamm and Helm, and that the fact that the jury so found establishes the fact that the jury were governed by partiality and prejudice, and that for this reason the verdict ought to be set aside and a new trial granted. This is the only argument presented in support of the first assignment. There are at least two reasons why the argument is not sound: First, conceding that the testimony of these two witnesses was the same as to each of the three defendants, still the fact that the jury may have released the defendant Splain would afford no reason for vacating their verdict as to the other two defendants if the evidence was sufficient to sustain the verdict as to them; second, the evidence of Eastwood and his son showed that, when the liquor was sold in Klamm's saloon, Mr. Klamm and his son and bartender were all present, and all three took part in the sale of the liquor to Eastwood. Their testimony further shows that at Helm's saloon Helm was present and participated in the sale of the liquors. As to Splain, their testimony was different. The son testifies that, while he was in Splain's saloon with his father, neither Splain nor his son was present; that the liquors were sold to them by the bartender only; and Mr. Eastwood himself is not certain that Splain was present. He testifies that he thinks he was there. Splain's testimony shows that he was not there. The jury may have been influenced by this testimony in finding in favor of defendant Splain and against the other defendants.

In support of the second assignment, defendants argue that the court erred in permitting Mrs. Alice Server, a

daughter of the plaintiff, to testify that when her father was not drinking he was kind, but that when he was intoxicated he was quarrelsome, and in permitting Mrs. Dorothea Barker, another daughter, to testify that when the father was drinking he was cross and cranky; that the court also erred in permitting the plaintiff Hannah Eastwood to testify that during the time her husband was laid up she had to call on the county for help, and also in permitting her to testify that "he is not able to work now like he did before he got his leg broke." The admission of this testimony was not error. *Brockway v. Patterson,* 72 Mich. 122; *Buck v. Maddock,* 167 Ill. 219; 1 Joyce, Damages, sec. 568; *Fox v. Wunderlich,* 64 Ia. 187; *Jockers v. Borgman,* 29 Kan. 109; *Young v. Beveridge,* 81 Neb. 180.

Defendants make no complaint of the instructions given by the court or the amount of plaintiffs' recovery. The case seems to have been fairly tried and properly submitted to the jury. Perceiving no error in the record, the judgment of the district court is

AFFIRMED.

BUFFALO COUNTY, APPELLEE, V. KEARNEY COUNTY, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,551.

1. **Counties: BRIDGE REPAIRS.** "A county which refuses to enter into a contract with an adjoining county to repair a bridge across a stream dividing the counties is liable to the county making the repairs under contract for 'such proportion of the cost of making said repairs as it ought to pay, not exceeding one-half of the full amount so expended,' when the county making the repairs has followed the procedure pointed out by the statute as to notice," etc. *Dodge County v. Saunders County,* 77 Neb. 787.

2. ———: ———: **ISSUES.** "Where the proper steps have been taken to render an adjoining county liable for the repair of such a bridge, and where an issue is raised as to the necessity of the

repairs or as to the amount paid being more than the actual and reasonable cost thereof, then the amount that the defaulting county ought to pay is a question for the jury, but, if no such issue is tendered, the county in default is liable for one-half of the cost of repairs." *Dodge County v. Saunders County*, 77 Neb. 787.

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

C. P. Anderbery and *Joel Hull*, for appellant.

J. M. Easterling and *H. M. Sinclair, contra.*

FAWCETT, J.

This is an action by plaintiff, Buffalo county, to recover from defendant, Kearney county, one-half of the cost for the rebuilding and repairing of 800 feet of the south end of a bridge over the Platte river immediately south of the city of Kearney, and at a point where said river is the dividing line between the two counties. The work was procured to be done by plaintiff under a contract with the Standard Bridge Company, and the cost has been paid by plaintiff. Prior to the taking of any steps in the making of the contract with the bridge company plaintiff duly served upon the board of supervisors of defendant a written notice, in which their attention was called to the necessity for doing such construction and repair work, and requesting the supervisors of defendant to cooperate with plaintiff in the proposed work. The board of supervisors of defendant on December 22, 1904, by motion entered of record, resolved to take no action relative to cooperating with plaintiff. Thereupon plaintiff served another notice upon defendant, stating that it had been duly determined to enter into a contract for the material, construction and completion of 800 feet of bridge, and that plaintiff had advertised for bids therefor, and proposed, if suitable bids were offered, to enter into a contract for such construction and repair work, and request-

ing defendant to join in said contract. The supervisors of defendant county thereupon, by motion duly entered of record, refused to enter into any such contract with Buffalo county. Buffalo county then proceeded to advertise for bids, and, after the contract with the bridge company had been prepared, forwarded the same to defendant with a request that it join in the execution thereof. Thereupon the supervisors of defendant county, by resolution entered of record, refused to enter into any such contract. Buffalo county then proceeded with the contract, had the work done thereunder, and paid for the same, the total cost of the work aggregating $5,732.42, and filed with the county board of defendant county a claim, duly verified, setting out the items of its expenditures, and requesting defendant county to pay one-half thereof, viz., $2,866.21. The claim was rejected, whereupon plaintiff appealed to the district court for Kearney county, notice of which appeal was duly served upon defendant. When the bridge company entered upon the work of reconstructing the bridge, it was found necessary to reconstruct 858 instead of 800 feet, as stated in the notice served upon defendant. It was also deemed advisable to expend other sums of money for extras and to construct a number of ice breaks; but on the trial of the case plaintiff abandoned its claim to compensation for the extra 58 feet of bridge construction or for any of the other extras referred to, and demanded a judgment simply for one-half of the construction of 800 feet of the bridge, which under defendant's contract with the bridge company amounted to $1,956. For answer the defendant admitted that the plaintiff and defendant is each a body politic and corporate by the name and style, respectively, of the county of Buffalo and the county of Kearney, and denied each and every other allegation in plaintiff's petition, and then set up several other alleged defenses which we do not deem it necessary to set out at length.

The first of these defenses is based upon *State v. Kearney County,* 12 Neb. 6. Another in effect is that the resi-

dents of Buffalo county are far more interested in, and will be more greatly benefited by, the bridge than the residents of Kearney county; that the county seat of plaintiff county will be greatly benefited by increased trade which it will receive from the citizens of defendant county; and that Kearney county is interested to a small degree only in the use of such bridge. Another is to the effect that in landing such bridge on the south edge or bank in defendant county the same was landed on ground owned by private parties (the evidence, however, shows that each end of the bridge connects with a public road); that the bridge was built and accepted by plaintiff for the exclusive benefit of itself and the city of Kearney; that said bridge was built prior to the enactment of sections 6085-6088, Ann. St. 1903, which sections originally became laws and in force June, 1879, being more than five years after the completion of said bridge; and, lastly, that by virtue of an act " 'To locate a state road from Kearney Junction, Buffalo county, to Bloomington, Franklin county, and thence to intersect a state road at the Kansas line, at the southwest corner of the southeast $\frac{1}{4}$ of section 34, town 1, range 16 west,' approved February 19, 1875 (laws 1875, pp. 301-303), the said bridge became the exclusive charge of Buffalo and Franklin counties, Nebraska, and as such was accepted by said counties, and any attempted repeal therefrom is contrary to section 1, art. XVI, entitled 'Schedule,' of the constitution of the state of Nebraska, and also contrary to section 15, art. III of the constitution of Nebraska, and also contrary to section 3, art. I of the constitution of Nebraska, and also contrary to the constitution of the United States, in that it deprives the defendant of its property without due process of law." The reply was a general denial of all allegations in the answer, "except the express admissions therein contained."

Before the trial was entered upon certain taxpayers of Kearney county appeared as interveners, and were permitted to file separate answers, which we do not deem it

necessary to set out or refer to in this opinion further than to say that their intervention was entirely unnecessary. We think the argument of counsel for plaintiff is sound that these interveners "have no rights in this controversy and no standing in court. It is a universal rule of law that no one has any right to intervene in any action unless he has some right to protect, which is not being protected." Kearney county through its legally constituted authorities was vigorously and ably doing everything that could be done to protect any rights which the defendant might have, and we see no reason why these taxpayers should have incumbered the record by intervention.

On the trial of the case plaintiff introduced the documentary evidence showing the various notices to and demands upon defendant to join in the construction and repair work and in the execution of the contract therefor, and the several refusals of the defendant above set out. It also furnished full and complete proof of its compliance with the law in regard to advertising for bids, its acceptance of the lowest bid, and entering into the contract, the doing of the work and the payment therefor. When both sides had rested, the court directed a verdict in favor of the plaintiff for one-half of the cost of reconstructing and repairing the 800 feet of the bridge referred to in the sum of $1,956, and upon a verdict rendered in accordance with such instruction rendered judgment, from which this appeal is prosecuted. In its brief defendant sets out sections 87-89, ch. 78, Comp. St. 1907, and then vigorously assails the amendment of 1899 of section 88 as unconstitutional and void. The decisions of this court in *Cass County v. Sarpy County,* 63 Neb. 813, and on rehearing in 66 Neb. 476, and again on rehearing in 72 Neb. 93, are also vigorously assailed. This court in the three decisions referred to and in *Iske v. State,* 72 Neb. 278, *Saline County v. Gage County,* 66 Neb. 844, and *Dodge County v. Saunders County,* 77 Neb. 787, has so thoroughly considered and decided all of the questions in-

sisted upon in defendant's brief that we must decline to again consider them. We have carefully reexamined all of those cases, and are entirely satisfied with the conclusions therein reached. The district court very properly followed the rule announced in those cases. The fact that the bridge in question was originally built prior to the enactment of the sections of statute pleaded by defendant and under which plaintiff is seeking to enforce contribution is immaterial, as such matters are at all times subject to regulation by the legislature.

The judgment of the district court is

AFFIRMED.

LEVI GUTRU, GUARDIAN, APPELLANT, V. JAMES MCVICKER, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,503.

Insane Persons: CONVEYANCES: SETTING ASIDE: EVIDENCE. In an action by a guardian of an alleged incompetent person to set aside his ward's conveyances of real estate, made before the appointment of such guardian, on the ground of mental incompetency, and for fraud and imposition by the grantee practised upon the grantor, the testimony examined, discussed in the opinion, and *held* sufficient to sustain the decree for defendant upholding the validity of the conveyances.

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

John J. Sullivan and *H. Halderson,* for appellant.

E. F. Gray, contra.

DEAN, J.

This is an action tried in the district court for Dodge county, wherein the appellant, who was plaintiff therein, and is hereinafter called plaintiff, in substance alleges his appointment on February 14, 1907, as guardian of one

Ole Ramstad, then about 80 years of age, and who "now is, and for more than 25 years last past has been, a man of feeble intellect and mentally incompetent to transact business, or to have the charge, management or control of his property," and who it is alleged "was always mentally feeble, part of the time wholly demented"; that for over 25 years last past said Ramstad has been the equitable owner and in full possession and occupancy of 160 acres of farm land in Dodge county; that on January 20, 1887, 80 acres thereof was deeded land, the other 80 acres being held by him under a contract of purchase from the Union Pacific Railroad Company; that on said date the defendant, who had long been a neighbor and professed friend and confidential adviser of said Ramstad, induced him, without consideration to execute and deliver to him a warranty deed to the deeded tract and an assignment of the railroad contract; that there were then incumbrances on said land amounting to less than 5 per cent. of its then value, which were thereafter paid by defendant, who took a deed of the railroad land to himself; that said Ramstad has by himself or tenant for over 25 years last past continuously occupied said land; that on May 7, 1896, defendant induced Ramstad to accept from him a life lease to the land at an expressed annual rental of $1; that no rent was ever demanded or paid; that said instruments are fraudulent and create a cloud upon Ramstad's title. Plaintiff prays for cancelation thereof, and for a conveyance of the land from defendant to Ramstad, and that the title be quieted in Ramstad.

Appellee, who was defendant in the district court, and is hereinafter called defendant, answered, denying generally and specifically all material allegations of the petition, but admitted the execution and delivery of the deed and assignment and lease, and alleged payment by himself of said incumbrances and about $100 to Ramstad, all in pursuance of an agreement of purchase of said land from Ramstad made on January 20, 1887, subject to an agreement for a life estate therein, reserved by Ramstad,

which was reduced to writing May 7, 1896; that Ramstad agreed to and did pay all taxes subsequent to January 20, 1887; that plaintiff and Ramstad conspired to defraud defendant; that plaintiff's causes of action are barred by the statute of limitations. Plaintiff's reply denies every statement of new matter in the answer, except such as admit allegations in the petition. Upon issues joined and trial had defendant had judgment, and plaintiff appeals.

Upon the question of the mental competency of Ole Ramstad considerable testimony was introduced on both sides, and on the part of plaintiff some of it related to a time somewhat remote from the date of the execution of the instruments which form the basis of this action. One of his witnesses on this point testified he had not seen Ramstad to exceed four times within 30 years, the last time before the trial being in 1894, while another first made his acquaintance in 1899 or 1900. The testimony of another relates to incidents occurring "in 1887 or 1888" when the witness was 13 years of age. The proof shows Ramstad was born in Norway, and came to the United States "the year Fremont run for president," as he expresses it; that he never married and is about 80 years of age, and for many years before the trial lived alone in a farm house in Dodge county, doing his own housework, his sole companions being two or three favorite dogs. It is in evidence that he destroyed some of these animals before his departure from home to be gone a short time, so that, as he said, "they would not worry after him while he was gone"; that he then buried them, marking the burial place with sticks; that he dug a hole beside his house "about a foot around" that he might there "listen to the house rot down"; that he "told about having dreams and visions"; that he said he destroyed his dogs, fearing he would become ill and die, and they would devour his remains; that he told a witness he feared the designs of a certain matrimonially inclined female who was about to engage his attention in a

breach of promise suit, and that he was going to Fremont to "fix his land so that this woman could not get it," and that "he would kill himself before he would submit to her demands"; that he ordered and erected a monument, and "wanted to be buried with his dogs." It is in evidence by the testimony of six or seven witnesses who were called on the part of plaintiff that one of Ramstad's most pronounced peculiarities was that of "talking to himself," and from the evidence it would seem with the utmost impartiality as between his own and the English language. The fact that he used both languages seemed to add to the prominence of this feature, and gave rise to some testimony indicating that the witnesses could not understand him. Some stress is laid upon this feature by counsel in his brief and in the oral argument. But if the courts accept proof of this characteristic as conclusive or even *prima facie* evidence of "mental incompetency to transact business," the sphere of the guardian's activity may thereby become so greatly enlarged as to prove burdensome to him and embarrassing to the community.

Ole Ramstad, the ward, was sworn and testified on the part of plaintiff. He was not interrogated with reference to the alleged designing woman, nor in regard to his alleged statement of a purpose once entertained by him of placing his property beyond her reach. He testified it was agreed between him and Gutru the latter was to be appointed his guardian that this suit might be brought. It is shown by Ramstad's testimony that, from the time he executed the conveyances to the time of trial in the district court in July, 1907, from the proceeds of the land in which he retained the life lease, and by investments in town property in the village of Rogers, he, unaided and alone, had accumulated property, both real and personal, of the value of several thousand dollars. He testified that at the time of the trial he owned three houses in Rogers that rented for about $5, $6 and $8 a month, respectively, and 28 business lots therein, one of them being worth $500. The ward's testimony thus tends

at least to rebut his guardian's allegation of mental incompetency "to transact business."

Levi Gutru, plaintiff, testified he first met Ramstad in July, 1906; that Ramstad said to him he wanted witness "to look after his business, and he said I should support him and take care of him, and, if there was anything left, I should have it." Witness testified a will and power of attorney were executed by Ramstad the second time he met him, and that he, the witness, suggested that he "had to have something to look after his business" and the power of attorney was then made, and he repeats Ramstad said, "if anything was left, I could have it." He says at that time he had not discovered his mental condition, but "ascertained the fact later." County Judge Mapes of Colfax county testified that about six months before this action was tried the plaintiff and his ward, Ramstad, called at his office in Schuyler to inquire about the appointment of a guardian for the latter, at which time Gutru exhibited a will to witness, made in his own favor, and told him, he, Gutru, had the whole matter in his own hands. Thus it is shown by the testimony Gutru is the sole beneficiary of a will executed by Ramstad on the occasion of his second meeting with him a few months before this suit was tried. From the testimony of Judge Mapes and of Gutru we are convinced the solicitude of the latter for the welfare of his recently acquired ward, the lone and childless relic of 80 years, is not inspired solely by high resolve and disinterested motive, but is in part at least the outgrowth of a sordid desire for gain. His conduct, as disclosed by his own testimony, tends to establish defendant's allegation of an attempt to defraud him of his title.

On the part of the defendant many witnesses were produced who testified with reference to Ramstad's mental condition. Their acquaintance with him for the most part covered a period of 25 years and over. Among these were merchants with whom he had done business for many years, many farmer neighbors, and a banker, with whom

he had kept a bank account. They seem to agree he was for the time embraced in the petition as well equipped to carry on his business affairs as the average citizen in the community. Upon the question of Ramstad's mental competency, we conclude, after a careful examination of the testimony, the plaintiff has failed to establish the material allegations of his petition. The proof shows he seemed to be eccentric in manner and odd in expression, due in part no doubt to the fact he retained some of the customs and much of the language of his native land. Ramstad is not shown by the proof to have been "mentally incompetent to transact business," but, on the contrary, it affirmatively appears from the testimony a fair success has attended upon his modest business ventures.

Testimony was introduced by both parties with reference to the quality and the value of the land involved in this action at the time the conveyances were executed and delivered. On direct examination one of plaintiff's witnesses testified it was then worth $17 or $20 an acre, but on cross-examination he says he was then but a boy, and did not know the price of land there, nor of any being sold in that vicinity, nor the value of the land in question at that time. Another witness on the part of plaintiff on the direct examination fixed the value at $10 an acre, but on cross-examination fixed it at about $7 or $8 if sold for part cash and partly on time. From a careful examination of all the testimony upon this feature we find the land was for the most part low and wet, and at the time indicated was worth from $5 to $7 an acre.

The proof fails to sustain the plaintiff's allegations of fraud practised upon Ramstad by the defendant in effecting the execution and delivery of the instruments forming the basis of this action. The defendant testified in substance that Ramstad in January, 1887, told him he was about to lose his land, and proposed if witness would pay his debts and give him a little money to live on until some revenue could be derived from the rent of the land he would convey it to defendant, but wanted to retain a

life estate therein, to which defendant testifies he agreed after some reflection, and the said instruments were then executed and delivered. He testifies he gave to Ramstad from time to time money to live on in pursuance of said agreement of purchase in the total sum of about $100, which with the incumbrances on the said land assumed and paid by defendant amounted in all to about $600; that he gave to Ramstad the "life lease" of said land in May, 1896; that the said land was mostly low and wet, with some gumbo, and no sale for land there in 1887 that he can recall. Defendant's testimony on this point is corroborated by several witnesses who testify that Ramstad told them at the time, or shortly after the execution of the deed and assignment, in substance, that he was about to lose his land because of the debts against it, and that he sold it to the defendant, who assumed his debts. By witnesses who testified with reference to a later date it is shown that Ramstad told them he obtained a "life lease" from defendant in 1896 to assure his possession in the event of defendant's death. There is not much dispute in the record concerning the incumbrances paid off by the defendant upon the land, the plaintiff alleging they were "not in excess of $480." From the proof we conclude the defendant paid a valuable consideration for the land and the transaction was in no sense a gift nor tainted by fraud, as pleaded and argued by plaintiff, nor is there any proof in the record of the abuse by defendant of alleged relations of trust and confidence existing between defendant and Ramstad.

The defendant pleads the statute of limitations as another defense, relying upon sections 7, 12 and 17 of the code, but it is unnecessary to consider this point, because upon the merits the controversy is resolved in favor of the defendant.

The decree of the district court is right and is in all things

AFFIRMED.

ARTHUR WILSON ET AL., APPELLANTS, V. BARTUS WILSON ET AL., APPELLEES.*

FILED FEBRUARY 20, 1909. No. 15,422.

1. **Witnesses:** COMPETENCY. A party claiming title under a deed made by a deceased person is an incompetent witness to prove the delivery of such deed.
2. **Deeds:** EXECUTION: EVIDENCE. Proof of an unacknowledged deed made by a subscribing witness, as provided by section 10807, Ann. St. 1907, entitles such deed to record, and is presumptive of its due execution.
3. **Homestead:** CONVEYANCE: VALIDITY. The sole deed of a married man conveying his homestead and other lands is void as to the homestead estate, but valid as to the lands in excess of the homestead.

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

J. K. Van Demark, C. S. Allen and *L. E. Gruver,* for appellants.

H. Z. Wedgwood and *Hall & Stout, contra.*

DUFFIE, C.

On the 6th day of May, 1891, Charles Wilson was the owner of a farm of 120 contiguous acres of land, upon which he resided with his wife, Maria. On that day he signed a deed purporting to convey the said farm to the defendant Bartus Wilson. The wife, Maria, did not join in this deed, nor was it acknowledged by Charles Wilson. He continued to reside on the premises until 1893, when he died intestate, leaving surviving him, his widow, Maria, and his five sons and heirs at law, the plaintiffs, Arthur, Thomas, Charles and James, and the defendant, Bartus Wilson. The widow continued to reside on the premises with the defendant Bartus, except one season, when the land was farmed by Arthur, until her death in 1904. After

* Rehearing allowed. See opinion, 85 Neb. ——.

the death of the mother the plaintiffs brought this suit, each claiming an undivided one-fifth interest in the premises, and praying a partition thereof. The defendant Bartus Wilson answered, claiming ownership by the deed above mentioned, as well as by adverse possession of the premises for more than ten years. The issue of adverse possession was upon application of the defendant submitted to the jury, who found for the plaintiffs. On the trial the parties stipulated that the dwelling house and improvements were situated on the southwest quarter of the southeast quarter of the land in dispute, and that this 40 acres, together with the buildings, was worth the sum of $2,000 on May 6, 1891, the date of the deed, and on June 7, 1893, the date of Charles Wilson's decease, and that, in event the deed was sustained as to the land in excess of Wilson's homestead interest, the southwest quarter of the southeast quarter might be treated as the portion which would be set off as the homestead interest if application had been made therefor. The court entered a decree of partition as to this 40 acres, quieting title in the defendant to the remaining 80 acres. The plaintiffs appeal.

The only direct evidence of the actual delivery of the deed under which the defendant claims was his own testimony that the instrument was in his possession before his father's death. This statement was received over the objection that, under the provisions of section 329 of the code, the witness was incompetent to testify to the transaction between himself and his deceased father. The word "transaction," as used in this section, embraces every variety of affairs, the subject of negotiations, actions, or contracts between the parties. *Smith v. Perry,* 52 Neb. 738; *Kroh v. Heins,* 48 Neb. 691. If the statement of the witness be taken as not implying a delivery, then it has no more force than the fact of possession at the beginning of the suit. If it implies an actual delivery, it is incompetent. *Russell v. Estate of Close,* 79 Neb. 318. There being no competent evidence of the actual delivery of the deed from Charles Wilson to the defendant Bartus Wil-

son, there is no direct evidence to support a finding that such deed was delivered so as to take effect during the lifetime of the grantor, and, unless the possession of such deed by the grantee therein named, raises a presumption of such delivery, the defendant has failed in establishing title to any of the land. It is a general rule that a presumption of delivery arises from the possession by a party claiming under a writing duly executed, and it is conceded that, had the deed in question been properly acknowledged, a presumption of delivery would have arisen from the fact of its possession by the said grantee, in the absence of any opposing circumstances; but it is insisted that this presumption does not obtain where the deed is not acknowledged, and that, if it would otherwise have arisen, it is overcome by the circumstances of the defendant being so situated as to naturally come into possession of the papers of Charles Wilson upon his death.

We do not think this contention can be sustained. Indorsed on the back of the deed we find the following: "State of Nebraska, Sarpy County, ss.: Be it known that on this 9th day of November, A. D. 1901, before me, a notary public, in and for said county of Sarpy, in the state of Nebraska, personally appeared Maria Wilson, who is personally known to me to be the identical person whose name is affixed to the within deed as witness to said deed, who being duly sworn according to law doth depose and say that her place of residence is in the county of Sarpy, state of Nebraska, that she set her name to the within deed as a witness to said deed, that she, said Maria Wilson, was personally acquainted with the grantor, and that she saw him sign the deed conveying certain lands unto Bartus Wilson; further, that she was fully acquainted with all of the conditions and terms of the within deed, and that said Charles Wilson did make said conveyance of his own voluntary free will, and that said Charles Wilson did receive value in full from the within named Bartus Wilson for the lands described in the within deed. (Signed) Maria Wilson. State of Nebraska,

Sarpy County: Personally appeared before me, Louis Bates, a notary public, in and for Sarpy county, Maria Wilson, who is personally known to me as the identical person, who did affix her signature to the above affidavit. Subscribed and sworn to in my presence this 9th day of November, 1901. Louis A. Bates, Notary Public, (My commission expires April 9, 1904.)" The above is apparently in strict compliance with section 10807, Ann. St. 1907, which provides: "If the grantor die before acknowledgment, * * * proof of the execution and delivery of the deed may be made by any competent subscribing witness thereto before any officer authorized to take the acknowledgment; and the witness must state, upon oath, his own place of residence, that he set his name to the deed as a witness, that he knew the grantor in such deed, and saw him sign or heard him acknowledge he had signed the same; and such proof shall not be taken unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person who was a subscribing witness to such deed." A somewhat similar statute was in force for many years in the state of New York, and, so far as the decisions from that state inform us, the subscribing witness was not formerly required to give his place of residence; but upon a revision of the statutes of that state the commissioners, in order that parties interested should have a means of identifying the witness aside from his mere name, recommended that the statute be so amended as to require the residence of the subscribing witness to be embodied in the affidavit made, and this recommendation was adopted and the statute so amended. *Irving v. Campbell,* 121 N. Y. 353. The statute relating to the proof of the deed by a subscribing witness being fully complied with and possession by the grantee being shown, the question of its execution and delivery is taken out of the case.

The plaintiffs further assert that, as the deed in question included the homestead of their father, and the same was not signed by their mother and acknowledged as re-

quired by our homestead statute, it was void in toto, and conveyed no title to any of the land therein described. Thompson, Homesteads and Exemptions, secs. 476, 477, announces the rule adopted by a great majority of the courts that a deed or mortgage executed by the husband alone, which conveys the homestead and other property, is void only as to the homestead estate, and operates as a good conveyance of property in excess of the homestead. This is the view seemingly taken by this court in *Whitlock v. Gosson,* 35 Neb. 829. On page 834 of the opinion it is said: "The decree of foreclosure is defended by counsel for appellee on the ground that the property in question exceeds $2,000 in value, and that the mortgage is valid as to the excess over and above that amount. The value of the homestead is, we think, under the issues in this case wholly immaterial. It is not doubted that in a proper proceeding the homestead property in excess of the statutory limit may be subjected to the satisfaction of a mortgage by the husband. But if such relief is sought it should be by pleadings which put in issue the value of the homestead. The case of *Swift v. Dewey,* 20 Neb. 107, was in a proceeding in the nature of a creditor's bill and is therefore not in point." See, also, *McCreery v. Schaffer,* 26 Neb. 173, and *Teske v. Dittberner,* 70 Neb. 544.

While the pleadings in the case at bar do not seek to have the homestead segregated and set apart, the parties by the stipulation above referred to have obviated the necessity of such a proceeding. We recommend an affirmance of the judgment of the district court.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

WILLIS CADWELL, APPELLEE, V. MARGARET C. SMITH ET AL., APPELLANTS.

FILED FEBRUARY 20, 1909. No. 15,446.

1. **Vendor and Purchaser:** CONTRACT: CONSTRUCTION. The parties to a contract for the sale of real estate stipulated that the balance of the consideration should be paid by a day named, in default of which the vendee was to forfeit his interest in the land. *Held*, That this provision manifested an intention to make time of the essence of the contract.
2. **Contracts:** WAIVER. Where both parties to a contract fail to perform their mutual covenants on the day named, they will be held to have waived its strict performance as to time, but the contract will remain unimpaired as to its effect.
3. ———: FORFEITURE. One party to a contract cannot declare a forfeture for failure of the other party to strictly perform its conditions, unless he is in position to perform on his part.

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

Sullivan & Squires, for appellants.

N. T. Gadd, C. L. Gutterson and *Flansburg & Williams, contra.*

DUFFIE, C.

On June 10, 1905, the parties to this action executed the following written contract: "For and in consideration of the sum of one hundred dollars to me in hand paid, I hereby give Willis Cadwell, of Broken Bow, the right to sell my farm, to wit, the west half of the northwest quarter and the southwest quarter of section fifteen, and the north half of the northwest quarter of section twenty-two, all in township seventeen north, range nineteen west 6th P. M., Custer county, Nebraska, for the sum of five thousand dollars, net, to me, as follows, to wit: One hundred dollars in hand paid, the receipt of which is hereby acknowledged. The sum of four hundred dollars June 12, 1905, the sum of thirty-five hundred

dollars January 1, 1906, without interest. The purchaser to assume a certain mortgage for the sum of one thousand dollars, with interest at nine per cent. from the 1st day of March, 1905, the purchaser to receive one-third of all crops raised during the season of 1905. Possession to be given January 1, 1906, at time final payment is made on purchase price. All improvements including buildings, fences, windmill, tower, tanks, all loose lumber, posts, or other material to remain on place, abstract to be furnished showing land to be clear of all incumbrance except said mortgage for the sum of one thousand dollars, and taxes up to and including the year 1904 paid. M. C. & S. P. Smith, M. C. Smith. Witness to signature of S. P. Smith: J. G. Painter."

Cadwell paid to the Smiths $100 on the date of the contract, and $400 on June 12, 1905, as by the contract required. June 2, 1906, at the request of the Smiths, a further contract was executed by the parties, as follows: "The deed and abstract herewith affecting the W. ½ N. W. ¼, the S. W. ¼, sec. 15, and N. ½ N. W. ¼, sec. 22, all in twp. 17-19, is held in escrow on following conditions, to wit: Whereas, Willis Cadwell, party of the first part, has purchased the above described property from Margaret C. and S. P. Smith for the sum of $5,000, and there remains due said Margaret C. and S. P. Smith the sum of three thousand no-100 dollars; now, therefore, if said Willis Cadwell shall well and truly pay to said M. C. and S. P. Smith the said sum of three thousand and no-100 dollars with interest at six per cent. on the 1st day of September, 1906, then the deed and abstract is to be delivered to said Cadwell. Provided, should said Cadwell fail to pay said sum and interest for thirty days after due, then and in that event the deed and abstract shall be delivered to said M. C. and S. P. Smith, and any interest said Cadwell may have acquired by reason of any moneys paid shall be forfeited to said M. C. and S. P. Smith. Dated this 2d day of January, A. D. 1906. Willis Cadwell, M. C. Smith, S. P. Smith."

While the agreement of June 10, 1905, is on its face more in the nature of an option than a contract of sale, it would seem from the evidence that the construction put upon it by the parties was that it operated as a sale of the land to the plaintiff. Both the plaintiff and defendants testified that rent was paid to the plaintiff for the use of the premises during the season of 1905, which would indicate that Cadwell was given possession of the land, and that defendants occupied the same as his tenants. In explanation of the contract made January 2, 1906, the plaintiff testified that the contract of June, 1905, was not carried out by him and the balance of the purchase price of the land paid, for the reason that during the latter part of 1905 Smith had several talks with him concerning their deal and was undecided whether he would stay in Custer county, move back to Missouri, or go to South Dakota; and, owing to the fact that there was a second mortgage for $800 on the land, which he would have to pay out of the balance of the money due January 1, 1906, he desired to change the contract, taking only $500 in cash, instead of the $3,500 due, and to lease the land for another year, allowing the $3,000 then remaining unpaid to run until the 1st of September, 1906. The impression which we get from the plaintiff's testimony, which is not disputed upon this point, is that Smith's wife, who held the legal title, desired to realize $3,000 in cash from the land, and that her husband should remain upon it as tenant until they accumulated sufficient to discharge the second mortgage of $800. Plaintiff complied with this request, the contract of January 2, 1906, was executed, the deed of the land placed in escrow to be held by the Broken Bow State Bank, and a lease running to Smith for 1906 executed and delivered. Some time after the middle of September, 1906, the plaintiff went with other parties to the state of Texas, and on the 27th of September wrote to S. P. Smith that one of the party had been taken sick at San Antonio, on account of which he had to leave another man with him and proceed alone

to other points in the state; that he would be unable to return to Broken Bow before some time in the succeeding week, at which time he would pay the balance due on the land, as well as any extra interest which Smith should incur by reason of the delay; that if this was not satisfactory to write him at a named point in Kansas, or to wire him as the case might require. This letter was not received by Smith until the 1st day of October, and after banking hours on that date he called on the bank for the surrender of the deed, and on the plaintiff's return home on the 6th or 7th of October, defendants refused to carry out the contract and make a conveyance. Plaintiff thereupon brought this action to enforce specific performance of the contract. From a decree in favor of the plaintiff, defendants have appealed.

The defendants insist that time was of the essence of the contract, and that payment of the $3,000 not being made or tendered on the 1st day of October, 1906, they had a right under the contract to declare the same at an end and to be relieved of any further obligations thereunder. The second contract required Cadwell to pay $3,000 on or before October 1, 1906, and provided for a forfeiture of his interest in the land in case of his default. This provision, we think, must be construed as making time of the essence of the contract. *White v. Atlas Lumber Co.*, 49 Neb. 82. That time may be made of the essence of a contract by stipulation of parties to that effect is not to be questioned. *Morgan v. Bergen*, 3 Neb. 209; *Jewett v. Black*, 60 Neb. 173.

It is equally well settled that a party to such a contract, who is himself in default, is not entitled to the aid of a court of equity to enforce the contract against a party who was ready and willing to perform according to the terms of the agreement. The record makes it clear that the plaintiff did not tender performance on his part on the 1st of October, 1906, and, unless there are circumstances attending the case which take it out of the general rule, the court cannot afford him any relief. On the

other hand, if the defendants were themselves in default, if they were not in position to perform on their part, equity will not allow them to declare a forfeiture and to take the benefit of the payments made them by the plaintiff. "As a general rule, a contract cannot be determined or rescinded by a party to it for nonperformance of the other party, unless the former is in a position to demand a specific performance." *Hale v. Cravener,* 128 Ill. 408. Where both parties fail to perform their mutual covenants on the day named, they will be held to have waived strict performance of the contract as to time, though it will be unimpaired as to its effect. *Van Campen v. Knight,* 63 Barb. (N. Y.) 205. As we have seen, both parties construed the contract of June 10 as one of sale, and that contract provides that the defendants shall furnish an abstract showing the land clear of all incumbrances except the $1,000 mortgage, the payment of which the plaintiff assumed.

It is insisted by the defendants that after the January contract was executed an abstract of the land was examined by the plaintiff, and by agreement of the parties it was provided that the abstract should remain in the hands of the abstracter until the land was paid for, at which time it should be delivered to the plaintiff. We do not think that this claim is supported by the evidence. One Leonard, who prepared the abstract, testified that Cadwell and Smith came to his office about the time the second contract was made; that Cadwell took and examined the abstract, then handed it to Smith, "and said something about wanting an extension of it, and they said they would just leave it there." This evidence falls far short of establishing an agreement upon the part of the plaintiff to leave the abstract in the hands of Leonard until after the last payment was made. On the contrary, it shows that the plaintiff desired to have the abstract extended, and this could not be done to show an unincumbered title in Mrs. Smith (excepting the $1,000 mortgage)

until payment of the second mortgage for $800 and a release thereof.

It is true that Smith testified that it was the understanding that the $800 mortgage was to be paid out of the $3,000 which plaintiff was to pay on October 1. This mortgage was given to the president of the Broken Bow State Bank, who resided in the state of Illinois, and the evidence shows that at Smith's request the cashier of the bank had procured a release of the mortgage from the president, and had it in his possession ready for filing when the mortgage was paid. The plaintiff denies that he had any knowledge that a release had been secured from the mortgagee, or that there was any agreement with Smith that it should be paid from the $3,000 due from him under the contract. On the contrary, his testimony shows that the defendants desired to save intact the $3,000 due from him, and pay the $800 mortgage from moneys derived from other sources. The plaintiff was not required to pay the $3,000 due October 1, 1906, nor any part thereof, until the defendants were prepared to convey a title wholly unincumbered, except by the $1,000 mortgage which he had assumed. Until the defendants were so prepared, the plaintiff was not in default. One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions, unless he is in position to himself meet the conditions required on his part. He cannot penalize the other party while himself unable to perform. It is quite evident that the district court found that the defendants were not themselves in position to carry out this contract on the 1st of October, when the money from the plaintiff was due, and that upon that ground he entered a decree in favor of the plaintiff.

A careful examination of the evidence satisfies us that the finding of the district court is fully supported by the evidence, that his decree is right, and that the judgment appealed from should be affirmed.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

HENRY B. GATES, APPELLEE, V. CHARLES E. TEBBETTS, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,453.

1. **Judgment**: CONSTRUCTIVE SERVICE: RES JUDICATA. A court has no jurisdiction to enter a personal judgment against a nonresident constructively served, who has made no appearance in the action; nor can any finding made in the case touching his personal liability operate as an estoppel so as to prevent him from showing to the contrary in a personal action subsequently brought against him.
2. **Principal and Surety**: RELEASE. A surety upon a contract is not released because the plaintiff in an action thereon fails to inform the court that another party to the contract is the principal debtor.
3. ———: ———. While it is a general rule that a discharge of the principal releases the surety, an exception to the rule exists when one becomes surety for a married woman, minor, or other person incapable of contracting.

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

Hazlett & Jack, for appellant.

E. O. Kretsinger, contra.

DUFFIE, C.

In 1900 the plaintiff commenced an action to foreclose a mortgage made by Ella F. Tebbetts and Charles E. Tebbetts, at that time wife and husband. The mortgage secured a note made by the parties for $1,300, and covered certain lots in the city of Beatrice, Gage county, Nebraska. Charles E. Tebbetts, the defendant in this action, was residing at Kansas City, and substituted service of sum-

mons was had on him in the state of Missouri. Ella F. Tebbetts, the wife, was personally served in this state, and she filed an answer, alleging that at the time of making the mortgage she was a married woman residing with her husband, and that at no time did she ever bind her separate estate, trade or business, and signed the note secured by the mortgage as surety for her husband, and had received no money for which the note was given.

Charles E. Tebbetts made no appearance in the action, except to object to the jurisdiction of the court over his person upon the service first made on him. This motion was sustained, after which a second service was had upon the defendant, and, no appearance being made by or for him, he was then defaulted. In February, 1901, the case was tried. The court found that there was due upon the note to secure which the mortgage was given the sum of $1,455.98; that Ella F. Tebbetts was a married woman at the time of the execution of the note and mortgage, and that she was not liable thereon except to the extent of the mortgaged property described in the petition; that, after the mortgaged property had been exhausted and the proceeds applied in payment of the note and mortgage, "the said Ella F. Tebbetts will not be liable to the plaintiff for any deficiency judgment." There was a further finding that the decree draw interest at the rate of 10 per cent. per annum. A foreclosure of the mortgage was decreed, an order of sale issued, the mortgaged property duly advertised and sold to the plaintiff herein for $740. December 17, 1901, the sale was duly confirmed by the court, and a finding made that there was a deficiency of $884.23. May 2, 1902, the plaintiff applied for and obtained leave of court to bring an action at law against Charles E. Tebbetts for the deficiency arising in the foreclosure proceedings, and this action for that purpose was commenced in October, 1903. To a petition reciting the above facts the defendant filed an answer which is too lengthy to be incorporated in this opinion. From a judgment in favor of the plaintiff, the defendant has appealed.

The principal defenses urged upon this hearing are that Ella F. Tebbetts was the owner of the mortgaged property which was incumbered by mortgage liens when she purchased the same; that the plaintiff's mortgage was given in renewal of one of such mortgage liens; that defendant had no interest in the property, the same being the separate property of his wife, and that he signed the note secured by the mortgage as surety for his wife, and was bound thereon as surety only; that these facts were known to the plaintiff, who failed to present them to the court when the mortgage was foreclosed, and permitted and connived at the entry of a judgment in said foreclosure action relieving said Ella F. Tebbetts from all personal liability upon said note, for which reason he alleges that he is released from liability.

The second objection urged to the judgment is that it is excessive. It is familiar law that a court has no jurisdiction to enter a personal judgment against a nonresident of this state who has not appeared in the action, and where substituted service of the summons has been had. In the foreclosure case the court had no jurisdiction to enter a personal judgment against Charles E Tebbetts, and did not attempt to do so. On confirming the sale made under the foreclosure decree, the court found the amount of the deficiency existing to be $884 23, and on the trial of this case the district court apparently took the view that this finding was conclusive upon the defendant, and would not allow him to show that in the foreclosure proceedings an erroneous computation of the amount due upon the notes secured by the mortgage was made, and that the deficiency was not so great as found by the court. In the foreclosure proceedings the court had undoubted jurisdiction to ascertain the amount due upon the mortgage, to declare it a lien upon the mortgaged premises, and to order a sale for the satisfaction of the amount due. It is conceded that in that action the court was without power or jurisdiction to enter a personal judgment against the defendant, and the question now

before us is: Did the court have jurisdiction to find any fact going to establish the defendant's liability to a personal judgment and the amount thereof which the defendant is estopped from disputing in this action? We think not. On principle the law must be that, in a case where the court has no jurisdiction to enter a personal judgment against a defendant, it cannot conclude him by a finding of material facts necessary to establish his liability or the amount thereof in a subsequent action brought in a court having jurisdiction over his person. If, by an erroneous computation of interest or otherwise, the court in the foreclosure proceeding fixed the amount of the deficiency at too large a sum, the defendant in this action is not bound by such finding, but may have the benefit of any evidence in his possession tending to show the amount of the deficiency which actually exists, and for which he is personally liable. The district court erred in refusing him this privilege.

Relating to the claim that plaintiff in the foreclosure proceedings should have used diligence to establish the primary liability of Mrs. Tebbetts for the mortgaged debt, there is no evidence in the record that the plaintiff fraudulently confederated with Mrs. Tebbetts to obtain a decree relieving her of personal liability, and it is well settled that, while the general rule prevails that a discharge of a principal releases the surety, an exception to the rule is found where a person guarantees the obligation or becomes surety for a married woman, minor, or other person incapable of contracting. In such case, while the principal is discharged on account of his incapacity, the debt remains and its burden must be assumed by the surety. *Jones v. Crosthwaite,* 17 Ia. 393; *Winn v. Sanford,* 145 Mass. 302, 1 Am. St. Rep. 461. In the case last cited it is said: "Where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit

in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee. *Yale v. Wheelock,* 109 Mass. 502." The district court in the foreclosure proceeding believed and held that Mrs. Tebbetts was not liable upon the note which the mortgage secured, and it may well be that the plaintiff held the same view, and for this very reason requested the defendant to sign the note as surety for his wife. In any view of the case which can be assumed, we are not prepared to hold that a party bringing an action upon a contract signed by two parties, one of whom is surety for the other, releases the surety by a mere failure to inform the court of the relation of principal and surety which the parties defendant sustained to each other. The case is very different from *Wright v. Hake,* 38 Mich. 525, where the creditor secretly and fraudulently released the principal debtor from payment of the principal amount of the debt, and then sought to hold the surety for the whole claim.

For the error in holding that the defendant was estopped from questioning the amount of the deficiency in the foreclosure proceeding, and refusing to allow him to show that the amount claimed was in excess of that owing by him, we recommend a reversal of the judgment and remanding the cause for a second trial.

EPPERSON, GOOD 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 a second trial.

REVERSED.

ADELLA M. KIRKPATRICK ET AL., APPELLEES, V. GEORGE W. KIRKPATRICK, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,457.

1. **Appeal: HARMLESS ERROR.** Erroneous rulings of the court, which work no prejudice to the complaining party, do not call for a reversal of the judgment.

2. ———: **AFFIRMANCE.** Where the transcript of the record contains only the pleadings and record of the entry of judgment, which latter conforms to the pleadings, and in which no error appears, the judgment will be affirmed.

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

Aaron Wall and *Hainer & Smith,* for appellant.

Sullivan & Squires and *A. P. Johnson, contra.*

DUFFIE, C.

In February, 1904, plaintiff was granted a divorce from the defendant by the district court for Custer county, Nebraska. The court awarded the plaintiff custody of their three minor children, said children now being, respectively, 15, 10 and 5 years of age, but the decree made no provisions concerning their maintenance and support, and the plaintiff has had their custody and made provision for their support from the entry of the decree to the present time. In February, 1907, the plaintiff, for herself and as next friend of her children, commenced this action, reciting the facts above set out, and asking a decree requiring the defendant to pay her such amount as the court might find reasonable and proper for the support of her children until their majority. The trial resulted in a decree requiring the defendant to pay to the clerk of the court for the use of the plaintiff in the support and education of these minors $180 a year, of which

sum $90 should be paid semiannually upon the 25th day of October and April of each year until the children attained their majority, and that $30 of said semiannual payments "shall be devoted to the support, maintenance, use and benefit of each of said minor children." From this decree the defendant has appealed.

Plaintiff, in her petition, alleged that no alimony was asked for or decreed to the plaintiff in the divorce proceeding; that the parties had settled and agreed upon a division of property outside of the court, but made no provision concerning the maintenance of their minor children. She further alleged that defendant has land in Custer county of the value of $3,000, and personal property of the value of $2,000; that she herself is the owner of a home in Broken Bow of the value of $1,000, but which is incumbered to the extent of $600, and that she owns a half section of land in Custer county worth $7,000, but has no cash or money, and in order to support herself and children is compelled to take boarders, and is unable to properly provide for their maintenance and education. The defendant alleged that, when a division of the property was made between them, the maintenance and support of their children was considered, and the settlement and transfer of the property conveyed to the plaintiff was based in part upon the agreement and understanding that she should maintain and support the children without cost to him. In her petition plaintiff asked judgment against the defendant for the amount expended by her in supporting the children from the date of the divorce up to the time of bringing this action, as well as for contribution from him for their future support, and a motion to require her to separately state and number her several causes of action was overruled by the court, as was a demurrer to the petition for the reason that there was a misjoinder of parties plaintiff. A general demurrer to the petition based on the insufficiency of the facts stated to constitute a cause of action was also overruled, and an exception taken to each of such rulings.

As the court did not allow any recovery for the support of the children by the plaintiff prior to the commencement of the action, the defendant was not prejudiced by the action of the court in overruling his motion to require the plaintiff to separately state and number her causes of action, and, as a demurrer does not lie for the misjoinder of parties plaintiff, there was no error committed in overruling the demurrer based upon that ground. The general demurrer was properly overruled upon the authority of *Eldred v. Eldred,* 62 Neb. 613, in which it was held that a dissolution of the marriage relation does not relieve the father of the duty to support his minor children and will not defeat an action therefor.

Our statute relating to divorce (Ann. St. 1907, sec. 5338) gives the court where the action is pending authority to make such order concerning the care, custody and maintenance of the minor children of the parties as it shall deem just and proper, and the succeeding section authorizes the court from time to time afterwards, on the petition of either of the parents, to revise and alter such decree. It would probably be more regular to apply for a change or modification of the decree by filing the petition in the same action in which the divorce was granted, and not, as in the present case, to commence an independent proceeding; but this is a matter of procedure only, and, as the rights of the parties could not be injuriously affected, the decree entered in this case should not be reversed for such irregularity.

The defendant has not preserved the evidence given upon the trial, and has presented for our review nothing but a transcript of the pleadings and the decree entered. In such case it has been the uniform rule of this court to affirm the judgment of the district court if the pleadings supported the judgment entered. While it is true that the defendant alleges that the property transferred by him to his wife at the time of the divorce proceeding was based partly upon the consideration that she should maintain and support the children, the plaintiff denies

that this was the case, and the court has determined that issue against the defendant. As the evidence taken on the trial is not before us, we must presume that such finding found support in the evidence offered by the parties. It being the rule of this court that a dissolution of the marriage does not relieve the father from the duty of supporting his children, unless the decree entered in the divorce proceeding relieves him of that duty, and the decree in the present case being silent upon that question, we have no other course to pursue, except to affirm the judgment of the district court.

We recommend that the judgment appealed from be affirmed, but with leave to the defendant to apply at any time hereafter for a modification of such judgment.

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, but with leave to the defendant to apply at any time hereafter for a modification of such judgment.

AFFIRMED.

DEAN, J., having been of counsel in the cause, not sitting.

BARBARA TAYLOR, GUARDIAN, APPELLANT, V. E. AUSTIN ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,482.

1. **Highways: ESTABLISHMENT: WIDTH.** A public highway regularly established by the county authorities under the law of 1866 (laws 1866, ch. 47, sec. 3) must be regarded as taking in land to the full width required by the statute defining the width of public highways, and the fact that the petition for the highway and the order establishing the same does not mention the width of the road is immaterial.

2. ———: ———: **NOTICE.** One who petitions for the establishment of a highway, as well also as his grantees, cannot complain

that the notice provided by statute of the time when the petition will be presented to the county board was not given.

3. ———: TITLE BY PRESCRIPTION. A party cannot acquire prescriptive title to a public highway by possession and use of the ground included therein, however long continued.

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

John C. Watson, for appellant.

C. A. Rawls and *W. C. Ramsey, contra.*

DUFFIE, C.

E. Austin, road overseer of district 59, in Cass county, in December, 1906, served a written notice on the plaintiff that her fence was in the public highway running north and south on the half section line through section 25, township 10, range 13, in Cass county, Nebraska, and directing her to remove her fence to a line 33 feet west of said half section line. The notice further stated that, unless its terms were complied with on or before the 10th of January, 1907, the overseer would himself proceed to remove the fence. Shortly thereafter this action was commenced to enjoin the overseer and the county of Cass from interfering with the plaintiff's fence or from trespassing in any manner upon her premises. A temporary injunction was issued, which upon the trial was made perpetual as to a portion of plaintiff's land claimed by the county as a highway, and dissolved as to another part of plaintiff's land, which the court found to be within the boundary of a regularly established road. Plaintiff has appealed from so much of the decree as found a regularly laid out road over any part of the land in dispute.

It was stipulated on the trial that prior to the year 1869 a legal highway had been established along and near the half section line running north and south through the center of sections 24 and 25, township 10, range 13, in

Cass county. In 1869 the owners of the land located along this half section line on both sides, and among whom was the grantor of plaintiff herein, filed a petition with the board of county commissioners asking that said road be changed so as to run on the half section line. The board allowed the petition and appointed one Dubois a special commissioner to view the proposed road and establish the same, if in his judgment the public good required it. Dubois reported under date of August 2, 1869, that after taking the oath required by law he proceeded to examine the line, and found that by locating the road on the half section line it would shorten the route as previously laid out and lessen the damage to private property, and that it could be made a good road. His report concludes as follows: "I do hereby vacate the old road as prayed for in the petition, and I do hereby establish the new route petitioned for as one of the county roads of Cass county." Accompanying this report was a plat showing the location of the old and vacated road and the new road which was established along the half section line. The old road ran north and south through sections 24 and 25 near the half section line, but lying principally west of said line. This report was filed with the county clerk on the 3d day of August, but no record appears to have been made.

It is the contention of the plaintiff that no highway has been established along the half section line through sections 24 and 25. The statute of 1867 (ch. 47, sec. 19) under which the county claims the highway in question was established required a notice to be posted on the courthouse door and at three other public places in the vicinity of the road sought to be located, changed, or discontinued, setting forth the time when application therefor would be made to the commissioners. There is nothing in the record before us showing that such notice was given in this case, but it is shown that the petition for the change was signed by 12 residents, who described themselves as owning the land on the half section line, and it

was stipulated upon the trial that they were the owners of land adjoining upon the half section line, and that H. F. Taylor, one of the petitioners for the road, was grantor of the plaintiff in this action. That H. F. Taylor was not entitled to notice, being one of the petitioners for the road, is established by the holding in *Graham v. Flynn*, 21 Neb. 229, where it is said: "A petitioner for the location of a public road over his own land is not entitled to notice of the pendency of such petition. He is, in fact, a plaintiff in the proceeding, and where a petition signed by the requisite number of landholders has been acted upon by the proper authorities and a road located, a grantee of such petitioner cannot enjoin the use of the road upon the ground of want of notice to his grantor." Aside from the want of notice, the proceeding taken to establish the road in question appears to have been regular, and, as we have seen, the plaintiff cannot take advantage of the want of notice to her grantor, he being a petitioner for the road.

It is conceded that a portion of the land claimed as a highway has been inclosed by the plaintiff and her grantors for 20 years or more, and this fact, if the road had not been legally established, and the county was claiming only a prescriptive right, would entitle the plaintiff to hold the part so inclosed as her absolute property. While the width of the road was not designated in the petition therefor, nor in the report of the commissioners establishing the same, the statute at that time required that all public highways should be 66 feet in width, and, as this highway was regularly established and has been in use by the public since 1869, it must be conclusively presumed that it was established as a legal road 66 feet in width; and the fact that it has not been worked or used to its full width, and that some portion of it has been inclosed by the plaintiff, does not vest her with any title thereto, as title by prescription cannot be obtained to a public highway. *Krueger v. Jenkins*, 59 Neb. 641; *Lydick v. State*, 61 Neb. 309.

The plaintiff's brief, while full and exhaustive, is based upon the theory that no legal highway has been established which included any part of the lands claimed by the plaintiff. If Cass county and the public made claim to this road, not as one legally established, but because of long usage, there is no doubt that, under the authorities cited in plaintiff's brief, the road, so far as the same has been inclosed for ten years or more, could not be claimed by the county.

The facts established leave the question beyond any doubt that the road is a statutory road and that the public are entitled to a use of its full width. We recommend an affirmance to the judgment appealed from.

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.

ROOT, J., not sitting.

LAURA MOTE ET AL., APPELLANTS, V. BEN KLEEN ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,541.

Executors and Administrators: SALE OF LANDS: ESTOPPEL. Where the adult heirs of a deceased party, with knowledge of the facts, accept and retain, as a part of their distributive share of the estate of the deceased, money derived from a sale of real estate made by the administrator, they cannot thereafter maintain an action to set aside such sale on the ground that the land was a homestead and not liable to be sold for the debts or charges against the estate.

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

Dorsey & McGrew and *Bernard McNeny,* for appellants.

H. Whitmore and *Samuel Rinaker, contra.*

DUFFIE, C.

In December, 1893, Robert W. Sipes and his wife, Elvira, purchased the southwest quarter of section 20, township 3, range 14, in Franklin county, with the proceeds of other lands owned by them jointly. The land was purchased from Salvador Hayes, and he conveyed the north 80 acres to Mrs. Sipes and the south 80 acres to her husband, each taking title to a separate 80 acres. The house, barn, granary, well and cistern were located on the north 80 acres to which the wife held title. The south 80 acres was the better land, and all, or nearly all, in a state of cultivation. Sipes and his family moved onto the land in March, 1894, occupying the house and making use of the buildings and other improvements upon the north 80 acres. The south 80 acres was farmed in connection with the wife's land, and was the most productive, portions of the north 80 acres being quite rough, and about 30 acres thereof used as a pasture.

Sipes departed this life November 16, 1894, leaving as his heirs, his wife, Elvira, who has since intermarried and is now known as Elvira G. Whitmore, Ada B. Sipes, a minor daughter born of their marriage, also Laura Mote, Etta Blemler, Ida S. Smith and Luella Wright, daughters of Sipes by a former marriage. The plaintiffs Hugh and Glen Wright are children of Luella Wright, whose death occurred since that of her father. Sipes died intestate, and his widow was appointed administratrix of the estate, but after serving a year or more she resigned, going to the state of Illinois, and George E. Shepard was appointed administrator. Final settlement of the estate was delayed in consequence of foreclosure proceedings, which finally terminated in this court (*Orient Ins. Co. v. Hayes,* 61 Neb. 173), but the final report and discharge of the administrator appears to have taken place in 1901. During the course of the administration Shepard applied to the district court for license to sell the south half of

the southwest quarter of said section 20, and after due notice and hearing he was authorized to and did sell the same to Elvira G. Whitmore, Sipes' former wife, and who held the principal claims against the estate, consisting of allowances made by the county court for the support of herself and family during the administration. She paid the administrator $1,100 for the land, obtained a deed therefor, and afterwards conveyed the whole quarter to the defendant Ben Kleen. After paying the debts due from the estate there remained the sum of $254, which the probate court ordered distributed among the heirs of Sipes. This distribution was made, and the receipts of all the children of Sipes by his first wife, acknowledging payment to them, are found in the bill of exceptions. This action is brought by the plaintiffs, Laura Mote, Etta Bemler and Ida Smith, surviving daughters of Robert W. Sipes, and Hugh and Glen Wright, the only children of a deceased daughter, their claim being that the south 80 acres of the southwest quarter of said section 20, to which the father held title, was his homestead; that the sale thereof by the administrator was absolutely void; and they asked that said sale and all conveyances and incumbrances placed thereon since the date of said sale may be set aside and held for naught.

It is conceded that the rights of the heirs of one who dies in possession of a homestead take precedence of the creditors, and that the sale of a homestead property for the payment of debts of the deceased is void. *Tindall v. Peterson,* 71 Neb. 160; *Bixby v. Jewell,* 72 Neb. 755; *Holmes v. Mason,* 80 Neb. 448.

The principal contention between the parties arises from the fact that Sipes and his family lived upon the north 80 acres to which the wife held title, that there were no buildings or improvements of any kind on the south 80 acres, except that the land had been broken and cultivated, and the defendants contend that by living upon the north 80 acres and using the pasture, the buildings and other appurtenances, Sipes had selected his

homestead out of his wife's property, and that her consent to such selection was manifest by the actual use made of the property. On the other hand, the plaintiffs contend that as the south 80 acres was the principal source of the family supplies, and was farmed in connection with the north 80 acres, it constituted the homestead of Robert W. Sipes, who was the head of the family. *Lowell v. Shannon,* 60 Ia. 713, *Mason v. Columbia Finance & Trust Co.,* 99 Ky. 117, 35 S. W. 115, and *Buckler v. Brown,* 101 Ky. 46, 39 S. W. 509, are relied on in support of the theory that a homestead may be claimed out of the husband's lands, although residing with his family in a house on adjacent land owned by his wife. Whether under our statute, which apparently requires the homestead to include "the dwelling house in which the claimant resides," a claim of homestead may be maintained to the south 80 acres under the circumstances of this case is a question that we do not care to discuss until it arises in such a way that it must be determined.

There is another view of the case which we also think quite decisive of the rights of the parties. The defendants have pleaded and assert that the plaintiffs are estopped from claiming any interest in the land of their ancestor because of having received and retained a part of the price for which it was sold. Due notice of the application to sell was given to all parties. The personal property belonging to the estate was wholly insufficient to pay the debts and the widow's allowance. Any sum remaining in the hands of the administrator when his final report was made was money derived from the sale of this land. With full knowledge of these facts the adult plaintiffs and the mother of the minor plaintiffs accepted from the administrator their distributive share of this money. Can they take their distributive share of the money arising from the sale of the land, and, while holding the same, ask to have the sale set aside and title to the land decreed in them? The legal principle involved was before the supreme court of Iowa in *Pursley v. Hays,* 17 Ia. 310, and

Deford v. Mercer, 24 Ia. 118. In these cases it was held that where heirs, after attaining their majority, with knowledge of the facts, and in the absence of fraud or mistake, receive and retain a portion of the money arising from the sale by their guardian of their interest in certain lands, they are thereby estopped from questioning the validity of such sale, and it is further held that this principle is not limited to cases of voidable sales, but extends to those where the sale is void. Judge Dillon, who wrote the opinion in the case last cited, furnished a note for the reporter which is found on pages 123 and 124 of the report, in which numerous cases are cited in support of the views adopted in that case. Believing that the opinion of Judge Dillon establishes a just and salutory principle, we are constrained to hold that the parties plaintiff, having received the benefit of the sale, are in no position to question its validity, and are estopped from so doing. To the same effect is *Staats v. Wilson,* 76 Neb. 204, and *Wamsley v. Crook,* 3 Neb. 344.

We recommend an affirmance of the decree appealed from.

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

AFFIRMED.

DAVID BRADLEY & COMPANY, APPELLANT, V. CHARLES E. MATLEY, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,458.

Judgment: COLLATERAL ATTACK. In this case, where a justice of the peace overruled a special appearance objecting to the jurisdiction over the person, an adequate remedy was given by error proceedings, and the ruling cannot be assailed collaterally.

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

Hainer & Smith, for appellant.

H. M. Sullivan and *Mockett & Matley, contra.*

EPPERSON, C.

On March 27, 1905, defendant obtained a judgment against plaintiff, a foreign corporation, in a justice of the peace court. The summons in that action was served upon said "David Bradley & Co., by delivering to W. D. Cocke, General Agent, a true and certified copy of the same." Upon the return day the plaintiff herein filed a special appearance objecting to the jurisdiction of the court over its person because no summons had been served upon it. This special appearance was supported by the affidavit of W. D. Cocke, who said that he was not the general or managing agent of said David Bradley & Company. The special appearance was overruled, but plaintiff herein made no further appearance before the justice of the peace, who entertained the cause and rendered judgment against the plaintiff herein. This action was brought to enjoin the collection of the judgment, which is alleged to be void because no summons had been served. The order of the justice of the peace in overruling the plaintiff's special appearance was an adjudication of the question of his jurisdiction over the person, and plaintiff had an adequate remedy at law by direct proceedings to reverse the judgment. We think that the plaintiff herein was at liberty to choose one only of two courses. It could appear before the justice of the peace by special appearance, or it could later collaterally attack the judgment rendered if the service of process was fatally defective. It voluntarily submitted the question of jurisdiction to the court. That court had the power to pass upon it, and its judgment was binding upon both the parties until reversed by an appellate court. The question is *res judi-*

cata, and we recommend that the judgment of the district court dismissing plaintiff's action be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

DEAN, J., not sitting.

ASA D. MCCULLOUGH, APPELLEE, V. WILLIAM DUNN, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,479.

1. Sales: BREACH OF WARRANTY: PLEADING: VARIANCE. In an action to recover on a warranty that a horse sold by defendant to plaintiff was sound, plaintiff alleged that the horse was suffering from a disease or defect of the back, the evidence indicating that the trouble was azoturia, a disease of the stomach, liver and kidneys. *Held*, Not such a variance as will require a reversal of a judgment in favor of the plaintiff, it not appearing that defendant was prejudiced by plaintiff's failure to allege azoturia as the horse's disease.

2. ———: ———: EVIDENCE. The testimony of a witness, otherwise admissible, who observed certain symptoms showing that a certain horse was diseased, although he was unable to identify it as the horse in controversy, is admissible in evidence, and will be permitted to stand in the record if the horse he observed is identified as the one in controversy by other witnesses.

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

Byron Clark and *C. E. Tefft*, for appellant.

Matthew Gering, contra.

EPPERSON, C.

Plaintiff sued to recover $152.50 paid by him as the purchase price for a horse bought of defendant, who, it is

alleged, warranted the horse to be perfectly sound in every way and free from disease or defect. The facts, according to plaintiff's evidence, stated generally are as follows: At an auction sale, conducted by the defendant for himself, the horse in controversy was offered for sale. The plaintiff, desiring to buy, asked the defendant if the horse was sound; if he would work in harness. To which the defendant replied, "Yes, this horse is sound, and if he ain't right we will make him right," and "We are selling that horse under a guarantee. We guarantee everything but his age," and "Ace, you can't go wrong on him. I am selling him absolutely sound, and I will give a full guarantee." Defendant also handed the plaintiff a card, giving a description of the horse, and a memorandum of the sale, on which it is stated: "This horse is sold sound." A few hours after the sale, and after traveling but a few miles, the horse showed symptoms of disease, which rapidly developed, resulting in death four days later.

Veterinarians who testified at the trial seem to have agreed that the ailment of the horse was azoturia, which is a disease of the liver, kidneys and stomach. And it is contended that, as this fact is established with reasonable certainty, the allegations of the petition are not supported by the evidence, in that the petition alleges an affliction of the back. Under the circumstances of this case this variance is not such as would require a reversal of the judgment, nor a defeat of the plaintiff's petition. The disease testified to was the disease with which the horse died. It is not urged by the defendant that he is not liable because the horse had azoturia instead of an affliction of the back. The real question to be determined is whether or not the horse was sound when purchased by the plaintiff. Had the defendant only warranted that the horse had no affliction of the back, the defendant's present contention might well be considered. This disease was made apparent to the plaintiff by symptoms of a weak back. The plaintiff evidently alleged, as best he could, the trouble with the horse as he observed it.

A disinterested witness observed that a horse sold at the auction by the defendant "seemed to be affected in the back." He does not identify this as the horse purchased by the plaintiff, but the horse which he observed was by other witnesses identified as the one here in controversy. The introduction of his testimony is objected to, and also an instruction wherein the court told the jury that they should disregard the evidence of this witness unless they should find that the horse which he observed was the horse purchased by the plaintiff. It cannot be considered that this instruction made the jurors judges of the competency of the evidence. The instruction might as well not have been given, but it is surely not prejudicial to the defendant. Evidently the jury, in the absence of such an instruction, would have disregarded the witness' testimony, unless they were satisfied that it related to the horse in controversy.

Several other errors are assigned, all of which we have examined and, failing to find therein any prejudicial error, we recommend that the judgment be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

HARVEY M. DUVAL ET AL., APPELLEES, V. ADVANCE THRESHER COMPANY, APPELLANT.*

FILED FEBRUARY 20, 1909. No. 15,464.

Judgment: PLEADINGS. In an action by an agent upon an agency and commission contract to recover commissions earned in selling merchandise to the amount of $2,706, plaintiff had judgment for $517.25. The contract was set out in the pleadings and showed that plaintiff's commission could not exceed 20 per cent. of the

*Rehearing allowed. See opinion, 85 Neb. —.

purchase price, and that the commission became due and payable only when the merchandise sold had been paid for in cash, and the pleadings also showed that but $830.50 of the purchase price had been paid in cash. *Held*, That the judgment was not supported by the pleadings.

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

Halleck F. Rose, W. B. Comstock and *W. C. Brown,* for appellant.

Duval & Amspoker and *C. E. Lear, contra.*

GOOD, C.

This action was brought to recover commissions earned by plaintiffs as agents for the defendant in the sale of machinery. Plaintiffs recovered judgment for $517.25, and defendant has appealed.

In substance, the plaintiffs alleged that they became the agents of the defendant to sell machinery, and in the course of their employment they effected the sale of an engine, threshing machine and other items to the total amount of $2,706, and that their commissions for making said sales amounted to the sum of $504.05, and that defendant had failed and refused to allow said claims or to settle for or pay the same or any part thereof. Defendant admitted the employment of the plaintiffs as agents, and alleged that the contract of agency, which provided for commissions to be earned by plaintiffs, was in writing, and incorporated a copy thereof in its answer. Among other things, the contract provided: "In consideration for all services rendered or to be rendered of every kind and nature, the party of the first part, the Advance Thresher Company, agrees to pay to the second party, subject to all the provisions hereinafter set forth, a commission on orders taken by party of second part and which shall be filled, settled for, and delivered, when the goods are fully paid for in cash, or the notes representing pay-

ment are fully paid for in cash and according to the terms of this contract as follows, viz.: (a) On time sales of engines, separators, horse powers, feeders, husker-shredders, and other machinery manufactured by the Advance Thresher Company not herein specifically mentioned, all over and above eighty (80) per cent. of list price at factory for 1906." The defendant alleged that the sales upon which plaintiffs claimed a commission were sold at less than 80 per cent. of the list price, and that plaintiffs were therefore not entitled to any commission upon the articles sold. The defendant also alleged that the notes representing the purchase price of said machinery sold had not been paid, and for that reason no commission had as yet accrued to the plaintiffs. Plaintiffs in their reply admitted the making of the written contract as alleged by defendant, and alleged that said machinery had been sold at the list price, and that three instalments of the purchase price, amounting to the sum of $830.50, had been paid. The district court directed a verdict for plaintiffs for the full amount sued for, and on the same day rendered judgment on the verdict. Defendant filed a motion for a new trial on the second day after the verdict was rendered, but the district court adjourned on the same day that verdict was rendered, so that the motion for a new trial was not filed at the same term that the judgment was rendered and cannot be considered.

The only question that can be determined upon this appeal is the sufficiency of the pleadings to support the judgment rendered. The written contract of agency was entered into on the 24th day of February, 1906. The sale of machinery on which commission is claimed is alleged to have been made and completed on the 31st day of July, 1906. By the terms of the contract it is apparent that the most that plaintiffs could be entitled to would be 20 per cent. of the purchase price of the machinery sold, but the contract further provides that no commission should become due until the machinery sold was fully paid for in cash, or the notes representing payment are

fully paid in cash. By the allegations of plaintiffs' reply it appears that only $830.50 of the amount of the purchase price had been paid. Whether this was paid previous to the commencement of the action is not disclosed. It is apparent that the utmost that plaintiffs would be entitled to at the time would be a commission of 20 per cent. upon the $830.50, or the sum of $166.10, together with interest thereon from the time the same became due. As the judgment rendered was for $517.25, it thus appears that judgment was rendered for a sum greatly in excess of the amount that was shown to be due to the plaintiffs by the pleadings. It follows that the judgment rendered is not supported by the pleadings.

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

DUFFIE, EPPERSON and CALKINS, CC., concur.

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

REVERSED.

PETER VAN BUREN, APPELLANT, V. VILLAGE OF ELMWOOD, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,468.

Villages: VACATION OF STREETS: STATUTES: REPEAL. An act of the legislature entitled "An act to provide for vacating streets, alleys and public grounds in towns and villages" (laws 1871, p. 125), passed and approved March 10, 1871, in so far as said act confers upon county boards the power to vacate streets within incorporated villages, was repealed by the act of the legislature entitled "An act to provide for the organization, government, and powers of cities and villages" (laws 1879, p. 193), passed and approved March 1, 1879.

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

A. N. Sullivan, for appellant.

H. D. Travis, William Deles Dernier and *Strode & Strode, contra.*

GOOD, C.

Plaintiff, who is the owner of blocks 29 and 32 in the village of Elmwood, in Cass county, petitioned the board of county commissioners of said county to vacate the street lying between said blocks. The village of Elmwood appeared and filed written objections to the jurisdiction of the board of county commissioners to act in the matter, upon the ground that said village of Elmwood was a duly incorporated village, and the streets, alleys and public grounds of said village are solely under the jurisdiction of the board of trustees of said village, and the board of county commissioners was without power or jurisdiction to vacate streets or alleys of an incorporated village. The county board found that it was without jurisdiction to hear the matter and dismissed the application. Plaintiff thereupon duly excepted to the decision of the board and filed a petition in error to the district court for said county. The district court rendered judgment dismissing plaintiff's proceeding in error, for the reason that the county commissioners had no jurisdiction to hear and determine said matter. Plaintiff has appealed.

The plaintiff's application to the county board to vacate the street was based upon the provisions of an act of the legislature of 1871, entitled "An act to provide for vacating streets, alleys and public grounds in towns and villages." Laws 1871, p. 125. This act is carried into the Annotated Statutes, 1907, as section 9015 to 9018, inclusive. Section 9015 authorizes persons desiring to have any street in a village vacated to give notice of his application to the county commissioners for the vacation of such street. Section 9016 authorized the county commissioners to appoint persons to examine such street and report at the next meeting of the board whether any injus-

tice or any inconvenience would be worked by the vacation of such street. The board, upon such report and other testimony presented by the applicant, or others opposing the vacation, is authorized to decide for or against vacation of the street. By section 9017 the board, if convinced that no injustice would be worked by such vacation, is required to order such vacation. It is conceded that, if this act is in full force, the county board was vested with jurisdiction to hear and determine the application. Defendant contends, however, that the act of 1871 was repealed in 1873 by an act of the legislature entitled "An act relating to incorporated towns and villages." This latter act is found in chapter 81 of the General Statutes of 1873. Section 7 thereof provides, among other things, that the board of trustees of each incorporated village or town shall have the power to have the streets opened, cleaned and repaired. Section 29 of the act provides for the repeal of "chapter 53 of the Revised Statutes entitled 'towns,' and all other acts and parts of acts inconsistent therewith." An examination of this act does not disclose that the power to vacate streets was given or attempted to be given to the village trustees, nor do we perceive that the act of 1873 was in conflict with the act of 1871, so that the repealing clause contained in section 27 of the act of 1873 would not operate to repeal the act of 1871. In 1879, however, the legislature passed an act "to provide for the organization, government, and powers of cities and villages." Laws 1879, p. 193. In addition to other powers granted to cities and villages, section 69 authorized cities and villages under the provisions of the act to enact ordinances or by-laws for the following purposes: "Subdivision XXVII. To open, widen or otherwise improve or vacate any street, avenue, alley, or lane within the limits of the city or village, and also to create, open and improve any new street, avenue, alley, or lane." Section 117 of this act provided for the repeal of certain specific acts, and also for the repeal of all acts and parts of acts inconsistent with the provisions of said act.

The plaintiff contends that the power to vacate streets which was given to the county board by the act of 1871 was to be exercised only for the benefit of the private owner, and when no person was injured by such vacation, and that the power to grant relief under these circumstances was not given to the village board of trustees by the act of 1879. We are unable to concur in this view. The power to vacate streets which was granted to the village board of trustees by the act of 1879 is not limited or circumscribed. Its power to vacate streets is full and ample, and reaches to every possible case where a village street might properly be vacated. We think the act of 1879 is clearly in conflict with the act of 1871, and that the repealing clause contained in section 117 of the act of 1879 operated as a repeal of the act of 1871 in so far as it conferred upon county boards the power to vacate streets in incorporated villages, and thereby deprived county boards of jurisdiction to vacate such streets.

The county board properly sustained the objection to jurisdiction and dismissed the application to vacate the street, and the judgment of the district court sustaining the action of the county board was right, and should be affirmed.

DUFFIE, EPPERSON and CALKINS, CC., concur.

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

AFFIRMED.

HENRY FINK, APPELLEE, v. JOHN BUSCH, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,489.

1. **Assault and Battery:** PETITION. A petition which contains averments to the effect that defendant wilfully and maliciously, with force and violence, pushed and shoved plaintiff across a room to a door and out of the door to the ground, a distance of six feet,

and that as a result plaintiff's leg was broken and his knee crushed, and to his damage in the sum of $5,000, states a cause of action for damages for assault and battery.

2. ———: JUSTIFICATION: INSTRUCTIONS. In an action to recover damages for assault and battery, it is not proper for the trial court to submit to the jury the defense of justification, when such defense is neither alleged nor proved.

3. **Damages:** INSTRUCTIONS. An instruction which directs the jury that, if they find for plaintiff, to assess his damages in any sum, not exceeding the amount claimed, which they may find will compensate him for the injuries received, is not prejudicially erroneous, if from other parts of the court's charge to the jury it appears that the jury were to ascertain the amount of plaintiff's recovery from the evidence.

4. ———: PLEADING. Physical pain and mental anguish are proper elements of damage in an action for personal injuries, and need not be specially alleged in the pleading, where the injury complained of is such as to necessarily import physical pain and mental anguish.

5. **Trial:** INSTRUCTIONS. It is not error for the trial court to refuse to submit to the consideration of the jury a defense which finds no support in the evidence.

6. **Appeal:** VERDICT: EVIDENCE. A verdict based upon conflicting evidence will not on appeal be set aside, even though the appellate court might from the evidence have arrived at a different conclusion from that reached by the jury.

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

John M. Macfarland and *W. F. Wappich,* for appellant.

George A. Magney, for appellee.

GOOD, C.

Plaintiff brought this action against John Busch and the Title Guaranty & Trust Company to recover damages for personal injuries inflicted upon plaintiff by the defendant Busch. Plaintiff dismissed his action as to the Title Guaranty & Trust Company, and on the trial recovered a judgment against the defendant Busch, who has appealed to this court.

In his petition the plaintiff alleged that defendant Busch was a licensed retail dealer in intoxicating liquors in the city of Omaha, and as such dealer had given a bond of $5,000 with the Title Guaranty & Trust Company as surety, which was duly approved by the proper authorities; that a copy of said bond was attached to the petition as an exhibit; that plaintiff entered defendant's saloon, and after drinking several glasses of beer became somewhat intoxicated and noisy, and while in that condition he said to the defendant: "If he was running a saloon in a respectable and lawful manner he would not be having women drinking in a wine-room therein"; that thereupon the defendant became angry, and ran from the bar to where plaintiff was and violently pushed and shoved him across the room and out of the rear door and down a flight of steps to the ground; that as a result his right leg was broken and knee crushed, and that the injured leg would always be shorter than the other and the knee stiff, that the only provocation given the defendant was the remark about women in the wine-room; "that said act of throwing the plaintiff out of the rear door and injuring him, as above described, was done wilfully, maliciously and unlawfully, without just cause or provocation"; that plaintiff had been compelled to employ a physician and surgeon at great expense; that he would not be able to do work of any kind for several months and would never again be able to perform manual labor or work at his trade as a tinner. The copy of the bond was not in fact attached to the petition. Defendant Busch admitted that he was a licensed liquor dealer, alleged that plaintiff's injuries were the result of his own carelessness and were not caused by the carelessness or negligence of the defendant, and denied all other allegations of the petition. In his reply the plaintiff denied all the allegations of the answer.

The defendant contends that the action was to recover damages under the Slocumb law, and was based upon the bond, and that under the rule laid down in *Andresen v.*

Jetter, 76 Neb. 520, the petition was not sufficient to entitle plaintiff to recover. The petition nowhere alleges that plaintiff's injuries were received in consequence of the defendant's traffic in intoxicating liquors, nor that defendant's traffic caused or contributed to his injuries. The petition seems to be entirely insufficient to permit a recovery upon the liquor bond. The plaintiff contends that the action is one to recover damages for assault and battery. The petition appears to contain all the allegations that are essential to a recovery in such an action. There are other allegations that are not essential, but they do not have the effect to destroy the force of the allegations which are properly contained in a petition. The action must be construed as being one to recover damages for assault and battery.

The defendant assails a number of instructions given by the court, upon the theory that they were not properly given in an action upon a liquor license bond. The view that we have taken of the petition renders it unnecessary to consider these objections.

The defendant also complains of the second instruction given by the court because it does not submit to the jury the question of justification or the amount of force that the defendant might properly have used in ejecting the plaintiff from his premises. The defendant denied that there was any assault and battery. The issue of justification was not presented by the pleadings. In *Barr v. Post,* 56 Neb. 698, it is said: "In a civil suit for assault and battery, where the answer is a general denial, evidence of justification is inadmissible." In the present action no evidence of justification was offered. The issue was not presented, and the court could not properly submit that issue to the jury.

By the third instruction the court told the jury that, if they were satisfied by a preponderance of the evidence that defendant did not touch or push the plaintiff from the rear door of the saloon, or if they were not satisfied by a preponderance of the evidence that the defendant

did push the plaintiff with force and violence from the rear door of the saloon, they should find for the defendant. The defendant criticises this instruction because it does not properly define assault and battery. The instruction does not define or attempt to define assault and battery, but there is nothing contained in the instruction that is prejudicial to the defendant, and no error is perceived in the giving of the instruction.

The fourth instruction given by the court is as follows: "If you should find for the plaintiff, then you will assess his damages in any sum not exceeding $5,000 which you may find will compensate him for the injuries received; and this will include his loss of time, his pain and suffering and mental anguish, taking into consideration, at the same time, the age of the plaintiff." The defendant contends that this instruction was erroneous because it did not confine the jury to a consideration of the evidence in determining the amount of plaintiff's recovery. In *Hoover & Son v. Haynes,* 65 Neb. 557, an instruction which directed the jury that, "in the event that you find from the evidence for the plaintiff, you will assess in his favor such damages, within the amount claimed, which is $2,500, as you think he has sustained by reason of the facts alleged in his petition," was held erroneous for the reason that it did not confine the jury to a consideration of the evidence in ascertaining the amount of plaintiff's recovery. In commenting upon the instruction the court said: "Instead of telling the jury they are to be governed by the evidence introduced on the trial, they are told to substitute what they think in its stead, and the only limit placed upon what they think is $2,500, and the basis of their thought is not the facts established by the evidence, but the allegations contained in the petition." But we think there is a difference between the instruction given in *Hoover & Son v. Haynes* and the fourth instruction in the instant case. It is a well-established rule of law that the whole of the court's charge to the jury should be considered together. By the second instruction the

court stated to the jury the facts which plaintiff was required to prove to entitle him to a recovery, and informed the jury that, if plaintiff had proved these facts by a preponderance of the evidence, then he would be entitled to recover such sum as he may have suffered by reason of the injury sustained. Taking the second instruction together with the fourth instruction, we think the inference is clear that the amount of damages should be ascertained by the jury from the evidence, and the following language from the fourth instruction, "then you will assess his damages in any sum, not exceeding $5,000, which you may find will compensate him for the injuries received," clearly meant, and was understood by the jury to mean, such sum as they should find from the evidence would compensate the plaintiff for the injuries received. The defendant also complains of the fourth instruction because it permitted the jury to take into consideration pain, suffering and mental anguish, when there was no direct allegation in the petition that plaintiff had suffered any pain or mental anguish. The rule is well established that no allegation of special damage is necessary to recover for mental suffering, where such suffering is allowed as an element of damages, since it is inseparably connected with and attends personal injuries. In *Brown v. Hannibal & St. J. R. Co.*, 99 Mo. 310, it was held that, since physical pain and mental anguish usually and to some extent necessarily flow from or attend bodily injuries, the jury might infer them from the facts alleged, and that, where bodily injuries are alleged in the petition and proved, the plaintiff's physical pain and mental anguish are proper elements of damage, though not stated in the petition. This proceeds upon the theory that damages which are the natural and necessary result of an injury need not be specially pleaded. The instruction properly directed the jury to consider the plaintiff's pain and mental anguish. The defendant further contends that the fourth instruction permitted the plaintiff to recover for future mental pain and suffering, without

limiting the recovery to such future pain and suffering as was reasonably certain to be endured by the plaintiff. We think that a careful examination of the instruction will disclose that it does not refer to any future pain or suffering, but is limited to that which the plaintiff had already suffered. The instruction is not subject to any of the criticisms made and appears to have been properly given.

The defendant complains because the court failed to submit to the jury the issue of contributory negligence. A sufficient answer to this is that, while contributory negligence was pleaded by the defendant, the evidence fails to disclose that there was any contributory negligence or any negligence upon plaintiff's part. It was neither necessary nor proper for the trial court to submit to the consideration of the jury a defense that had no support in the evidence.

The defendant complains that the verdict and judgment are not sustained by and are clearly contrary to the weight of the evidence. Plaintiff testified that he received his injuries substantially in the manner alleged in the petition, and there is but slight corroboration of his testimony. Two ladies, who were passing along a sidewalk just opposite the saloon building, testified that they heard loud talking and sounds as of shuffling or running across the floor of the saloon, and as they reached a point on the walk opposite the rear end of the saloon they heard a man groan; that they went on a few steps, and then returned to ascertain who was injured, and discovered the plaintiff lying upon the ground with his leg broken. Upon the other hand, the evidence shows that about 12 or 14 feet of the rear of the saloon was separated from the front part by a partition, in which there was an archway, and that the rear door of the saloon was some 12 or 14 feet from the partition. There were four or five persons in the saloon at the time of the controversy, all of whom, with the defendant, testified that defendant did not touch or strike the plaintiff; that plaintiff ran out of the saloon at the rear door, and defendant followed him no further

than to the archway in the partition, and that defendant did not get closer than 10 or 12 feet to the plaintiff. It will be observed that the greater number of witnesses as to the assault and battery is upon the part of the defendant. But the weight of the evidence and the credibility of the witnesses are questions for the jury. The jurors and the trial judge saw the witnesses, and had the opportunity of observing their appearance, their fairness and candor, or lack thereof, and their manner of testifying, and were better able to determine what weight should be accorded their testimony than the appellate court. While we might have arrived at a different conclusion from that reached by the jury, that is no sufficient reason for setting aside a verdict that is based upon conflicting testimony. The question of fact was properly submitted to the jury and determined adversely to the defendant. The verdict will not be disturbed by this court.

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

DUFFIE, EPPERSON and CALKINS, CC., concur.

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

AFFIRMED.

ELIAS BALLARD, APPELLANT, V. JOSEPH CERNEY, TREASURER, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,857.

Village warrants drawn in excess of 85 per cent. of the current levy for the purpose for which they are drawn, unless there shall be sufficient money in the village treasury to the credit of the proper fund for their payment, are void, and their payment will be enjoined at the suit of a resident taxpayer.

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

Bartos & Bartos and *Hall, Woods & Pound,* for appellant.

W. G. Hastings, contra.

GOOD, C.

Plaintiff, a resident taxpayer of the village of Wilber, brought this action to enjoin the village treasurer from paying certain particularly described village warrants. The grounds upon which the injunction was sought were: First, no appropriation had been made against which said warrants could be drawn; second, no estimate had ever been made on which to base an appropriation ordinance appropriating money for the payment of said warrants; third, said warrants had been drawn in excess of 85 per cent. of the current levy for the purpose for which they were drawn, and that they were drawn when there was no money in the treasury to the credit of the proper fund for the payment of said warrants. A general demurrer to the petition was sustained, and, plaintiff electing to stand upon his petition, a judgment of dismissal was entered. Plaintiff has appealed.

Plaintiff contends that the warrants were absolutely void, and that injunction will lie to enjoin their payment. Defendant contends that the defects complained of are mere irregularities in the issuance of the warrants, and do not go to the validity of the indebtedness which the warrants represent, and that plaintiff cannot enjoin the payment of warrants if they represent just and valid claims against the city, and also contends that the warrants show that they were drawn for an indebtedness for maintaining village light and water plants, and that as the municipality was authorized by statute to make contracts for the erection and maintenance of such plants and to furnish light and water for a profit, if it saw fit, unappropriated general funds in the treasury might be used for such purpose.

Section 8969, Ann. St. 1907, which is applicable to the government of villages, provides in part as follows: The village board shall have no power to appropriate, issue or draw any order or warrant on the treasury for money, unless the same has been appropriated or ordered by ordinance, or the claim for the payment of which the warrant is issued has been allowed according to the provisions of the charter, and that the corporate authorities shall not add to the expenditures in any one year anything over and above the amount provided for in the annual appropriation ordinance for that year, except as otherwise specially provided. Section 8970 prohibits the mayor and council from making any contract or incurring any expense, unless an appropriation shall have been previously made concerning such expense, except as otherwise specially provided. Construing similar provisions of the statute, this court has held, in *Christensen v. City of Fremont,* 45 Neb. 160, that unappropriated general funds in a city treasury might be used for maintaining a light system, and that for such purposes no general appropriation ordinance was necessary as provided by statute. In *City of North Platte v. North Platte Water Works Co.,* 56 Neb. 403, and *Lincoln Land Co. v. Village of Grant,* 57 Neb. 70, it was held that section 8970 had no application to indebtedness or contracts creating it on account of water plants and their maintenance, as they come within the exception mentioned in the statute, and that no appropriation or estimate was necessary to the creation of such indebtedness. Several of the warrants in this case are drawn on the water fund and electric fund, respectively. The plaintiff failed to allege any facts showing these warrants were not within the exception, and as to those warrants it does not affirmatively appear that an estimate should first be made and an appropriation ordinance passed to authorize their issuance.

The other objection to the issuance of the warrants is a more serious one, viz., that they were issued in excess of 85

per cent. of the current levy and without any money to the credit of the funds on which they were drawn. Section 8962, Ann. St., 1907, provides: "Upon the allowance of claims by the council or trustees, the order for their payment shall specify the particular fund or appropriation out of which they are payable as specified in the annual appropriation bill to be passed in the manner hereinafter provided; and no order or warrant shall be drawn in excess of 85 per centum of the current levy for the purpose for which it is drawn, unless there shall be sufficient money in the treasury at the credit of the proper fund for its payment; and no claim shall be audited or allowed except an order or warrant for the payment thereof may legally be drawn." Under this section of the statute the village trustees were prohibited from issuing or drawing any warrant in excess of 85 per cent. of the current levy for the fund on which it was drawn, unless there was sufficient money in the treasury to the credit of the proper fund for its payment. In *Christensen v. City of Fremont, supra,* it appears that the money was on hand and in the treasury for the payment of the warrants drawn. The provisions of the statute relative to the issuance and payment of the warrants by the counties are quite similar to those regulating the issuance and payment of warrants by villages. *National Life Ins. Co. v. Dawes County,* 67 Neb. 40, was an action brought to recover on county warrants that had been issued in excess of 85 per cent. of the current levy. It was held that warrants so issued were void, and no recovery could be had thereon. In the opinion it is said: "In the case at bar, the objection to the validity of the warrants is not that the officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure with which they might have complied; but the objection is that the officers could not by any manner of procedure issue any valid warrants against the fund in question. They were absolutely prohibited by statute

from so doing." *Bacon v. Dawes County,* 66 Neb. 191, was also an action to recover on county warrants issued in excess of 85 per cent. of the current levy. It was there said: "There can be no doubt that warrants drawn after 85 per cent. of the amount levied for the year is exhausted are not chargeable against the county where there are no funds in the treasury for the payment of the same. * * * If the county board could bind the county in this manner, it could evade all restrictions on the amount of the levy. It follows that the plaintiff cannot recover upon the warrants so drawn." In *Grand Island & W. C. R. Co. v. Dawes County,* 62 Neb. 44, it was held that a three-mill levy to pay warrants that had been issued in excess of the limit of 85 per cent. prescribed by the statute was illegal and the tax was void, and its collection was enjoined at the suit of a taxpayer. *Kelly v. Broadwell,* 3 Neb. (Unof.) 617, was a suit brought by a taxpayer to enjoin the treasurer of South Omaha from paying certain city warrants. It was alleged in the petition that no estimate had been made, no appropriation ordinance passed, and no fund provided against which the warrant could be lawfully drawn. It was there said that, if the record shows that these acts or any of them were not performed, then the warrants are illegal, and are not a lawful charge against the city, and the decree enjoining their payment must be affirmed. Under the statutes above quoted and the decisions of this court, we think the conclusion is irresistible that the warrants in question were issued without any authority of law and are absolutely void, and payment thereof should be enjoined at the suit of a taxpayer.

It follows that the judgment of the district court should be reversed and the cause remanded.

DUFFIE, EPPERSON and CALKINS, 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.

KATE W. DAVIS, ADMINISTRATRIX, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,403.

Negligence: DIRECTING VERDICT. The question of negligence and contributory negligence is usually a question to be submitted to a jury, but where the facts are undisputed, and such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to direct a verdict.

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

C. S. Polk and *O. B. Polk,* for appellant.

James E. Kelby, Halleck F. Rose, Frank E. Bishop and *Fred M. Deweese, contra.*

CALKINS, C.

This was an action against the defendant railway company and one of its locomotive engineers for negligently causing the death of Stephen A. Davis, plaintiff's intestate. At the close of plaintiff's testimony the trial judge directed a verdict for defendants, and from a judgment rendered upon this verdict the plaintiff appeals.

Mr. Davis was in the employ of the owners of a stone quarry which was reached by a spur track about three miles long, leaving the main line of the defendant railroad at Cedar Creek, a station about six miles west of Plattsmouth. He resided in Plattsmouth. Under his employment it was part of his duty to go to the quarry in the morning to bill out loaded cars and have empty cars set for loading. For many months he had been accustomed to leave Plattsmouth on an early morning freight train which carried passengers in its way car. When this train arrived at Cedar Creek it was usually run out on the station siding. There was

a siding to the spur track, upon which cars for the quarry were stored, and it was customary for the train crew with the engine to make up a train for the quarry, Mr. Davis directing what cars he wished taken to the quarry, and the order in which he desired to have them placed. When this train was made up, he usually rode to the quarry on a flat car, the way car being left at Cedar Creek, and sometimes in the cab of the engine, returning in the same manner. On the morning of the accident, two flat cars for the quarry had been run upon the spur track, upon one of which the train conductor and Mr. Davis were standing. The conductor then left the car and went about making up the train for the quarry in compliance with the directions which he had received from Mr. Davis. Mr. Davis remained standing upon a flat car, with twelve-inch boards at the end presumably to keep the stone from slipping off between the cars. The engine was then attached to a coal car having side and end boards about three feet high, and this car was propelled toward the car upon which Mr. Davis was standing, being cut loose from the engine after gaining headway, and left to reach the other cars by its own momentum. This method of shunting cars was described by the witnesses as "kicking in." The head brakeman was riding on the coal car kicked in, and, discovering that the car had not sufficient momentum to reach and couple onto the cars standing upon the track, he jumped off the car and pushed, but was unable to bring it nearer than within one or two feet of the cars standing upon the track. That Mr. Davis was conversant with what the train men were doing appears from the fact that he jokingly remarked to the brakeman that he was not a very good locomotive. After this the train crew coupled to a string of seven flat cars, and kicked them in upon the spur track with the object of coupling them to the coal car before kicked in, and causing that car to couple to the two cars, upon one of which Mr. Davis was standing. The same brakeman was in charge of the string, and, after partially setting the brake upon the car which

was in front of the seven and nearest Davis, he went back to the brake on the next car, but he is uncertain as to which end of that car the brake was on. He was the only eye witness of the accident. He testified that, when the cars approached to within about a car length of the coal car, he saw Mr. Davis, who was standing near the end of the car next to the approaching string. The witness states that he was within two or three feet of the end of the car, but admits that the coal car with the end boards three feet high was between him and Mr. Davis. He testifies that Mr. Davis' attention was fixed upon a memorandum book which he held in his hand, that he called to him to "Look out!" and that Davis looked up and toward him, and then looked down again; that, when the cars struck, Mr. Davis fell off the end of the car, and was run over by the trucks of the coal car and the front trucks of the next car, receiving injuries from which he died in about 20 or 30 minutes. The cars were equipped with automatic couplers, and the evidence discloses that they needed to be brought together with some force in order that the couplings should connect. The testimony of the witness Wagner is that the string of cars was moving at from four to six miles an hour, and that they came together with more force than was used sometimes and less than at others. It also appears from the evidence of this witness that he made no effort to set the brake after he gave the warning to Mr. Davis, and that a prompt setting of the brake at that time would have reduced the momentum of the moving cars and the violence of their impact.

It is contended by the plaintiff that, conceding that the deceased carelessly placed himself in a dangerous position, the evidence justified the submission to the jury of the question whether the brakeman Wagner did not discover his peril in time to avoid the injury by the use of reasonable care on his part. If Mr. Davis had been standing on the track in a place of positive danger, and his conduct had been such as to indicate to the brakeman in charge of the approaching cars that he was oblivious to his

jeopardy, it would have been the duty of the brakeman to use every effort to check the speed of the cars in order to avoid the injury if possible. But in this case Mr. Davis was not in a position of positive danger. He was, as the brakeman knew, accustomed to be upon such cars, and acquainted with the effect of the impact resulting from switching cars. The brakeman had a right to assume that he had gained some skill in the practice of preserving his equilibrium under such circumstances. A person so experienced would naturally meet the danger of such a shock, not by jumping from the car, but by bracing himself so as to resist the tendency to fall. There was nothing therefore in his conduct to indicate to the brakeman that he was unprepared. True it is that the brakeman testified that Mr. Davis was standing within two or three feet of the end of the car, but the admitted facts show that it would have been impossible, on account of his position and the intervening coal car, for the brakeman to see with any degree of accuracy how near the end of the car Mr. Davis stood. It is fair to say that the accident resulted from the deceased's being unprepared to meet the shock, or from his standing so near the end of the car, or both, and we are satisfied that the evidence is insufficient to justify a finding by a jury that the existence of these conditions was apparent to or should have been discovered by the brakeman. Had the question been submitted to the jury upon this evidence and a verdict found for the plaintiff, it would have been the duty of the court to set it aside. In such cases the court should direct a verdict in justice to the parties and the jury, which is put in a false position where it is directed to deliberate upon evidence from which it can reach but one possible conclusion.

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

DUFFIE and EPPERSON, CC., concur.

GOOD, C., not sitting.

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

AFFIRMED.

ROOT, J., not sitting.

MATTHEW H. GLASSEY, APPELLANT, V. JACKSON DYE, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,486.

1. **Assault and Battery:** JUSTIFICATION. Where one has entered the premises of another for the purpose of notifying him of the straying of his stock, and the landowner thereupon orders him to depart, his failure to do so instantly, unaccompanied with any threat or violence toward the landowner, does not justify the latter in using a deadly weapon to eject him.

2. ———: INSTRUCTIONS. Where the plaintiff entered upon defendant's premises to notify him of the straying of his stock, and the defendant thereupon ordered him to depart, and upon his failure to do so instantly assaulted him with a deadly weapon, breaking his arm, it was error for the court to instruct the jury that the defendant might use such force as was necessary in self-defense, or to prevent receiving bodily harm, it not appearing that the plaintiff in anywise attacked or threatened the defendant.

3. ———: ———: MITIGATION OF DAMAGES. Where the plaintiff brought his suit for two alleged assaults pleaded as separate causes of action, and there was no evidence whatever that the plaintiff had at the time of or shortly previous to the second assault used provocative or threatening language toward the defendant, it was error to charge the jury generally that, if they believed from the evidence that plaintiff recently before or at the time of the alleged assault had used provocative or threatening language toward the defendant, they might take that circumstance into consideration in mitigation of damages.

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

Sullivan & Squires, for appellant.

A. S. Moon, contra.

CALKINS, C.

This was a civil action to recover damages for an assault and battery. There was a verdict and judgment for the defendant, and the plaintiff appeals.

1. The plaintiff sought to recover for two assaults pleaded as separate causes of action; the first occurring on the 11th day of July, and the second on the 23d of the same month. In the view we have taken of the case, it will only be necessary for us to consider the facts of the latter date. It appears that the parties were neighboring farmers, between whom there had been considerable friction, and that the defendant had forbidden plaintiff to come upon his premises. On the morning of July 23 the plaintiff found a steer belonging to defendant upon his premises. He got upon a pony and rode to the house where defendant, with a Mr. Lewen, who was working his farm, resided, for the purpose of informing Mr. Lewen of the straying of the steer. His account of the transaction is that he rode up and called to Mrs. Lewen, whom he saw through the screen door, and thereupon the defendant came out with a gun, threatened to kill him, and struck him with the gun, breaking his arm. The defendant's account of the transaction was that the plaintiff rode up to the house, and said a calf had got out of defendant's pasture and was in plaintiff's corral; that thereupon the defendant said to him, "Well, now you have told your story I want you to get out of my yard with your horse"; that he didn't go, and defendant stepped into the house and got a gun, and told him, "I want you to be going"; and that, plaintiff remaining sitting on his horse, the defendant struck at his horse with the gun; that the horse jumped and that he supposed he hit the plaintiff on the arm with the gun. There was no evidence that the plaintiff had said anything except to inform the defendant of the whereabouts of the stock, nor that he did anything to excite or provoke the defendant, unless his failure to depart as soon as defendant thought he should might be

so regarded. The defendant's conduct, according to his own statement, was insulting, violent and unreasonable. The plaintiff had entered the defendant's premises upon a friendly errand, and his failure to depart instantly upon being told so to do did not justify the defendant in using a deadly or dangerous weapon to eject him. *Everton v. Esgate,* 24 Neb. 235; and see note to *Hannabalson v. Sessions,* 93 Am. St. Rep. 250 (116 Ia. 457). The plaintiff asked the district court to instruct the jury to this effect, which it refused to do. The jury were told that defendant had the right in law to use such amount of force as was reasonably necessary under the circumstances to remove the plaintiff from his premises; but they were left the sole judges of what force was necessary, and were given no assistance by the court upon the question as to whether the use of deadly and dangerous weapons under the circumstances was justified in law. The practice of menacing by fire arms is an extremely dangerous one, and its indulgence leads directly to deadly assaults and homicides. It should be resorted to only in extreme cases and as a last recourse in the defense of life and property from serious injury. We think the failure of the court to properly instruct the jury on this question was likely to leave them under the mistaken impression that the law permitted the use of fire arms upon slight pretexts and for trivial causes.

2. The twelfth instruction given by the court on its own motion was as follows: "The jury are instructed that, while the law will not excuse or justify the use of more force than is reasonably apparently necessary to eject an intruder upon the premises of a person or than is reasonably necessary in self-defense and to prevent receiving bodily harm, still the law does make a reasonable allowance for the infirmity of human judgment under the influence of sudden passion or provocation, and it does not require men to reason with mathematical exactness the degree of force necessary to eject a person or to repel an assault. The jury must determine from all the

evidence and from all the facts and circumstances proved on the trial whether he did use more force and violence than was apparently reasonably necessary under the cirstances surrounding this case." This instruction was not applicable to the facts proved. The defendant was not attacked, and therefore nothing was necessary to be done by him in self-defense and to prevent his receiving bodily harm. There was no provocation, and therefore there was no allowance to be made for the infirmity of human judgment under its influence. While in a criminal case the fact that an act was done under the influence of passion may alter its character, we doubt the validity of any such rule applied to an action to enforce a civil liability, for in such case a defendant is to be held liable for the consequences of his act, irrespective of his intention. However that may be, the instruction above quoted should not have been given in this case and under the facts as shown.

3. The sixteenth instruction given by the court told the jury that, if it believed from the evidence that plaintiff recently before the alleged assault had used provocative and threatening language toward the defendant, and at the time by language and conduct aggravated defendant into making an unlawful assault, they might take such circumstance into consideration in mitigation of damages. This instruction was not confined exclusively to either cause of action, but was given as applicable to both. There is absolutely no evidence that the plaintiff used any provocative language on the 23d day of July, nor at any time betwen the 11th day of July and that date. The instruction was therefore misleading and erroneous. *Langdon v. Clarke,* 73 Neb. 516. Since punitive damages cannot be recovered in this state, it logically follows that the rules with regard to the mitigation of such damages, which obtain in states where exemplary damages are allowed, are not applicable here, and the above instruction is erroneous for that reason also. *Mangold v. Oft,* 63 Neb. 397. The remedy by action to recover damages for assaults and batteries, when properly administered, is an

efficient factor in the preservation of peace and order. Men of violent disposition, responsible financially, who care little for fines imposed by magistrates under criminal suits, have a wholesome dread of such actions in jurisdictions where they are properly enforced. They should not therefore be lightly regarded, but the right to recover in such cases should be upheld and enforced.

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

DUFFIE, 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 a new trial.

REVERSED.

DEAN, J., having been counsel below, took no part in this decision.

SINGER SEWING MACHINE COMPANY, APPELLEE, V. OMAHA UMBRELLA MANUFACTURING COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 20, 1909. No. 15,491.

Sales: OPTION. Where the owner of sewing machines places the same in possession of a prospective purchaser on trial and with an option to purchase at a fixed valuation, but with no agreement to pay rent therefor, such transaction does not constitute a conditional sale nor lease within the meaning of section 26, ch. 32, Comp. St. 1907.

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

Richard S. Horton, for appellants.

John E. Quinn, contra.

CALKINS, C.

This was an action in replevin to recover possession of sewing machines seized by the defendant Simpson under a writ of attachment directed to him as constable and commanding him to take the property of the defendant the Omaha Umbrella Manufacturing Company. There was a trial to the court and a finding and judgment for plaintiff, from which defendant Simpson appeals.

It appears that some time in July, 1907, the plaintiff installed the machines in question in the shop of the umbrella company. The agent of the plaintiff and the president of the umbrella company, who, respectively, represented their companies in the transaction between them, both testified that the machines were installed for trial, and that before the levy of the attachment the umbrella company had decided not to accept them and had so advised the plaintiff. It appears, however, that after the installation of the machines, and before the levy, the president of the umbrella company signed a paper which the defendant Simpson characterizes as a conditional contract of sale. It is his contention that this paper, not being recorded, is, so far as it retains any property in the machines in the plaintiff, void as to attaching creditors under section 26, ch. 32, Comp. St. 1907, which provides "that no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid," etc., unless the same be in writing and a copy thereof filed with the clerk of the county. This document, a copy of which is attached to the record, appears to have been a blank printed form prepared by the plaintiff for leasing sewing machines to intending purchasers. The blank left for the description of the goods is filled out with an enumeration of the property in question, which is there stated to be of the value of $214.50. There are suitable blanks left in the printed form for the insertion of the amount of rent and the time and manner in which it is to be paid; but none of these blanks are filled, and as a necessary consequence there is

no rent stipulated nor agreed to be paid. There is a stipulation that the umbrella company is to use the machines with care and keep them in good order. There is no agreement to purchase contained in the instrument; but at the end there is printed the clause: "And it is further agreed that ———— may at any time within said rental term purchase the said chattel ———— and apparatus by paying the above valuation therefor, providing the terms and provisions have been punctually complied with, and then, and in that case only, the rent theretofore paid shall be deducted therefrom."

It is a general rule that, where words are omitted from a contract or contradict one another, the ambiguity is patent. In such cases, explanatory evidence not being admissible, the contract fails. Anson, Contracts (2d Am. ed.), p. *248. The rule as stated by Mr. Stephen (Stephen, Digest of the Law of Evidence, art. 91) is: "If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of a document intended to say." Applying these principles, the contract, as it stands, amounts to no more than an acknowledgment on the part of the umbrella company that it held the machines as the property of the plaintiff, and that it would use them with care and keep them in good order, and an option by the plaintiff to the umbrella company to purchase the same at the valuation given. This is not a sale, contract or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition, and it is not therefore within the provisions of the statute relied upon. *McClelland v. Scroggin*, 35 Neb. 536. The contract established by the oral testimony was not inconsistent with the writing, so construed, and we can discover no error in the finding and judgment of the district court.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

PATRICK KILLEN, APPELLEE, V. OSCAR D. FUNK, APPELLANT.

FILED MARCH 5, 1909. No. 15,481.

Vendor and Purchaser: LAND IN HIGHWAY. While a public highway along and upon agricultural land is an easement, and easements are, as a general rule, incumbrances, yet, such easement tending to increase rather than diminish the value of the estate, the sale of the land upon which the highway exists, without a reservation of the land upon which the easement is located, does not furnish a breach of the contract to convey the whole, and a purchaser of such a tract will be liable to pay the contract price for all the land conveyed, including that portion occupied by the highway.

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

J. A. Grimison, for appellant.

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

REESE, C. J.

This action was instituted in the district court for Colfax county. The suit grew out of a contract by which one Homer B. Robinson sold and conveyed to the defendant all that part of a certain tract of land described as the west half and the southwest quarter of the northeast quarter of section 13, township 18, range 4, in Colfax county, lying north of Maple creek, a stream which bisected the land owned by Robinson. The written contract is set out in the petition and is as follows: "Agreement. Aug. 19, 1905. H. B. Robinson agrees to sell, and O. D. Funk agrees to purchase, the following described lands

in the manner here stated: All of the land in the west half of sec. 13-18-4 laying north of the creek and the S. W. ¼ of the N. E. ¼ of 13-18-4 laying north of the creek at $67.40 per acre. Said land to be paid for as soon as Robinson has it surveyed and notifies Funk. Funk is to receive all rents for 1905, said land to be clear of all incumbrances and title perfect. O. D. Funk. H. B. Robinson." The land was surveyed and reported to Robinson as containing 173.215 acres, for which defendant paid the contract price of $67.40 an acre, amounting to $11,674.69. A deed of conveyance was made in accordance with the contract, and following the description with the clause "all containing 173.215 acres, more or less." Robinson afterwards sold the land south of the creek to plaintiff, and upon a survey being made it fell short of what it was thought to contain; that is, the two tracts did not appear to contain the number of acres known to be included in the whole tract. Attention was then directed to the survey of the tract sold defendant, when it was ascertained that the surveyor had excluded from his estimate of the quantity of land a public highway along the north side of the land sold to defendant. Robinson then assigned his claim against defendant to plaintiff for the purchase price of the portion thus alleged to have been omitted, and for which plaintiff brought this suit, claiming the omission was by mistake of the surveyor. The trial in the district court resulted in a judgment in favor of plaintiff, from which defendant appeals. It is conceded that the question of defendant's liability depends upon whether the public road along and on the margin of the land constitutes such an incumbrance as will, under the contract, exempt defendant from payment for the land included therein. This is the sole question involved.

The case of *Harrison v. Des Moines & Ft. D. R. Co.*, 91 Ia. 114, is cited and relied upon by plaintiff as supporting his right to recover. That suit was in effect an action for a breach of a covenant of warranty in a deed of conveyance; there being public highways upon the land not

excepted from the covenant. It was held that no action could be maintained. The opinion of the court is exhaustive in its reasoning, and holds that "no easement should be regarded as an incumbrance to an estate, which is essential to its enjoyment, and by which its value is presumably advanced"; that by the system of public highways "the landed estates become mutually servient, and in such a way that the easements are mutually advantageous, and the respective land values enhanced thereby"; and that "such an easement is not an incumbrance." While we approve the logic and reasoning in that case, yet we are not unmindful of the fact that it is in direct conflict with many decisions in this country, and is possibly prompted more by a consideration of "the general welfare" than any well-established rule of law. Indeed, the writer of the opinion says it is conceded that the authorities are not uniform on the question (citing cases both ways), and that "both lines of authorities have support from rulings on kindred questions, and nothing less can be said, on authority, than that the question is one of grave doubt."

In this state, as in Iowa, practically the whole course of conveyances has been to treat public roads as an essential and necessary betterment, and not an incumbrance which depreciates the value of the land, and, hence, they have rarely been excepted from covenants in deeds of conveyance, and yet not considered as inimical to full covenants of seizin and warranty. We agree with the decision in the case above cited that no action could be maintained on covenants of seizin and warranty under the circumstances. This being true, there would seem to be no good reason why plaintiff might not recover in this action for the value of the land conveyed, but, owing to an error on the part of the surveyor, not paid for.

The judgment of the district court is therefore

AFFIRMED.

KATHERINE MONTGOMERY, APPELLEE, V. HARRY M. MILLER, APPELLANT.

FILED MARCH 5, 1909. No. 15,531.

Assault and Battery: INSTRUCTIONS: HARMLESS ERROR. In an action by a married woman for damages caused by an assault and battery, it is *held* not prejudicially erroneous, under the issues and evidence submitted, for the court to instruct the jury that they might consider any loss of earning capacity which might have been caused to plaintiff by the assault, if the jury found in her favor.

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

Clark & Allen and *R. C. Ozman*, for appellant.

Talbot & Allen and *Hainer & Smith, contra.*

REESE, C. J.

This is an action to recover damages for personal injuries sustained by plaintiff by reason of an alleged unprovoked assault made upon her by defendant, which she avers consisted of striking, seizing and violently pushing her upon and against certain chairs, furniture and fixtures and upon the floor, whereby she was seriously hurt and injured, both externally and internally; that at the time of the alleged assault she was the wife of George P. Montgomery, with whom she was living, and was then pregnant, and by reason of the injuries inflicted upon her she was caused to miscarry and give premature birth, the child being still-born. The petition contains the usual allegations as to the injury and damage resulting from the alleged assault. The expenses of nurses and physician were also alleged. The answer is a general denial. A jury trial was had, which resulted in favor of plaintiff for the sum of $2,000, and upon which judgment was ren-

dered; a motion for a new trial being overruled. The case is brought to this court by appeal.

There was a direct irreconcilable conflict in the evidence upon every material part of the case, but the jury adopted the plaintiff's version as the true one. The motion for a new trial and the assignments of error in this court include a number of grounds. It is considered necessary to notice but one; the others being deemed to be without merit. It is contended that the giving of the seventh instruction, given by the court upon its own motion, was prejudicially erroneous. It is as follows: "In the event that you find from the evidence and under these instructions in favor of the plaintiff, then you will assess her such damages as will compensate her for the injuries received. You will allow her no speculative damages or damages by way of punishment, but such as are compensatory merely. You may take into consideration the character of her injuries, and whether they were the proximate cause of the miscarriage which she later had, and any physical or mental pains and sufferings occasioned thereby, and any loss of earning capacity which has been caused thereby. In this connection you are instructed that the plaintiff cannot recover for loss of service or companionship which belonged to the husband, or for such incapacities sustained by her which prevented her performing the duties that reasonably devolved upon her in the marriage relation. For such elements the husband alone can recover. On the other hand, should you find for the defendant, you will so say by your verdict."

The particular part of the instruction to which objection is made is that part which directs the jury to consider "any loss of earning capacity which has been caused thereby." The basis of the assault upon this language is that there was no averment nor testimony showing the extent of the earning capacity of plaintiff before the alleged injury. It is alleged in the petition that by reason of the assault and resulting injury she "became permanently sick, lame and disordered, and has since been unable to attend her ordi-

nary duties and business, and was compelled to employ the services of nurses and physicians," etc. The evidence as to the earning capacity of plaintiff, or what she was engaged in before the date of the alleged assault, is very meager. Her husband testified that at that time one person was boarding with them, and on account of her sickness and inability to perform her duties the boarding of that person had to be discontinued, and plaintiff testified to having gone to the theater (defendant's place of business) to sell tickets for him. Neither one was cross-examined upon these subjects. Section 4, ch. 53, Comp. St. 1907, provides that the earnings of any married woman from her labor or services shall be her sole and separate property. This, when considered in the light of all the evidence in the case, would probably be sufficient to excuse the use of the language in the instruction. However, we do not think the phrase made use of could work any prejudice to defendant, and this is especially true, since the jury were so clearly instructed that she could not recover for loss of service to which the husband was entitled, or for such incapacities as would prevent her performing the duties that reasonably devolved upon her in the marriage relation. Any other holding, under the law of this state, would be too narrow and technical to admit of justification. We find no prejudicial error in the instruction.

One of the errors assigned, both in the motion for a new trial and in the assignments here, is that the verdict is excessive. This is not discussed in the briefs, and was not argued at the bar, and must therefore be considered as waived.

The judgment of the district court is

AFFIRMED.

HARMON G. LAYTON, APPELLEE, V. SARPY COUNTY, APPELLANT.

FILED MARCH 5, 1909. No. 15,571.

Counties: DEFECTIVE BRIDGES: DAMAGES. Where a steam traction engine is injured by reason of defects in a bridge upon the public highway for which a county is liable in an action to recover therefor, plaintiff can prove the costs of repairs; the amount of recovery being only the actual cost value of such necessary repairs.

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

Ernest R. Ringo, for appellant.

H. Z. Wedgwood, contra.

REESE, C. J.

This is an appeal from the judgment of the district court for Sarpy county. Plaintiff was the owner of a traction engine, which was being driven by him along a public road in that county. In doing so, he had occasion to cross a bridge over one of the streams in the county, when the bridge broke down, and the engine was precipitated into the bed of the stream some ten or eleven feet below, and injured by having some of its parts broken. The suit is for damage to the engine. The trial jury returned a verdict in favor of plaintiff, upon which judgment was rendered, and from which the county appeals. There is no contention that any of the instructions given to the jury were erroneous, or that the case was not fairly submitted to the jury in that regard.

The only contention is that there was no competent evidence as to the amount of damages, and that the court erred in permitting evidence as to what it cost to make the repairs necessary for the restoration of the engine to its original condition. The right of action is based upon

the provisions of section 6197, Ann. St. 1907, which renders counties liable for damages to the owners of property injured by reason of defects in highways and bridges within the county in which the highway or bridge is located. Upon the trial of the case the plaintiff, over the objections of defendant, was permitted to prove the cost or expense of restoring the injured parts of the engine to their original condition so as to make it serviceable, substantially as before the accident, rather than by showing the extent of the diminution in value of the property injured. It is to be conceded that the method of proof of damages contended for by defendant would ordinarily be competent. But the question arises: Is that method of proof exclusive? In case the property is destroyed, or so nearly so as to render its repair, to the extent of restoring it to the use to which it was originally designed, impossible, or even unreasonable, we apprehend the rule contended for would have to be applied. This rule, however, may not be the exclusive or even the proper one under some circumstances. In *McClure v. City of Broken Bow,* 81 Neb. 384, where a mill property was damaged, it was held that proof of the fair and reasonable cost and expense, if any, of restoring the property to the same condition as it was before the injury was permissible. The same rule was announced in the case of injury to personal property caused by a collision between two vehicles, in *Travis v. Pierson,* 43 Ill. App. 579. In *Berry v. Campbell,* 118 Ill. App: 646, it was held that an instruction giving the rule here contended for by defendant was erroneous, although harmless in that case, and that the correct measure of damages in cases of this kind is the reasonable cost of making the repairs. This was held to be the correct rule in *Overpeck v. City of Rapid City,* 14 S. Dak. 507, and a number of cases are cited in the opinion sustaining the decision.

There was no error in the ruling of the district court, and its judgment is

AFFIRMED.

ST. VINCENT'S PARISH, APPELLEE, V. WILLIAM MURPHY, APPELLANT.

FILED MARCH 5, 1909. No. 15,577.

1. **Religious Societies:** USE OF PROPERTY: INJUNCTION. When property has been acquired by a church organization for the purpose of religious worship in accordance with the doctrine and discipline of a particular denomination, persons claiming under such denomination, and not pretending in any way to hold adversely, or to have any title of their own, except as members thereof, may be enjoined from using such property contrary to the determination of the governing authorities of such denomination.

2. ———: GOVERNMENT: REVIEW BY COURTS. Where a local church or parish is a member of a general organization, having general rules for the government and conduct of all of its adherents, congregations and officers, the final orders and judgments of the general organization through its governing authority, so far as they relate exclusively to church affairs and church government, are binding on the local associations and their members and officers, and courts will not ordinarily review such final orders and judgments for the purpose of determining their regularity, or accordance with the discipline and usages of the general organization.

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

R. S. Norval, J. J. Thomas and *M. D. Carey,* for appellant.

A. J. Sawyer and *C. E. Holland, contra.*

BARNES, J.

St. Vincent's parish, a religious corporation, brought this suit in the district court for Seward county against the defendant, William Murphy, who, it is alleged, is a deposed priest of the Roman Catholic church, to restrain him from exercising any of the rights, faculties or privileges of a priest or rector in or upon the church property of the plaintiff, and from hindering, interfering with or in

any manner preventing one Francis A. O'Brien, the regularly appointed priest of said parish, from performing his duties as rector thereof, from in any manner interfering with divine worship in the church of said parish, and from continuing to use, or from attempting to use, the church property or any part thereof. A trial resulted in a decree for the plaintiff, and the defendant brings the case here by appeal.

His first contention is that the plaintiff's petition does not state facts sufficient to confer jurisdiction of this case upon the district court for Seward county. A like proceeding was before this court in *Pounder v. Ashe*, 44 Neb. 672, where it was held that, where charges have been preferred against the minister of the gospel, and he has been deposed from such ministry, and expelled from membership in the church by the ecclesiastical tribunal having jurisdiction of such charges, the courts will recognize such judgments when regularly brought to their notice, and will enjoin the one against whom they were rendered from further acting in the capacity of a minister or a member of the particular church organization, and will enjoin him from excluding from the church building and property a presiding elder of the church, or any of its members in good standing who desire to worship therein. This rule was approved and followed in *Bonacum v. Harrington*, 65 Neb. 831. That case was very like the one at bar. The defendant, Harrington, who was officiating as priest in the parish of Orleans, Nebraska, was expelled by the bishop of Lincoln from the church and from that parish. He refused to surrender the church property, and the bishop brought a suit in equity to restrain him from interfering with said property, and holding possession thereof to the exclusion of the parish priest who had been appointed to succeed him. The district court denied the injunction, but this court on appeal reversed the judgment and remanded the cause, with directions to the district court to enter a decree enjoining the defendant as prayed, and make the injunction perpetual. It will thus be seen

that we have already determined this question adversely to the defendant's contention. We find that this rule is sustained by the great weight of authority in this country, and the objection to the jurisdiction of the district court was properly overruled.

Defendant's second contention is that the district court erred in refusing to dismiss this action. The ground of his motion to dismiss was that the trustees of the parish were not duly notified to attend the meeting which authorized the bringing of this suit. It appears that the business affairs of the plaintiff are controlled and administered by a board of trustees, consisting of the bishop of Lincoln, the vicar-general of the diocese, the rector for the time being of the parish of St. Vincent, and two laymen, whose election must be confirmed by the bishop; that at the meeting called for the purpose of considering the matter of the commencement of this action there were present the bishop of Lincoln, the vicar-general of the diocese by proxy, the Reverend Francis A. O'Brien as rector of the parish, and one of the two laymen who had been regularly elected as a trustee. It also appears that one of the lay trustees was not notified of the meeting because he had withdrawn from the regular church organization and had become one of defendant's adherents. It therefore appears that a majority of the regularly constituted board of trustees was present and took part in the proceedings of the meeting which authorized the commencement of this action. So we are of opinion that the district court properly refused to dismiss the action upon the defendant's application therefor.

We come now to consider the principal or main contention presented by the record. It appears that the bishop of the diocese of Lincoln on several occasions prior to the 22d of January, 1901, cited the defendant to appear before the diocesan curia at Lincoln, which is the ecclesiastical court of the Roman Catholic church having jurisdiction of all matters of church discipline, to show cause why he should not be proceeded against for contumacy and other

violations of the laws, ordinances and regulations of said church; that on each of said occasions the defendant, by letter only, challenged the right of the bishop to preside over said court on the trial of the charges preferred against him, and he alleges that he forthwith prosecuted his challenge and appeal in each of said citations to the sacred congregation of the propaganda fide at Rome. It also appears that the eccelesiastical court proceeded to hear and determine the charges against defendant, and at one time suspended the defendant from the sacred ministry and the performance of each and every ecclesiastical function for the space of one month. It further appears that the defendant was again cited to appear before said ecclesiastical court on the 22d day of January, 1901, to show cause why he should not be excommunicated for his frequently repeated violations of the rules, regulations and laws of the Roman Catholic church, and for contumacy toward the regularly constituted authorities thereof; that said citation contained a full and complete statement of the charges preferred against him; that defendant failed and refused to appear before said court, and again by letter objected to the jurisdiction of the bishop to preside over said court upon the proposed trial, and informed the bishop that he would again renew his challenge and appeal to Rome; that on the said 22d day of January, 1901, the defendant was tried upon the charges thus preferred against him, in his absence, and a decree, judgment or order of said court was rendered against him excommunicating him from the Roman Catholic church and excluding him from the diocese of Lincoln.

It is claimed by the defendant that his so-called appeals to Rome ousted the ecclesiastical court of jurisdiction; that the bishop had no right thereafter to proceed against him; that his appeal is still pending and undetermined; and that therefore he is still entitled to officiate as rector in St. Vincent's parish to the exclusion of the rights of his regularly appointed successor. It is conceded that the diocesan curia had jurisdiction of the subject matter of

the charges preferred against the defendant, and we find in the record sufficient competent evidence to show that whatever appeals the defendant has attempted to prosecute to the propaganda fide at Rome the same have been wholly disregarded, rejected and dismissed by that tribunal. The record thus presents for our consideration a question which we will not attempt to determine. It is sufficient for us to know that the ecclesiastical court of the Roman Catholic church, having jurisdiction over the defendant and of the charges preferred against him, has pronounced upon him a judgment of excommunication and expulsion which deprives him of the right to use or occupy the church property in question.

One of the first cases involving this question was that of *Shannon v. Frost,* 3 B. Mon. (Ky.) 253. In that case two discordant factions of the Baptist church were litigating their respective claims to the use of a house of public worship erected by that church upon ground conveyed in trust for its use and benefit, and it was there said: "This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. And these we must decide as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. For every judicial purpose in this case, therefore, we must consider the persons who were expelled by a vote of the church as no longer members of that church, or entitled to any rights or privileges incidental to or resulting from membership therein."

In the case of *Watson v. Jones,* 13 Wall. (U. S.) 679, *Shannon v. Frost, supra,* was cited with approval. The case was one growing out of a schism which divided the congregation of a Presbyterian church, and which was brought to the court to determine the right to the use of the property acquired for church purposes. It was said: "In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the general assembly over all. These are called, in the language of the church organs, 'judicatories,' and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases. In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." The rule there announced has been followed in *Chase v. Cheney,* 58 Ill. 509, in *Lutheran Evangelical Church v. Gristgau,* 34 Wis. 328, and by this court in *Pounder v. Ashe, supra,* and *Harrington v. Bonacum, supra.* We think we should adhere to this rule. It seems to be founded on sound reason, and has become the settled law of this state.

This disposes of all of the defendant's contentions, and

we are therefore of the opinion that the judgment of the district court was right, and it is in all things

AFFIRMED.

REESE, C. J., dissents.

IN RE ELMER C. HAMMOND.
IN RE BYRON G. BUTTON.

FILED MARCH 5, 1909. NOS. 16,063, 16,064.

1. **Depositions.** Sections 966 and 967 of the code do not apply to the taking of depositions before justices of the peace, but section 356 *et seq.* control in such matters.
2. **Habeas Corpus:** CONTEMPT. Irregularities in proceedings before justices of the peace committing a recusant witness cannot be reviewed upon habeas corpus. It is only when the proceedings are void that this writ can be of any value.
3. **Constitutional Law:** CONSTRUCTION. The language of the constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption, and the course of ordinary and long-settled proceedings according to law.
4. **Depositions:** JUSTICE OF THE PEACE: AUTHORITY. Statutes authorizing justices of the peace to take depositions and to punish persons who disobey subpœnas or refuse to answer proper questions are within the provisions of section 18, art. VI of the constitution, providing that justices of the peace shall "have and exercise such jurisdiction as may be provided by law."
5. ———: CONTEMPT. A refusal to answer such improper questions as would constitute abuses of process is not a contempt and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court.

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

Flansburg & Williams, for petitioners.

Charles A. Robbins, contra.

LETTON, J.

This is an application for a writ of habeas corpus. The petitioner was detained by virtue of an order of commitment issued by Minor S. Bacon, a justice of the peace in and for Lancaster county, which commanded the keeper of the jail of that county to receive him "and him there safely keep until he shall submit to be sworn and testify and to give his deposition in the case entitled George W. Herr, Plaintiff, v. Button Land Company *et al.*, Defendants, now pending in the district court for Lancaster county, Nebraska."

It appears that a subpœna was served upon the petitioner requiring him to appear and give his deposition in that case on January 19, 1909, before Justice Bacon; that he demanded and was paid his fees for one day's attendance, and that he failed to appear in response to the subpœna, whereupon an attachment was issued by the justice and delivered to a constable, who arrested and brought him before the justice forthwith. He was then requested by the justice to be sworn and testify, but he refused, saying that, acting upon the advice of counsel, he would refuse to be sworn and would refuse to testify in the case. Certain questions were then asked by the attorney for Herr, which the witness refused to answer. By agreement the hearing was adjourned until the next day. Like proceedings were had as to Byron G. Button. On that day an answer was filed, alleging that the taking of the depositions was in bad faith and for the purpose of annoying the defendants in the case and was a mere fishing for testimony; that their testimony was not material nor necessary to the plaintiff's cause of action; that the defendants are residents of Lancaster county, wherein the action is pending; that they have no intention of removing therefrom; that other witnesses were named in the notice to take depositions, but that none of them were examined or sworn; that after the witnesses were arrested and brought before the examining officer, the plaintiff

Herr and his attorney abandoned the complaint, charging disobedience to the subpœna, and undertook while they were under arrest to compel the defendants to be sworn and examined under the notice to take depositions, and that the complaint to which this answer is filed is a different complaint and is for a different offense from that for which these defendants were arrested. It is further alleged that the proceeding is void, and in violation of that provision of the federal constitution which provides that no person in a criminal case shall be compelled to be a witness against himself. The record then shows that the witness "having refused to be sworn, and having refused to testify by deposition upon being requested so to do by the court, and the defendant having filed his showing why he should not be punished for contempt, the court finds the defendant Elmer C. Hammond guilty of contempt of court," and judgment was rendered committing him to the county jail, "there to remain until he shall submit to be sworn and testify and to give his deposition in the case." A warrant of commitment was thereupon issued and the petitioner committed to jail.

A number of questions are discussed in the brief of the petitioner. His first contention is that under sections 966 and 967 of the code a justice of the peace has no power to do more than impose a fine of $5 for refusal to be sworn or to answer questions. We are of the opinion that these sections do not apply to the taking of depositions, but that sections 356 *et seq.* control.

It is next contended that, when a witness is brought before the court by attachment for refusal to obey a subpœna, he can only be tried and punished for that contempt, and that a court has no power to propound questions to him and punish for a refusal to answer the questions. This, however, is the ordinary practice when a trial is in progress, leaving the contempt in refusing to obey the subpoena to be dealt with later, and we see no objections to the practice. The order of procedure is within the court's discretion.

He next contends that the justice of the peace in taking a deposition does not act judicially; that he is a mere ministerial officer, and has no power to adjudge a person guilty of contempt and commit him to jail, and that a law conferring such power violates section 1, art. VI of the constitution of the state. Lastly he urges that a refusal to answer improper and irrelevant questions is not a contempt of court, and that it is an abuse of process to take depositions for the purpose of discovery. Several of the points raised by the petitioner have already been considered by this court, and disposed of adversely to his contentions, in other cases. In *Dogge v. State,* 21 Neb. 272, certain witnesses who had been subpœnaed to appear before a notary public for the purpose of having their depositions taken failed to appear, an attachment was issued, and the witnesses arrested, taken before the notary, and one of them required to be sworn and give testimony, which she refused to do. She was then found guilty of contempt and ordered to be committed to prison until she should consent to testify. It was urged in that case, as in this, that the witness was a resident of Lancaster county capable of being present at the trial, that she had no intention of being absent from the county, that she was an adverse party in the case, and there was no provision of law whereby she could be compelled to testify before the time of the trial. She further contended that the notary public had no power to commit her, for the reason that he had no judicial powers. As to the first point, it was decided that "it was the intention of the legislature, in the enactment of the chapter on evidence, to remove every barrier to discovery of truth, where the parties to the action have equal opportunity to testify. And, where necessary, either party may call the other to testify as to facts exclusively within his knowledge, provided the questions are not privileged." On the second point, it is held that the provisions of section 1, art. VI of the constitution, providing, "The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of

the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns," do not limit the exercise of all judicial functions to the courts named; that it was not the intention of the framers of the constitution to prevent the exercise of all judicial functions except by these courts; and that since these statutory powers were in existence before the adoption of the constitution they were continued in force by section 4, art. XVI thereof.

In *Courtnay v. Knox,* 31 Neb. 652, it was held that a notary had no power to punish a person, not a witness, for contempt in using flagrant and profane language in the presence of the notary and witnesses then present to give testimony, since no such power was conferred by the statute. The conclusion is reached that the notary's powers are limited to the provisions of the statute, and "that he borrows no judicial power, in the taking of depositions, from the dignity of his employment or the necessities of his case." *Olmsted v. Edson,* 71 Neb. 17, was an action against a county judge to recover damages for false imprisonment. The petition alleged that the plaintiffs were husband and wife, and residents of Webster county; that an action was brought against them in the district court for that county; that a notice to take their depositions in that case at the office of the defendant county judge was served on them, and that a subpœna was issued and served requiring them to appear and give testimony. The plaintiffs appeared before the county judge and made known to him that they were residents of Webster county, that they have no intention of absenting themselves therefrom, either temporarily or permanently; that neither of them are either sick, aged or infirm, so as to interfere with them being present and giving testimony at the trial of the case; that the attempt to take their deposition was not in good faith, but for the purpose of harassing and vexing them; that they were husband and wife, and that they each objected on that ground to either of them being sworn or to testify as witnesses, and that they thereupon refused to

give their depositions; that the county judge entered an order finding them guilty of contempt in refusing to give their depositions and committed them to jail, from which they were afterwards discharged by habeas corpus. In the opinion it is said: "The proper and orderly thing for them to have done was to have taken the oath as witnesses and if, by the questions propounded, it appeared that the answers would constitute evidence by the one against the other, to have then made the proper objections which, undoubtedly, would have been sustained. * * * Plaintiffs' contention that such jurisdiction was ousted by a showing that none of the grounds enumerated in section 372 of the code for using the depositions on the trial of the case existed at the time it was sought to take them is untenable. That section is not a limitation on the right to take depositions, but on the right to use them on the trial of the case." *Wehrs v. State,* 132 Ind. 157; *In re Abeles,* 12 Kan. 451.

The facts in *In re Butler,* 76 Neb. 267, were that the petitioner had been imprisoned by a notary for failing and refusing to obey a subpœna requiring him to appear before the notary to take his deposition. Under section 358 of the code the officer can impose no greater punishment than a fine of $50 for refusing to obey a subpœna, and the court held that since this is the full power given by the statute in such a case the notary had exceeded his power, that his act was void, and the petitioner was illegally held, and he was set at liberty. It was also said that notaries in such matters are not a court and do not exercise judicial functions, but derive their powers solely from the statute. In *DeCamp v. Archibald,* 50 Ohio St. 618, the same contention was made as in this case with reference to the powers of a notary public in committing a witness to jail for refusing to answer questions. The sections of the revised statute of Ohio, which are mentioned in the opinion, contain identical provisions with those of the Nebraska code. The supreme court of Ohio

was of the opinion that the term "'judicial power' * * * does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between parties. Power to hear and determine matters more or less directly affecting public and private rights is conferred upon and exercised by administrative and executive officers. But this has not been held to affect the validity of statutes by which such powers are conferred"—citing *Dogge v. State,* 21 Neb. 272, *In re Abeles,* 12 Kan. 451, *Ex parte McKee,* 18 Mo. 599, and distinguishing the case of *Kilbourn v. Thompson,* 103 U. S. 168, one of the cases relied on by petitioner.

The supreme court of Kansas at first held in *In re Abeles, supra,* that a notary had power to commit for refusal to testify, but in *In re Huron,* 58 Kan. 152, 36 L. R. A. 822, by a divided court it overruled that case and held that the statute purporting to confer such power is invalid. The opinion announcing this conclusion is written by Johnston, J., in opposition to his own views, which are also stated, and which are in line with *Dogge v. State, supra.* In a note to *Farnham v. Colman,* 1 L. R. A. (n. s.) 1135 (19 S. Dak. 342), a number of cases are collated, and it is shown that at common law only courts of record had power to punish for contempt, and that the power of a justice of the peace to punish a witness for contempt for refusing to be sworn and refusing to testify had its origin in a statute of Philip and Mary. The practice has long been followed in this country under authority of statutes. The power has its source in the statute and exists no further than thus granted. This is the point really decided in *In re Kerrigan,* 33 N. J. Law, 344, cited by petitioner, where a recorder was held to have no general power to punish for contempt, not being a court of record, and that magistrates and others empowered to act in a summary way must act within the powers specially conferred. While admitting the persuasiveness of an opinion by a court of the standing of the courts of New York, we believe that under the laws and constitution of this state we

must decline to follow *People v. Leubischer,* 34 App. Div. (N. Y.) 577, if inconsistent with the views expressed here, though as to this we are somewhat doubtful when the whole opinion is examined. The gist of that case seems to be that a commissioner of the court of another state is not an officer empowered to imprison for contempt, and is not an officer connected with the administration of justice in New York state.

If the language of the constitution were to be construed as strictly as petitioner contends, no judicial powers or functions could be exercised by a judge at chambers or by a county judge, except when in session as a court, for "district courts" and "county courts" alone are mentioned in the section which he quotes. But the words of the constitution are to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption, and the course of ordinary and long-settled proceedings according to law. Whether the special power given by statute to fine or imprison recusant witnesses is the exercise of a judicial function or of judicial power we think really is merely a matter of academic definition. The point to determine is: Does it violate any provision of the fundamental law? It is one of the long-established means or instrumentalities adopted to aid in securing justice, and must have been in the minds of the makers of the constitution as much as the fact that much of the action of a county judge or of a district judge in chambers is of a judicial nature. *DeCamp v. Archibald,* 50 Ohio St. 618. But, in any event, section 18, art. VI of the constitution, provides that justices of the peace "shall have and exercise such jurisdiction as may be provided by law." The power to take depositions and commit for refusal to testify is expressly conferred by statute. We think that, construing the two sections together, there is no constitutional restriction upon the legislative right to enact the statute or upon the officer to exercise the power. The language of this section is as broad as of that giving judges of courts of record

such jurisdiction as may be provided by law. Constitution, art. VI, sec. 23.

The petitioner complains that the taking of the deposition is not in good faith, and that the questions asked him would require the disclosure of his private business. The record does not disclose that this has been attempted, but, even if it were, it might be proper under the issues, of the nature of which we are not informed. If it should be sought to perpetrate a wrong or to abuse the process of the court or officer clearly for an unjustifiable purpose, we think the witness might lawfully refuse to answer, but this question is not presented here, since the petitioner refused to be sworn or to testify at all. While objections to testimony cannot be ruled upon by the officer, yet it cannot be permitted that a witness may be compelled to answer questions seeking to elicit matters which the determination of the issues of the case did not require, or which pertain to his private business or affairs, and are not proper subjects of inquiry in the case. A commitment of a witness for properly protecting himself from an illegal inquisition would not be upheld. But a refusal to be sworn may properly be punished, as may also a refusal to answer proper interrogatories. *Ex parte Jennings,* 60 Ohio St. 319; *Ex parte Schoepf,* 74 Ohio St. 1; *Ex parte Mallinkrodt,* 20 Mo. 493; *Ex parte Krieger,* 7 Mo. App. 367; *Ex parte Abbott,* 7 Okla. 78. In the case *In re Davis,* 38 Kan. 408, and in *In re Cubberly,* 39 Kan. 291, decided while the rule of the *Abeles* case was the law of that state, it is held that an officer has no power to commit a witness for refusal to give a deposition, when it appears that it is not taken in good faith, but merely to harass and annoy the adverse party or to fish out evidence in advance of the trial. In this state a speedy remedy for the abuse of the power granted is conferred by section 359 of the code, which provides that a witness imprisoned by an officer before whom his deposition is being taken may apply to a judge of the supreme court, district court or probate court, who shall have power to discharge him

if it appear that his imprisonment is illegal. This affords a summary method of review by a judicial officer, and by another section of the statute such power may be exercised at chambers. A refusal to answer such questions as would constitute abuse of process is not a contempt and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court.

Under the facts shown in the record, the justice had the right to issue the subpœna to compel the petitioner to appear. On his refusal he had a right to issue an attachment and have him brought into his presence at the time and place specified in the notice to take depositions. He then had a right to request him to be sworn, and upon his contumacious refusal so to do the statute expressly gave him the power to imprison him until he would comply with the order of the court.

The petitioner seems to be held under a lawful commitment, and the writ is therefore

DENIED.

SECOND NATIONAL BANK, APPELLEE, v. SNOQUALMIE TRUST COMPANY, APPELLANT.

FILED MARCH 5, 1909. No. 15,508.

1. **Notes:** BONA FIDE PURCHASERS. Defendant's board of directors, by resolution, authorized the execution of the corporation's note to D., its president. The note was prepared and signed in the corporation name by the secretary alone and delivered to D. The instrument did not indicate that D. was interested in, or an officer of, defendant. D. secured said note by misrepresentations and could not have recovered thereon. The contents of defendant's articles of incorporation were not disclosed, and but two sections of its by-laws were introduced in evidence, and they do not specifically authorize any officer or officers of the corporation to execute its promissory note. Before maturity, in due course of trade, for value and without notice, other than the face of the instrument would import, plaintiff purchased said note in

good faith from D.'s indorsee. *Held*, That it was not void in plaintiff's hands.

2. ———: ———. "An indorsee of a negotiable instrument, who takes it before maturity in part payment of a preexisting debt, and credits it thereon, is a purchaser for value in the due course of business." *Smith v. Thompson*, 67 Neb. 527.

3. **Trial:** DIRECTING VERDICT. The evidence is undisputed that plaintiff purchased the note in suit in good faith, in due course of trade, before its maturity, for a valuable consideration, and without notice of any infirmities therein. *Held*, That the court properly instructed the jury to return a verdict for plaintiff.

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

M. F. Harrington, T. J. Doyle and *G. L. De Lacy*, for appellant.

Burkett, Wilson & Brown, contra.

ROOT, J.

Action by the indorsee of a promissory note. The district court directed a verdict for plaintiff, and defendant appeals.

1. Prior to 1905 defendant was organized as a corporation under the laws of Arizona. Its articles of incorporation were not introduced in evidence, but the secretary testified that it was formed for the purpose of financing a mining enterprise whose property was situated in Washington. L. M. Disney was interested in, and vice-president of, the mining company, and president of defendant. T. J. Doyle was secretary of the trust company, which maintained offices in Lincoln, Nebraska. Disney had made a claim against defendant for salary or commissions for something he had, or claimed to have, done in its interests, and also offered to sell it certain stock of the mining company that was in fact owned by defendant. April 13, 1905, the defendant's board of directors passed the following resolution: "It was moved and carried that the proposition of L. M. Disney to sell this company

6,000 shares of mining stock for fifteen hundred dollars, he releasing all claim for salary, except expenses, and charges prior to January 1, 1905, be accepted, that he be paid five hundred dollars, and the remainder of one thousand dollars be paid him July 1, 1905, and that a note be given for the same bearing interest at the rate of six per cent." Thereupon the instrument in suit was executed. It is as follows: "$1,000. Lincoln, Neb., April 14, 1905. On or before July 1 after date we promise to pay to the order of L. M. Disney one thousand and no-100 dollars, at Lincoln, Neb. (Signed) Snoqualmie Trust Co., By T. J. Doyle, Sec." Defendant's seal was stamped upon the writing. This instrument was transferred by indorsement to the payee's wife, and by her sold and indorsed to plaintiff on the 19th of April, 1905. The mining stock transferred by Disney as aforesaid actually belonged to the corporation, so that, independent of the release of Disney's claim for salary or commission, there was no consideration for the instrument, and it was procured by the misrepresentation of the payee. Defendant alleged that under the laws of Arizona and of Nebraska, and by virtue of its articles of incorporation and by-laws, its president only, or, in case of his disability, the vice-president, had authority to execute said note; that the note had never been executed by it and was not its obligation; that the impression of defendant's seal thereon was a forgery imprinted by said Disney after the instrument was signed, and constituted a material change thereof. That plaintiff had notice of the facts and was not an innocent purchaser. Mr. Disney's testimony was not offered.

2. Neither the laws of Arizona nor defendant's articles of incorporation were introduced in evidence, and but two sections of its by-laws, those relating to the duties of the president and secretary. Neither officer is in terms authorized to execute promissory notes on defendant's account or in its name. The president is vested with power to sign warrants on the treasurer for the payment of money, to sign deeds of conveyance, and to discharge such

other duties as are ordinarily and usually performed by the president of a private corporation. The secretary is made the custodian of the corporate seal. So far as the record discloses, none of the officers, nor all combined, were specifically authorized to execute a negotiable instrument in its name. However, the power to contract necessarily involves the power to create a debt, and, as said by Mr. Justice Gordon in *Watt's Appeal,* 78 Pa. St. 370, 391: "A corporation, without such power would be a body without life, utterly effete and worthless." *Richmond, F. & P. R. Co. v. Snead & Smith,* 19 Grat. (Va.) 354, 100 Am. Dec. 670. And the record being silent as to the agencies provided by defendant for the exercise of this very essential function, we must look to the facts in the particular instance unenlightened by information concerning its usual course of business in such transactions. The seal to which so much importance is attached by defendant is not controlling, because its use was not necessary to constitute the instrument the obligation of defendant. *Crowley v. Genesee Mining Co.,* 55 Cal. 273. Nor does defendant plead that the seal was attached after the instrument was delivered, but "after the signing of said note," a proper time for such an act. Mr. Doyle the secretary, did testify that he did not stamp the corporate seal on the paper, and that he does not know how, when or where such impression was made, but there is absolutely no proof that the payee is responsible for what was done in this regard; nor does it appear that the vice-president or some director of defendant did not perform that act. The board of directors had authorized the execution of the note, and in August following, after they had discovered Disney's fraud, a meeting was held in Mr. Doyle's office, and a lengthy resolution adopted, wherein it was determined to repudiate the note in suit, not because it was executed without authority, but for the reason that defendant had never received any consideration therefor. *Prima facie* at least the note was the obligation of the corporation. *Reeve v. First Nat. Bank,* 54 N. J.

Law, 208, 33 Am. St. Rep. 675; *Merchants Nat. Bank v. Citizens Gas Light Co.,* 159 Mass. 505, 38 Am. St. Rep. 453; Joyce, Defenses to Commercial Paper, sec. 80.

3. Defendant urges that plaintiff is not a *bona fide* holder of the note sued on. The wife of the payee was related to several of the stockholders and some of the officers of plaintiff. She had a separate estate which she managed, and was indebted to plaintiff on her promissory note for $5,500. She indorsed the note in suit and delivered it to plaintiff and received a credit of $1,000 on her obligation to the bank. The cashier, with whom, so far as the record discloses, she dealt exclusively concerning this transaction, testified positively that he did not know that L. M. Disney was interested in, or an officer of, defendant; that he did not know of any defense to the note and took it for the bank in good faith; that he was told that the note had been made for salary or commission. The credit on Mrs. Disney's obligation was the payment of a valuable consideration by plaintiff. *Martin v. Johnston,* 34 Neb. 797; *Jones v. Wiesen,* 50 Neb. 243; *Smith v. Thompson,* 67 Neb. 527. There is nothing in the record to contradict or render improbable this testimony, and plaintiff was entitled to the instruction given by the court. *Stedman v. Rochester Loan & Banking Co.,* 42 Neb. 641.

The judgment of the district court is therefore

AFFIRMED.

CHRISTIANA SOUCHEK, APPELLLEE, V. ERNEST KARR, APPELLANT.

FILED MARCH 5, 1909. No. 15,744.

1. **Evidence Taken on Former Trial.** The official reporter testified that a bill of exceptions of the evidence submitted during a former trial of the case correctly reproduced the testimony of the witnesses. It also appeared that some of those witnesses were nonresidents of and absent from the county during the succeeding

trial, and that plaintiff had been unable to secure their depositions or presence. *Held*, That it was not error to permit the testimony of such absent witnesses to be read from the bill of exceptions to the jury.

2. **Appeal:** HARMLESS ERROR: COMMENTS OF JUDGE. The trial court in response to an objection to a question propounded to a witness stated that, while he was satisfied upon principle that the witness was not sufficiently informed upon the subject to testify thereto, yet, in deference to a possible construction of the opinion of this court upon a former appeal, he would overrule the objection. *Held*, That, as the point upon which the witness was then interrogated was established without dispute by witnesses for both plaintiff and defendant, the remarks of the court were not prejudicially erroneous, and did not have a tendency to destroy the credibility of the witness concerning her other testimony.

3. **Trial:** INSTRUCTIONS. It is not error to refuse to give an instruction that singles out a witness and informs the jury that she is competent to testify upon a given subject.

4. **Appeal:** EVIDENCE. If a case has been tried three times, the verdict each time being in favor of plaintiff, this court will not set aside the last verdict as being against the weight of the evidence, unless the evidence is clearly insufficient to support the verdict.

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

R. D. Sutherland, S. A. Searle and *M. D. Carey*, for appellant.

R. S. Norval and *J. J. Thomas, contra.*

ROOT, J.

Defendant has appealed to this court from a judgment of filiation. A like judgment was reversed on a former appeal. 78 Neb. 488.

1. Defendant argues that the district court erred in permitting the official reporter to read to the jury from a bill of exceptions the testimony of three witnesses given on a former trial of this case. It was admitted in open court when the case was tried that the witnesses were then nonresidents of Seward county and absent there-

from. It was further shown that plaintiff was without means to secure the depositions of those witnesses or their attendance at court. The official reporter testified that he had correctly reported the testimony of said witnesses, given on the former trial, and accurately transcribed it into a bill of exceptions, which had been settled and allowed by the clerk of the court in accordance with a stipulation signed by attorneys for the respective parties, and thereupon said testimony was read on behalf of plaintiff. In *Omaha Street R. Co. v. Elkins,* 39 Neb. 480, it was determined that testimony preserved in a bill of exceptions was competent, and, under certain conditions, admissible upon a subsequent trial. *Smith v. State,* 42 Neb. 356, cited by defendant, merely holds that the certificate of a reporter to a transcript of his notes is not a sufficient foundation to admit that transcript in evidence. *Pike v. Hauptman, ante,* p. 172; *Vandewege v. Peter, ante,* p. 140. It is not suggested that the testimony is incorrect, and we are of opinion that it was properly admitted.

2. Upon a former trial of this case the district court refused to permit a professional nurse, Miss Kealing, who attended plaintiff in childbirth, to testify as to the average period of gestation, and that plaintiff's child when born had the appearance of a fully developed nine months' child. The facts are material because plaintiff's association with defendant was such as to preclude the finding of his guilt if conception had occurred nine months preceding the child's birth. On the first appeal to this court we held that Miss Kealing was competent to testify upon said points, but the syllabus does not refer to the competency of the witness to testify to the period of gestation. Upon the last trial the court permitted the nurse to testify upon both subjects; but, referring solely to a question concerning the average length of gestation, the trial judge stated in open court that upon principle it was perfectly clear to him that the witness was not competent to testify, but, in deference to what was written in the body of the former opinion in this case, he would overrule the objection.

Defendant excepted to the judge's remarks as tending to destroy the weight of the witness's testimony. All objections to the other questions propounded to the witness were promptly overruled by the court. Upon the question of the average period of gestation the evidence is not conflicting. The nurse agreed with the physicians called for each side, and we are of opinion that the case should not be reversed for those remarks of the trial judge.

3. Nor did the court err in refusing to give an instruction that the nurse was competent to testify. By admitting that testimony the court decided that it was competent, and its weight was for the jurors, and they were properly instructed upon this point.

4. It is argued that the verdict is not sustained by the evidence. We have read the bill of exceptions, and find the evidence in sharp conflict on many material points, but there is evidence tending to prove every material allegation in the complaint. Three verdicts have been returned in favor of plaintiff, and two motions for a new trial have been overruled. The verdict is not clearly wrong, and ought not to be set aside. *Dunbar v. Briggs,* 18 Neb. 94; *Missouri P. R. Co. v. Fox,* 60 Neb. 531; *Brownell & Co. v. Fuller,* 60 Neb. 558; *Heidemann v. Noxon, ante,* p. 175.

The judgment of the district court therefore is

AFFIRMED.

FAWCETT, J., I am so thoroughly impressed by the evidence that the defendant is not guilty that I cannot concur.

JUNE W. HART, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MARCH 5, 1909. No 15,495.

1. Appeal: EXCEPTIONS. An instruction to which there is no exception is not reviewable.

2. **Damages:** DESTRUCTION OF TREES. In a suit to recover damages to timber injured by fire, the court may decline to instruct the jury that the measure of damages is the difference in value of plaintiff's land before and after the fire, where the trees have a value separate from the land.

3. **Evidence:** VALUE OF TREES. In an action to recover damages to timber injured by fire, a competent witness for plaintiff may testify to the number of trees destroyed and the difference in their value before and after the fire.

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

B. T. White, C. C. Wright and *B. H Dunham,* for appellant.

M. F. Harrington and *R. M. Johnson, contra.*

ROSE, J.

Sparks from defendant's engine started a fire which burnt over a quarter-section of land owned by plaintiff in Holt county, and she brought this suit to recover resulting damages in the sum of $2,000 to her land, grass and a ten-acre grove of trees. The answer was in effect a general denial. In open court defendant admitted responsibility for the fire. The amount of damages was the only issue tried, and the jury returned a verdict in favor of plaintiff for $350. From a judgment in her favor for that sum defendant appeals.

The trial court instructed the jury to the effect that the measure of damages to the trees was the value thereof "with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards." Defendant assails this instruction on the ground that it does not correctly state the measure of damages. It is also criticized on the ground that it authorizes a double recovery. Consideration of this instruction is unnecessary. When given, there was no exception to it in the district court. It was therefore satis-

factory to defendant at the time the case was submitted to the jury, and cannot be urged now as a ground for setting aside an adverse finding.

Complaint is also made of the failure of the trial court to instruct the jury that the measure of damages was the difference in the value of the land before and after the fire, in the event of a finding that the trees were of no value except to increase the selling price or value of the farm. Defendant requested a series of instructions applicable to the rule stated, which the trial court declined to give. The doctrine invoked by defendant and announced in the rejected instructions is not without support in reason and is an established rule in the courts of many jurisdictions, but the instructions requested on this issue and refused by the trial court are not in harmony with the former holdings of this court. *Fremont, E. & M. V. R. Co. v. Crum,* 30 Neb. 70; *Kansas City & O. R. Co. v. Rogers,* 48 Neb. 653; *Missouri P. R. Co. v. Tipton,* 61 Neb. 49; *Alberts v. Husenetter,* 77 Neb. 699. The rule was recently stated as follows: "The measure of damages to growing trees, having no value for purposes of transplanting, is the value of the trees with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards." *Union P. R. Co. v. Murphy,* 76 Neb. 545. There is authority for holding that this rule is general in its application to trees destroyed by fire. In *Missouri P. R. Co. v. Tipton,* 61 Neb. 49, this court, in an opinion by Judge HOLCOMB, said: "We think this court is committed to the doctrine that a recovery may be had under evidence showing the value of fruit trees, shade or ornamental trees, or young growing timber, as they stood as live, growing trees before the injury complained of, and their value, if any, immediately thereafter."

The doctrine applies to artificial groves as well as to natural timber. *Kansas City & O. R. Co. v. Rogers, supra.* Defendant insists, however, that plaintiff's trees were cottonwood of no value except to "increase the selling

price of the land and its value as a farm," and that there was no competent evidence of the value of the timber for any other purpose. This is urged as a distinguishing feature which required the application of the rule stated in the rejected instructions to the effect that the measure of damages was the difference in the value of the land before and after the fire. Defendant showed by its own witnesses that the trees had a value of their own. One witness, after testifying he had counted the trees destroyed, was asked: "What would you say a tree the size of the largest you said was there would be worth for fence posts, standing there?" The answer was: "Be worth about five cents." Another witness who had counted and described the trees was asked, in testifying on behalf of defendant: "What would you say the amount of the injury to that grove was as you found it out there?" To this he answered: "Well, I don't know. I placed the injury right around $50." This same witness testified that, if he were buying the land, he would not make any difference in the price on account of its having been burnt over. Defendant thus disproved the distinguishing feature upon which it relies for the adoption of the rule suggested in the rejected instructions and is bound by its own proof. It follows that the district court did not err in refusing to give the instructions requested by defendant.

Defendant's concluding argument is directed to the point that one of the witnesses for plaintiff did not show himself competent to testify to the value of the trees and assumed a false basis in estimating damages. In substance he testified he had known plaintiff's land, had seen the grove 18 years ago, when it was his father's timber claim, was with his father when the latter was working on the trees, which had been cultivated several years. The land had been purchased by plaintiff four or five years ago, when the grove was in excellent condition. He had trimmed the trees, and cut the brush and dead trees in 1904. The grove had been injured by fire in 1905. He counted 3,500 trees killed by the fire, knew the fair value

of trees like these, when they were burned. The trees were ornamental, furnished shade and posts. He could use them for lots of things. The trees were worth nothing after the fire, and were worth at least 50 cents a tree at the time they were burned. Testimony of this character to establish damage to trees injured by fire has been approved by this court, and there was no prejudicial error in admitting it. *Fremont, E. & M. V. R. Co. v. Crum, supra; Kansas City & O. R. Co. v. Rogers, supra; Alberts v. Husenetter, supra.*

No error appearing in the record, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE BRANDT, APPELLANT.*

FILED MARCH 5, 1909. No. 15,565.

1. **Intoxicating Liquors: VIOLATION OF ORDINANCES: APPEAL.** A saloonkeeper who has been fined by the police court for keeping his place of business open after hours or on Sunday, in violation of an ordinance of the city of Hastings, cannot appeal to the district court under the provisions of section 324 of the criminal code, relating to appeals from judgments rendered by magistrates in imposing fines or imprisonment for violations of statutes of the state.

2. **Constitutional Law.** A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights or interests are not invaded or affected by its provisions.

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

John C. Stevens, for appellant.

W. F. Button, contra.

* See *Brandt v. State,* 80 Neb. 843.

ROSE, J.

When defendant was a licensed saloon-keeper in the city of Hastings, he kept his place of business open "after hours, or on Sunday, September 29, 1907," in violation of a city ordinance. For this offense the police judge fined him $50 and costs, with the alternative of payment or imprisonment. He attempted to appeal to the the district court, but failed to comply with a provision of the Hastings charter, declaring that no appeal by defendant shall be allowed in any case arising under a city ordinance, unless a recognizance to pay the fine and costs is given by him within ten days. Comp. St. 1907, ch. 13, art. III, sec. 101. Failure to give the recognizance required by the charter resulted in a dismissal of the appeal for want of jurisdiction when the case reached the district court, and from that order defendant has appealed to this court.

Defendant admits he did not give the recognizance required by the city charter, but argues that the requirement is void, because it conflicts with the constitutional provision on the subject of uniformity of laws relating to courts. Constitution, art. VI, sec. 19. He further insists that the offense of which he was accused and convicted was a violation of the statute, declaring that every person who shall sell or give away any malt, spirituous or vinous liquors on Sunday shall forfeit for every offense $100. Comp. St. 1907, ch. 50, sec. 14. He also asserts that he appealed from the conviction under the statute cited and gave a recognizance in strict conformity with the requirements of section 324 of the criminal code, relating to appeals from judgments rendered by magistrates in imposing fines or imprisonment for misdemeanors denounced by statutes of the state. Under that appeal and recognizance defendant argues that the district court acquired jurisdiction and erroneously entered the order of dismissal herein assailed. This position cannot be maintained for the reason his offense was denounced only by

the city ordinance and is not punishable under any provision of the criminal code. The question has already been settled in this case. In *Brandt v. State,* 80 Neb. 843, this court, in an opinion by Judge LETTON, said: "The offense with which Brandt was charged was not a violation of any criminal law of this state, but of a local regulation or ordinance of the city of Hastings." The statute under which defendant attempted to give his recognizance did not apply to the offense of which he was convicted in the police court, and his appeal conferred no jurisdiction on the district court. It is manifest, therefore, if that part of the city charter which requires defendant to give a recognizance to pay the fine and costs as a condition of appeal were declared unconstitutional and void, the district court would still be without jurisdiction. This conclusion makes it unnecessary to examine the constitutional question presented by counsel for defendant, though it was ably argued at the bar and in his brief. The rule is that a party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights or interests are not invaded or affected by its provisions. *State v. Stevenson,* 18 Neb. 416; 8 Cyc. 787.

There is no error in the judgment of the district court, and it is

AFFIRMED.

ELIZABETH WALLY, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 5, 1909. No. 15,585.

1. Instructions examined, and *held* to have properly submitted the issues in controversy to the jury.
2. Evidence examined, and *held* sufficient to sustain the verdict of the jury and judgment of the court.

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

N. H. Loomis, Edson Rich and *James E. Rait,* for appellant.

James C. Kinsler, contra.

FAWCETT, J.

This action was brought against the defendant and the Omaha & Council Bluffs Street Railway Company, by plaintiff as administratrix of the estate of John Wally, deceased, to recover damages sustained by his widow as a result of his death, which plaintiff alleged was wrongfully and negligently caused by defendants on the night of September 11, 1906. At the conclusion of plaintiff's case, the court directed a verdict in favor of the defendant Omaha & Council Bluffs Street Railway Company, and the case proceeded to trial against the other defendant, appellant here. Plaintiff's intestate was a motorman in the employ of the street railway company, and at the time of the accident which caused his death was operating a motor car on the Thirteenth street line of that company in the city of Omaha. Thirteenth street runs north and south, and at the point of the accident is occupied by two tracks of the street railway company, the north bound track being on the east side of the street. Jones and Leavenworth streets run east and west, and cross Thirteenth street at right angles. Midway between Jones and Leavenworth streets there is an alley running east and west, which also crosses Thirteenth street at right angles. The defendant has a spur or loading track on this alley which crosses Thirteenth street on grade. The east end of this spur track is connected with the main track of defendant at a point about four blocks east of Thirteenth street, while the west end ends abruptly at the east side of Fourteenth street, a trifle less than one block west of the center of Thirteenth street. At the time of the accident, which was on what is shown to have been a dark night, plaintiff's intestate was proceeding

with his car northward on the east track, when just as he was about to cross the spur track of defendant, his car was run down by a train of defendant's freight cars which were being backed westwardly along the alley. The result of the collision was the death of plaintiff's intestate and one of the passengers in his car. The jury returned a verdict in favor of plaintiff for $5,000, upon which judgment was rendered. Defendant appeals.

Defendant bases its claim for a reversal upon two grounds: "(1) For the reason that the court below should have directed a verdict for the defendant because the undisputed testimony showed that the plaintiff's intestate by his own carelessness and negligence contributed to his injury and death. (2) For the reason that, even though the questions involved were for a jury to determine, the court erred in submitting to the jury the second theory in the plaintiff's petition because the facts in this case wholly fail to make the case one within such a theory, and the instruction given by the court was erroneous, inapplicable, confusing and misleading, and deprived the defendant of a fair submission to the jury of any question which was proper for the jury to determine."

Plaintiff's second theory, referred to in defendant's second assignment of error, is that the defendant with the exercise of ordinary and reasonable care could and would have seen the perilous situation in which plaintiff's intestate was placed in time to have avoided the collision and injury, but that, "instead of so doing, the defendant railroad company and its agents and employees in charge of said engine and train carelessly, negligently and recklessly continued to propel said engine and train out through the dark alley on the east side of Thirteenth street, as aforesaid, toward said intersection and toward and against the car upon which said John Wally was employed, as aforesaid, and thereby carelessly and negligently caused the injuries and death of said John Wally." The law as to negligence, contributory negligence, and the liability of a railroad company for injury to one who

negligently exposes himself to danger by being upon or in close proximity to its tracks, and who is evidently oblivious of his danger, where by the exercise of reasonable care the agents of the company in charge of its train could and would see the dangerous situation of such person in time to stop its engine and avoid the injury, is now so well settled in this court as to not require a further citation of cases or discussion of those questions.

We have carefully examined the evidence introduced upon the trial of the case, and find that it fully justified the trial court in submitting all three of the questions referred to to the jury. The testimony as to the rate of speed at which plaintiff's intestate approached the intersection is conflicting, but to our minds preponderates in favor of plaintiff's contention that at such time the motor car was not proceeding at a greater rate of speed than four miles an hour. It was proceeding so slowly at the time that a passenger riding upon the rear platform of the car, who suddenly saw the freight car about to come in contact with the motor car, jumped from the car without difficulty or accident. The uncontradicted evidence shows that the head light of the motor car was burning brightly. The testimony as to whether or not there were any lights upon the freight car of the defendant is conflicting. The employee of the defendant who was in charge of the backing freight train testified that he was upon the rear end of the freight car with a lighted lantern in his hand; that their train was traveling at a speed of about four miles an hour; that, when he saw the approaching motor car and discovered that a collision was imminent, he signalled the engineer to stop the train; that he gave such signal with his lantern when that part of the car upon which he was standing was over the curb on the east side of Thirteenth street; that he then ran back over the length of his car, a distance of 34 feet, went down over the end of that car, and fell off in the alley. Plaintiff argues that this testimony is untrue; that the car upon which the witness was riding had not at that time

reached the curb on the east side of Thirteenth street, but was a considerable distance east of that point, and directs attention to the record which shows that, notwithstanding the fact that his train was running west at the rate of four miles an hour, after he had run east along the top of his car 34 feet, and fell off, the point where he fell was 20 feet east of the east line of the sidewalk, which, considering the width of the sidewalk, would make it at least 24 to 26 feet east of the curb on the east side of Thirteenth street. The testimony of this witness, together with that of others introduced by defendant to show that there were lanterns on the rear end of the freight train, is met by the positive testimony of the conductor of the motor car and passengers on the car that there were no lights upon the freight car, that the engineer was not ringing the bell or blowing the whistle, and that there was nothing to indicate the approach of the freight car until it had entered upon Thirteenth street and was within a very few feet of the motor car. We do not see how any good purpose could be served by further quoting the testimony on this branch of the case. It was, to say the least, conflicting, and warranted the submission of the case to the jury. From it the jury might well find that, if defendant's employees had been keeping even a slight lookout, they would have seen the glare of the headlight of the motor car in ample time to have stopped their train and to have avoided the unfortunate collision which their negligence caused.

In the light of what we have above said and of the statement made by counsel for defendant in their brief, we do not deem it necessary to enter into an extended consideration or discussion of the instructions given by the court. Counsel set out the instructions in full, and then say: "The foregoing instructions, if the case were a proper one for the jury to determine, would clearly and fairly submit the question to the jury were it not for the conflicting provisos and qualifications attached to each instruction." The provisos referred to appear at the end

of instructions 5, 6, 8, 10 and 11, and are as follows: "Unless you find for the plaintiff upon the second theory of plaintiff's petition." By the ninth instruction the court fairly advised the jury as to this theory. We have carefully examined the instruction, and, while it does not appear to have been drawn with the customary precision and clearness of the learned judge who gave it, we cannot say that it was prejudicially erroneous.

A careful examination of the entire record satisfies us that the case was fairly and properly submitted to the jury upon sufficient evidence to warrant such submission, and that there is ample evidence in the record to sustain the verdict of the jury and judgment of the court. Finding no error in the record, the judgment of the district court is

AFFIRMED.

WILMOT Z. EMERSON V. STATE OF NEBRASKA.

FILED MARCH 5, 1909. No. 16,004.

Larceny: INSTRUCTIONS. E. was charged with the crime of stealing property in S. county over the value of $100. Upon the theory of the state that said property was feloniously obtained by the accused in C. county and from thence brought into S. county and there sold by the defendant, the court gave the following instruction: "Should you believe from the evidence that the mules described in the information were wont to run upon a range or in a pasture in Cherry county, Nebraska, and if you further believe from all the facts and circumstances in evidence that the said mules were taken from the range in said Cherry county, and if you further believe from the evidence that said mules were brought into Sheridan county by the defendant, and sold by him in Sheridan county, then the crime charged in the information would be complete in Sheridan county." *Held* prejudicial to the rights of the accused and erroneous.

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

William Mitchell, R. L. Wilhite and *Harrison & Prince*, for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

DEAN, J.

Wilmot Z. Emerson, hereinafter called defendant, was convicted in Sheridan county of unlawfully and feloniously stealing, taking and driving away on or about December 20, 1907, in said Sheridan county, two mules of the value of $200, the property of one William O'Toole, with the unlawful and felonious intent of converting the said property to his own use and without the consent of the owner. The defendant was sentenced to serve a term of five years in the penitentiary, and prosecutes error to this court.

Following is a synopsis of only so much of the record as is necessary to obtain an understanding of one of the assignments of error relied on by defendant and discussed in the opinion: The proof shows that William O'Toole was on the date of the alleged offense, and for several years prior thereto had been, a resident ranchman of Cherry county and an owner of and dealer in horses and mules which he kept for sale upon his ranch in said county, and that the defendant was at said time, and for about two years prior thereto had been, a farmer residing in Sheridan county about 40 miles from the O'Toole ranch; that the animals described in the information were always the property of O'Toole, and on or about one week prior to said December 20 were in his possession upon said ranch in Cherry county, and disappeared therefrom between December 13 and 21, 1907, without the said owner's knowledge or consent; that on or about January 1, 1908, the said animals were by the defendant sold and delivered in Sheridan county to his nearest neighbor, one Robert Patton, for about their value, and kept by Patton on his farm in Deuel county, about four miles distant

from defendant's place, until some time in March, 1908, when O'Toole discovered the whereabouts of his property, and, asserting ownership, obtained possession thereof from Patton. The case was apparently prosecuted by the state on the theory that defendant had stolen the animals in Cherry county, and, having thereafter brought them into Sheridan county, there sold them. For the purpose of this review, the case at bar turns upon an instruction evidently given by the court upon this theory.

Counsel for defendant in oral argument and in their brief recognize and take no exception to the familiar rule of law, which holds in substance that property stolen in one county and by the wrongdoer taken into another county constitutes a continuing offense against the common sovereignty, the state, and that the accused may properly be prosecuted in either county or in any county within the sovereignty into which he may take the stolen goods. *Hurlburt v. State,* 52 Neb. 428; *State v. Smith,* 66 Mo. 61; *Stinson v. People,* 43 Ill. 397; 1 McClain, Criminal Law, sec. 552. But, while admitting the rule, defendant's counsel contend the trial court, evidently having this principle of law in mind, and with the intention of incorporating it in the instructions to the jury, erred in giving instruction numbered 4, and assigns the giving of said instruction, among other alleged errors occurring at the trial, as ground for reversal of the judgment. The instruction complained of is in the following language: "Should you believe from the evidence that the mules described in the information were wont to run upon a range or in a pasture in Cherry county, Nebraska, and if you further believe from all the facts and circumstances in evidence that the said mules were taken from the range in said Cherry county, and if you further believe from the evidence that said mules were brought into Sheridan county by the defendant, and sold by him in Sheridan county, then the crime charged in the information would be complete in Sheridan county." The above instruction does not properly refer to the commission of

the offense of larceny as charged in the information. Every element of the crime for which the defendant at the bar is called upon to plead is ignored in its language. The crime of larceny is not even remotely referred to therein. It contains no reference to any belief the jury may have formed from the evidence as to whether there was or was not an unlawful and felonious taking of the property in Cherry county by defendant. The court in effect instructs the jury that, if they believe from the evidence that the mules described in the information ran upon a range or in a pasture in Cherry county, and were taken therefrom and brought into Sheridan county and there sold by the defendant, such conduct of itself constitutes the crime of larceny "in Sheridan county." We believe the language used is susceptible of no other construction, and as used is obviously prejudicial to the rights of the accused, and hence is fatally defective. There were eight instructions given to the jury by the learned trial court, but not one of them, nor do they all collectively, by their terms, supply the omissions or cure the defects herein pointed out. "It is the duty of the trial court to instruct the jury distinctly and precisely upon the law of the case. * * * The instructions should be full, clear, and explicit, giving to the jury all the law so far as it relates to the facts proved or claimed to be proved, if such facts are sustained by any evidence." 12 Cyc. 611.

Among other errors assigned and argued by counsel for defendant is a summary overruling of a plea in bar, entered in apt time by the accused, without an opportunity to have the issue thus by him interposed tried to a jury. But it is unnecessary to discuss this feature for the reason the judgment must be reversed for the error in giving instruction numbered four.

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

REVERSED.

MARY O. SMITH, APPELLANT, V. WILLIAM H. CARNAHAN ET AL., APPELLEES.

FILED MARCH 5, 1909. No. 15,475.

1. **Tax Sales: REDEMPTION.** Section 3, art. IX of our constitution, gives to the owner or persons interested in real estate two years to redeem from a sale made for delinquent taxes, and this right of redemption applies to judicial sales for unpaid taxes, as well as to administrative sales.

2. **Taxation: JUDICIAL SALE: REDEMPTION.** Where a county, before any administrative sale of real estate for taxes due thereon, brings an action to foreclose the tax lien and obtains a decree under which the land is sold, the sale so made is a judicial sale, and does not become final and complete until confirmation thereof by the court. In such case the two years given the owner to redeem dates from final confirmation.

3. ———: ———: **CONFIRMATION: REDEMPTION.** Whether on confirmation of a judicial sale for taxes, where no administrative sale has been had, the court has jurisdiction in confirming the sale to cut off the right of the owner to redeem, *quære.* Whether such power and jurisdiction exist or not, an order of confirmation which does not expressly deny to the owner the right of redemption will not be construed as denying that right.

4. ———: ———: **REDEMPTION.** On redeeming from such a judicial sale, the owner should pay the full amount of taxes and costs paid by the purchaser, and 12 per cent. interest thereon.

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

Hoagland & Hoagland, for appellant.

A. Muldoon, contra.

DUFFIE, C.

In August, 1900, the county of Logan commenced an action in the district court to foreclose a lien for taxes assessed against the property in controversy herein. The owner of the legal title and a mortgagee appeared in the action and demurred to the petition, and, their demurrer being overruled, a decree was entered in favor of the

county February 28, 1901. No appeal was taken from this decree, and in October, 1901, the land was sold to Mary O. Smith, the plaintiff herein, for $250. The defendants in the action filed objections to a confirmation of the sale, which the court overruled. The sale was confirmed and a deed ordered made to the purchaser. The defendants superseded the order of confirmation and appealed to this court, where the case was determined December 7, 1904. *County of Logan v. McKinley-Lanning L. & T. Co.*, 70 Neb. 406. We held that "an absolute order of confirmation of a sale, made in pursuance of a decree for the sale of land for the satisfaction of taxes over objections which deprives the decree debtor of the right of redemption from tax sale given by the statute or the constitution, is erroneous." The order of confirmation was reversed and the case remanded to the district court, with directions "to enter an order confirming the sale, subject to the appellant's right of redemption within the time allowed by law, and to direct the execution and issuance of a deed by the sheriff conveying to the purchaser the premises sold, in the event such redemption is not had within the time provided."

The mandate in the case was filed in the district court February 12, 1905, and on April 30, 1906, on motion of the plaintiff, the court entered an absolute order of confirmation and directed the sheriff to execute a deed to the premises. It is evident from the journal entry made that the district court was of opinion that the two years given by our constitution in which to redeem from a judicial sale made for taxes dated from the date on which the sale was made by the sheriff, and not from the date of confirmation ordered by the court. This clearly appears from the language of the order of confirmation, wherein it is recited: "Now on this date after 1 o'clock and 30 minutes P. M. this case came on to be heard on application of the plaintiff to confirm the sale heretofore made herein. No objections to said confirmation having been made, it is submitted to the court on the mandate of the supreme

court, heretofore issued in this case, and the return of the sheriff to the order of sale, and it appearing to the court that said sale was conducted in all respects as required by law, and that more than two years have elapsed since said sale was made herein, and since the former confirmation of said sale had in this action, and no redemption of said sale has been had by the defendants herein or either of them, and no effort having been made by said defendants to effect said redemption, it is therefore ordered and adjudged that said sale be and the same is in all things confirmed absolutely, and the sheriff is hereby ordered to execute a deed to the purchaser, M. O. Smith, for the following lands."

On the 28th of July, 1906, and within the six months allowed for taking an appeal from said order of confirmation, the plaintiff commenced this action, making the record owner of the land in dispute and numerous lienholders parties defendant, and asking that her title to said land be quieted and confirmed, and that the defendants, each and all, be forever estopped from asserting any right, interest or possession in or to said premises. Howell, the owner of the fee title, filed an answer and cross-bill. In the cross-bill it is alleged that the sheriff's deed issued to the plaintiff in conformity to the order of the court made on confirmation of the sale is absolutely void, because issued within the time allowed him for redemption, and that the order of confirmation was procured by fraudulent misrepresentation of law and facts made to the court, and without notice to the defendants of the pendency of the motion to confirm. It is charged that the plaintiff has collected the rents and profits accruing from said land for the years 1903 to 1906, both inclusive, and he prays that the right of redemption be allowed him, asking for an accounting between the parties, and that title to said land be quieted in him. The facts in the case were either agreed to or established by undisputed evidence and are as above set forth. Upon these facts the court entered a decree allowing the defendant Howell to redeem from the

tax sale upon paying the sum of $347.75 within 20 days of the entry of said decree. From this decree the plaintiff has appealed.

In the decree entered in this case the court, referring to the confirmation made April 30, 1906, recites: "And the court further finds that he was without power and authority under said order of the (supreme) court and the constitution and the revenue laws of the state to make the absolute confirmation barring right of redemption; that the defendant Howell has made his application herein to redeem from said tax sale within two years from the date of order of second confirmation, offering to pay all the taxes due and costs made in said foreclosure action, and he is entitled to have the prayer of his petition granted and be given leave to redeem." By section 3, art. IX of our constitution, a right of redemption is given from all sales of real estate for the non-payment of taxes for two years after the sale. This applies to judicial sale where there had been no prior administrative sale. *County of Logan v. McKinley-Lanning L. & T. Co.*, 70 Neb. 406. Defendants insist that under this constitutional provision they are given two years from the date of confirmation within which to redeem. It must, we think, be considered that in an action brought, as in this case, to foreclose a tax lien claim by the county, the sale had under the foreclosure decree is a judicial sale, and that it is completed only by confirmation.

In *Hatch v. Shold*, 62 Neb. 764, it was held: "The legal title of mortgaged real property remains in the mortgagor pending the confirmation of a sale thereof made under a decree of foreclosure of the real estate mortgaged." In the opinion it is said: "Until confirmation of sale, the mortgagor's equity of redemption is not cut off, and his legal title to the property gives him a valuable interest therein, and a right of action to protect that interest, subject only to the superior lien of the mortgagee for the amount due on the incumbrance." In *State Bank v. Green*, 8 Neb. 297, the court said: "In sales under a

decree, the court is the vendor and the sheriff or commissioner making the sale a mere instrument, * * * but no title passes by the sale until it is confirmed, and the same rule applies to sales upon execution." On a second hearing (10 Neb. 130) the court again in passing upon the question said: "Under our law governing sales of real property on execution the title of the purchaser depends entirely upon the sale being finally confirmed by the court under whose process it was made, and until this is done the rights of the execution debtor are not certainly divested." While not passing directly upon the question, a late decision of this court strongly favors the views that the sale we are considering is a judicial sale. In *Butler v. Libe,* 81 Neb. 740, affirmed on rehearing, 81 Neb. 744, we held that the purchaser under a decree foreclosing a tax lien was entitled to 12 per cent. interest on redemption from the sale. This holding was based on the view that the statute relating to the interest allowed purchasers at judicial sales governed in this class of cases. We have no hesitation in holding that the sale in question did not become final or complete until confirmation by the court.

It is true, as was substantially held in *Nebraska L. & T. Co. v. Hamer,* 40 Neb. 281, that an accepted bid becomes a binding obligation. This rule is not inconsistent with the conclusions we have reached. There is no completed sale until a report of the proceedings is approved by the court. It is equivalent to a contract which may be enforced against the bidder except under such circumstances as would justify the rescission or reformation of other contracts. On the other hand, it may be set aside for irregularities, and, when such are alleged, it is a matter to be considered and determined by the court. An accepted bid gives to the purchaser the right to demand confirmation and deed, but it is not until confirmation that his attempt to purchase is effective. That such was thought to be the law by this court is apparent from the very fact that more than two years had elapsed after the sale here in controversy, and before this court construed the rights

of the defendants to redeem in *County of Logan v. McKinley-Lanning L. & T. Co., supra.* It necessarily follows that the two years for redemption commences at confirmation, and not at the date of a successful bid.

This brings us to appellant's contention that the right of the defendants to redeem from the tax sale has been adjudicated by the order of confirmation entered in the district court of date April 30, 1907, said order being absolute in its terms and apparently intended to cut off any right of redemption. As we understand the appellant, he concedes that upon the issuance of the mandate by this court in the case above cited the defendants were entitled to have the order of confirmation made conditional, or, in other words, the district court should have entered such a confirmation as would expressly preserve to the defendants their constitutional right to redeem, and it is argued that the order actually entered set at rest that question which is now *res judicata,* the defendants having neglected to appeal therefrom. This leads us to a consideration of the order of confirmation above referred to, for the purpose of ascertaining whether or not it does in fact bar the defendants' right to redeem. It is quite apparent from the judgment appealed from and from the order of confirmation that the trial court by the last order of confirmation attempted to bar the defendants' constitutional right to redeem, but we are convinced that he failed in this purpose, and that his confirmatory order of April 30, 1907, was ineffectual to defeat the defendants' present effort in that regard. By reference to the opinion in *County of Logan v. McKinley-Lanning L. & T. Co., supra,* it appears that the objections were made to the confirmation when the matter was first brought to the attention of the court, in part, because two years for redemption had not expired since the sale. Evidently the defendants then considered that they had only two years from the time the purchaser's bid was accepted in which to redeem, and that this necessarily required that the confirmation be stayed until the expiration of two years. This court held

that the order of confirmation there appealed from, entered by the district court, was erroneous because it did not reserve to the defendants the right to redeem within two years. Such adjudication became the law of the case, and we are not disposed to interfere with the rule there announced, in so far as the disposition of the matters now in issue are concerned. That order of confirmation is not in the record in this case. If it were, it might be that it would not appear effective for the purpose of barring the defendants' right to redeem. However that may be, both the parties and the court assumed that it was sufficient for that purpose, and as such it was held erroneous. The reversal of the first order of confirmation placed the case in the same position it was in before the motion for confirmation and objections thereto were filed.

The plaintiff, when the case was remanded, without notice to defendants, filed a new motion for confirmation upon which the case proceeded without objection or appearance by the defendants; but, the mandate of this court having placed the case in the position in which it existed at the time the first motion for confirmation was filed, we must view the case as though no former motion to confirm had been filed, and no action taken thereon, except, of course, we must give effect to such rules as have become the law of the case. The defendants' right to redeem was never questioned in the pleadings. No issue was ever raised except in the motion for confirmation and objections thereto, which were abandoned by the parties upon the reversal of the judgment rendered thereon. We can see no good reason for the defendants' appearance in the foreclosure case at any stage of the proceedings. They had no defense to the foreclosure which we need to notice here. They had no legal or equitable objection to the confirmation of such sale as the court had jurisdiction to make, nor could they object to the issuance of a deed conveying to the purchaser such title as was foreclosed in the proceeding. Such foreclosure proceeding, as will hereinafter

be more fully pointed out, must necessarily have been made with reference to the defendants' constitutional right to redeem. As was said in *County of Logan v. McKinley-Lanning L. & T. Co.*, 70 Neb. 406: "The right to redeem from sale which is given by the law is usually self-executing and, to enjoy the benefit of which, no proceedings, ordinarily, are required to be had in the courts to make such right effective. A statutory right to redeem fixes the terms upon which such redemption may be had, and the right thus given may be availed of without the formality of a decree, consequent upon an adjudication in court proceedings, and without other or different steps for the establishment of such right than those provided for by the statute itself."

If the order of April 30, 1907, was to be construed as a bar to the right of the defendants to redeem, its validity might well be questioned. In *Bigelow v. Forrest*, 9 Wall. (U. S.) 339, the trial court condemned the land of one Forrest, an officer in the confederate navy, and ordered the same sold under the act of congress of July 17, 1862, commonly called the "Confiscation Act." After the death of Forrest, his son and only heir at law brought an action to recover the land from the purchaser, who contended that, as the title of the elder Forrest was a fee simple title and the libel filed against the land by the government was "against *all the right, title, and interest, and estate of the said French Forrest, in and to the said tract of land,*" the decree of condemnation and the sale thereunder vested in the purchaser the fee title, and not an estate terminating with the life of the elder Forrest, as claimed by the plaintiff. While the decree condemned "the real property mentioned and described in the libel" and directed a sale of the same, the supreme court construed the decree to authorize the sale of a life estate only, that being the only interest which the act empowered the court to sell. In the opinion it is said: "But, under the act of congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life

of French Forrest. Had it done so it would have transcended its jurisdiction."

Under our constitution no sale for taxes, judicial or administrative, can be made which vests in the purchaser an unconditional absolute title. The sale must in all cases be made subject to the owner's right to redeem within two years from the completed sale, and no court or officer has power to sell and convey a higher title. This right was of value. The author knows of no law which will authorize a court to deprive a citizen of valuable property rights in his absence, and without notice to him. But such order cannot be given this force. It is true that the order of confirmation was entered without objection and is absolute upon its face. No objection to the confirmation was necessary to preserve to the defendants the rights given them by the constitution to redeem. It was the completed sale from which the owner had a right to redeem. It is true, he had the right to redeem before, but, as heretofore pointed out, confirmation did not necessarily exhaust such right. The court found that the sale was conducted in all respects as required by law. That being true, the purchaser was entitled to confirmation. The court did not need to inquire further than to ascertain whether or not the proceedings were regular. It mattered not that more than two years had elapsed since the sale and since the confirmation which had been vacated. Nor did it matter that no redemption from the sale had been made by defendants, and no motion had been made to effect said redemption. Defendants were not required to thus exert themselves at that time. The confirmation of the sale was a right existing in the incumbrancer that he might receive the amount due him upon the lien foreclosed, and it was also due to the purchaser that he might receive his deed, and, moreover, have a time definitely fixed during which redemption must be made. We do not consider that the word "absolute" in the order of confirmation in any way interfered with the constitutional right of the defendants to redeem. Most all judicial sales are confirmed abso-

lutely, and yet the purchaser thereof takes only such title as the court had the power to confer. It is apparent from the findings upon which the order of confirmation was based that the court had in mind to bar the defendants from their constitutional right of redemption; but, as we view it, the order entered was not effective for this purpose, and although it did not expressly reserve to the defendants the right which this court adjudged they were entitled to, and which it directed the court to recognize in its order of confirmation, yet the order which was actually entered did not deprive them of this right. The defendants had the right to redeem for two years from and after any confirmation which might have been entered in pursuance to the order of this court, or by any order of confirmation which the lower court made in an attempt to follow the orders and directions of this court, or, for that matter, any confirmation which may have been made unless it expressly denied to the owner his constitutional and statutory right to redeem.

Selby v. Pueppke, 73 Neb. 179, was an appeal from an order of confirmation in a case very similar to this. There, as here, it was urged that to permit a redemption after an order of confirmation had been entered was to allow a collateral attack upon the decree of confirmation. In that case it is said: "The confirmation applied only to the regularity of the proceeding. It held the sale valid and regular, but in no way adjudicated the right of redemption from it. The latter existed by virtue of a self-executing constitutional provision independent of the court. The court's action must be held to have been taken with this right in view. Of course, in this view, that confirmation, like the other proceedings in this sale, was had provisionally and subject to the right of redemption." We take it that the phrase, "that confirmation * * * was had provisionally and subject to the right of redemption," was an implied, and not an express, condition in the order of confirmation, and that it exists by virtue of the constitutional provision, which applies to all sales made of

this character. The above language was quoted with approval by this court in *Wood v. Speck,* 78 Neb. 435, and *Butler v. Libe,* 81 Neb. 740. *Wood v. Speck,* also, was a case wherein the plaintiff was permitted to redeem within two years from the time of the judicial sale which was confirmed by an order of the court on its face unconditionally and without reservation. An adjudication which does not expressly deprive a party of his right of redemption, and which gives to his adversary no title inconsistent with his right to redeem, should not for any technical reason be held to have barred such right.

Plaintiff is rightfully in possession, and continues so until redemption is legally effected, and therefore, is not required to account for rents and profits. The trial court allowed but 7 per cent. interest on the amount bid and paid by plaintiff at the sheriff's sale. Under the rule announced in *Butler v. Libe, supra,* it should have been 12 per cent.

We therefore recommend that the judgment of the district court be affirmed so far as it dismisses plaintiff's petition and permits the defendants to redeem, but that it be reversed and remanded, with instructions to the lower court to enter judgment permitting the defendants to redeem only upon the payment of the full amount of the bid, with interest at 12 per cent. per annum.

EPPERSON, GOOD, and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified so as to allow redemption on the payment of the full amount bid at the sale, with 12 per cent. interest thereon from date of sale, and the cause is remanded, with directions to the district court to carry this judgment into effect.

JUDGMENT ACCORDINGLY.

NIELS RASMUSSEN, APPELLANT, V. AUGUST BLUST ET AL., APPELLEES.*

FILED MARCH 5, 1909. No. 15,514.

1. **Waters:** IRRIGATION CANAL: RIGHT OF WAY. One who has not acquired a right of way for an irrigation canal over the public lands of the United States prior to their entry as a homestead must arrange for such right of way with the entryman or take proper proceedings to appropriate the land for that purpose.

2. ———: ———: ———: RIGHT OF ENTRYMAN. The construction of an irrigation canal through the public lands of the United States without first securing the consent of the general government or taking a right of way deed from a homestead entryman, who afterwards abandons the land and allows it to revert to the general government, gives the proprietor of the canal no claim to the land over which it runs as against a subsequent entryman.

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

J. E. Porter, for appellant.

Allen G. Fisher, contra.

DUFFIE, C.

The plaintiff has projected and partially completed a system of irrigation in Dawes county, Nebraska. The proposed system is something over 30 miles in length, of which about 15 miles have been completed, and which include certain reservoirs for the storage of waste water. In April, 1901, he made an application to the commissioner of the general land office at Washington for right of way for his system over the public lands of the United States, under the act of congress approved March 3, 1891, and subsequent acts amendatory thereof. A certified copy of a letter from the commissioner of the general land office of date November 16, 1906, is to the effect that plaintiff's application was returned for correction, the date when said application was last returned being June

* Rehearing allowed. See opinion, 85 Neb. ——.

13, 1902, and that, no correction being made by Rasmussen, no action had been taken thereon by the officers of the general land office, it being considered that the application had been abandoned. Under these circumstances any claim to a right of way granted by the general government, or any supposed right growing out of a pending application therefor, can receive no consideration in disposing of this case.

Some of the lands through which the plaintiff's ditch is constructed were at the time occupied by parties under homestead entries. From some of these, right of way deeds were obtained, and, as we understand the record, some of the lands now occupied by the defendants were formerly in possession of homestead claimants who granted to the plaintiff right of way through their lands, but these homestead claimants have since abandoned their entries, and the land reverted to the United States free from any claim by such parties. . The defendants are now in possession of some of these lands and refuse to allow the plaintiff to enter thereon for the purpose of clearing out his ditch, repairing or operating the same. This action was brought to enjoin them from interfering with his control, operation, repairing and maintaining the ditch through these lands. The answer of the defendants is quite lengthy, and to the effect that the waters of the creek from which the plaintiff supplies his ditch are wholly insufficient to supply an irrigation canal, and that it is entirely dry during portions of the year, so that the project is not a feasible one.

The plaintiff is constructing his ditch under a permit obtained from the state board of irrigation, which has jurisdiction in the first instance to grant such permits, and to determine from what streams water may be taken and the amount of such water. The action of that board cannot be questioned or ignored in this proceeding. It is evident from the evidence that the plaintiff has no right of way granted him by the defendants over their lands, and the fact that before they entered the same from the

United States they had knowledge that the ditch was projected, or even built through the lands now occupied by them, cannot operate as an estoppel against their assertion of title or their objecting to the plaintiff trespassing upon their lands. His application to the federal government for a right of way has apparently been abandoned, and the defendants, when they entered the land from the United States, took it free from any claim which the plaintiff might have had were his application still pending. Whether a pending application for a right of way through the public lands would take precedence over a homestead entry made subsequent to such application is not a question upon which we are called to express an opinion. The plaintiff, before he can enter upon the lands of the defendants, in maintaining and operating his ditch, must either obtain a right so to do by agreement with the occupants or by condemnation proceedings instituted for that purpose. We cannot discover from the record that such a right now exists, and the district court properly dismissed his petition.

We recommend an affirmance of the judgment.

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.

GEORGE B. MORAN, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MARCH 5, 1909. No. 15, 533.

1. **Public Lands: RAILROADS: HOMESTEAD: PRIORITIES.** September 24, 1886, the secretary of the interior approved the line of survey made by the Grand Island & Wyoming Central Railroad Company for the building of its road in Grant county, Nebraska, and a map of the approved survey was, by direction of the secretary,

sent by the commissioner of the general land office to the district land office and there filed November 13, 1886. *Held*, That under the act of congress of March 3, 1875, any party entering public lands, over which said survey extended, as a homestead or otherwise, after such approved map was filed in the district land office, took the land subject to a right of way for the building of the road, such right of way extending 100 feet from the center of its track on each side thereof.

2. ———: RAILROADS: RIGHT OF WAY. The fact that the profile of its surveyed line was sent directly to the secretary of the interior by the president of the railroad company, instead of being transmitted to him through the district land office, is immaterial.

3. **Railroads: EASEMENT: ADVERSE POSSESSION.** "The use for agricultural purposes, such as grazing and cultivation by adjoining landowners of otherwise unused and unfenced parts of the right of way of a railroad company, is not inconsistent with or adverse to the enjoyment of the easement." *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8.

APPEAL from the district court for Grant county: JAMES N. PAUL, JUDGE. *Affirmed.*

Sullivan & Squires, for appellant.

J. E. Kelby, Frank E. Bishop and *Arthur R. Wells, contra.*

DUFFIE, C.

The facts stipulated by the parties disclose that one Fitzpatrick on the 18th of December, 1886, made homestead entry of the northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter, and lots 3 and 4, section 19, township 24, range 36, in Grant county, Nebraska. He departed this life while living upon the land, and his heirs in due time made final proof in support of his entry, residence and cultivation, and a patent was issued to them embracing the whole of the above described lands without reservation or condition. The heirs afterwards conveyed the land to the plaintiff herein, who is now in possession.

In April, 1886, the Grand Island & Wyoming Central Railroad Company surveyed a line for a proposed road

over the land hereinbefore described, and after said survey the said company transmitted by mail to the secretary of the interior at Washington a map of the survey of the proposed line. On September 24, 1886, the secretary of the interior approved the line of survey, and on October 12, 1886, the commissioner of the general land office, by direction of the secretary, advised the president of the company that the secretary had approved the line of survey, and that copies of the maps had been sent to the register and receiver of the local land office with necessary instructions. These maps were received at the local office November 13, 1886, and the register, in acknowledging receipt of the maps, informed the commissioner of the general land office "that said line of route has been duly marked upon the records of this office in consonance with instructions contained in circular dated January 7, 1880." The action of the railroad company in sending a map of the location of its survey and route was for the purpose of acquiring a right of way over the public lands under the act of congress of March 3, 1875 (18 U. S. Statutes at Large, p. 482. ch. 152). The first section of this act granted to any railroad company, duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, the right of way over the public lands to the extent of 100 feet on each side of the central line of said road. The fourth section of the act defines the steps to be taken to obtain its benefits, and is as follows: "That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the secretary of the interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of

subject to such right of way: *Provided,* That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road." During the year 1887 the Grand Island & Wyoming Central Railroad Company constructed its road over the land in question, and thereafter built fences on each side of its track and distant 25 feet from the central line thereof, thus including a strip 50 feet wide. The remainder of the 200 feet right of way, being 75 feet on each side of the track, was used by the plaintiff and his grantors in connection with the adjoining land from the time the railroad fence was built up to a short time before this suit was begun, when the defendant company was about to take possession of all of its right of way, whereupon the plaintiff commenced this suit and applied for an injunction to restrain the defendant from taking any part of the 200 feet strip claimed as its right of way and lying outside its fences. On the final hearing the temporary injunction issued on the plaintiff's application was dissolved and his petition dismissed. From this judgment he has appealed.

By reference to the fourth section of the act of March 3, 1875, it would seem that the regular course of proceeding by a railroad company seeking to obtain a right of way over the public lands of the United States was to file a profile of its line in the land office of the district where its line was located, and this profile would be transmitted by the register and receiver to the secretary of the interior for his approval. If the secretary of the interior approved the line of survey, the map would be returned to the district land office, and when there filed all public lands thereafter disposed of, crossed by the survey, would be taken subject to the right of way granted to the railroad company. If we understand the contention of the appellee, it is to the effect that the Grand Island & Wyoming Central Railroad Company did not comply with the act of congress, in that it sent the map of its survey directly to

the secretary of the interior, instead of having it transmitted to him by the officers of the district land office. This we regard as wholly immaterial. Before the railroad company could acquire a right of way over the public lands, a map of its survey had to be approved by the secretary of the interior, and, before parties entering public lands could be in anywise affected by any claimed right of way, the approved map had to be returned and filed in the local land office. When this was done, parties entering public lands over which the approved survey was made took these lands burdened with the right of way granted by the general government, and, while they had to pay for the whole tract, the right of way was legally vested in the railroad company. That subsequent entrymen took the land subject to the rights of the railroad company is apparent from the provisions of section 4 of the act, and has been expressly ruled in *Jamestown & N. R. Co. v. Jones*, 177 U. S. 125; *Northern P. R. Co. v. Townsend*, 190 U. S. 267; *Minneapolis, St. P. & S. S. M. R. Co. v. Doughty*, 208 U. S. 251.

In a circular issued by the department of the interior and found in 12 Land Dec. 428, the following rule was announced: "All persons settling on public lands to which a railroad right of way has attached take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases." The interior department has also held that it was improper to include in the patent issued any exceptions making the grant subject to a railway right of way acquired under the act of 1875. *Dunlap v. Shingle Springs & P. R. Co.*, 23 Land Dec. 67; *Oregon S. L. R. Co. v. Harkness*, 27 Land Dec. 430; *Denver & R. G. R. Co. v. Clack*, 29 Land Dec. 478. The fact that the patent issued by the general government for the tract of land conveyed to the plaintiff's grantors did not contain an exception of the right of way obtained by the defendant is therefore wholly immaterial and can have no bearing upon the rights of the parties.

Relating to the plaintiff's claim of title acquired by adverse possession, the stipulation is clear that his use of the land outside of the line of the fence constructed by the defendant company was for the hay growing upon said land and for pasture purposes after the hay had been cut and removed. In *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8, it was held: "The use for agricultural purposes, such as grazing and cultivation by adjoining landowners of otherwise unused and unfenced parts of the right of way of a railroad company, is not inconsistent with or adverse to the enjoyment of the easement." In other words, it was held that the use of a part of a railroad right of way by an adjoining owner for agricultural purposes would not ripen into a title, however long that possession and use was continued. This we believe to be the general rule adopted by a great majority of the courts, and which appears to us to be founded in reason from the fact that such possession does not interfere with the business of the road or the maintenance of its line, and, until the land may be needed by the company in the further progress of its business, the possession and use will be regarded as permissive.

We discover no error in the record, and recommend an affirmance of the judgment appealed from.

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.

HIMENUS ADAMS, APPELLEE, V. CHARLES M. FISHER, APPELLANT.

FILED MARCH 5, 1909. No. 15,474.

1. **Contracts: ACTIONS: INSTRUCTIONS.** In an action to recover a balance due upon a verbal contract to exchange work, which is denied, the evidence being in conflict, the court should instruct the jury, in substance, that to entitle the plaintiff to recover therefor he must show that the value of work done by him for defendant exceeded the value of work done by defendant for plaintiff.

2. **Trial: PREJUDICIAL ERROR.** In the trial of a case in the district court on appeal, it is error for counsel or the court to inform the jury of the result of the trial in the lower court, and also error for the court to reprimand opposing counsel for objecting to such conduct.

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

Hoagland & Hoagland, for appellant.

Wilcox & Halligan, contra.

EPPERSON, C.

Plaintiff brought this action in the county court to recover upon three items—two for pasturing defendant's cattle, and one for a balance due upon a verbal contract to exchange work in putting up hay for the defendant. Plaintiff recovered in the county court and on appeal in the district court. In the petition he alleges specifically with reference to the hay transaction that the amount claimed is due under a verbal agreement to exchange work. The evidence given in support of this allegation is that plaintiff and his employees, in pursuance to said verbal contract, assisted in cutting and stacking 102 tons of hay more for defendant than was cut and stacked for plaintiff, and that generally it was worth $1 a ton to put up hay. Plaintiff contends that, as he furnished one-half the labor,

he should recover one-half the value of putting up the 102 tons. This would be true, of course, if the labor expended upon each ton of hay was of the same value. But plaintiff introduced no evidence whatever as to the difference in value of the labor performed by his employees and those of the defendant. The defendant's evidence was, in effect, that he furnished a few days' labor less than the plaintiff, but that he furnished more horses needed, and that, upon the whole, he furnished more of value than did the plaintiff. And, again, defendant's evidence shows that a greater amount of labor was required to put up the plaintiff's hay and more time expended therein because they were required to sweep his hay further and go a greater distance to their meals, whereby it would appear that the amount of hay put up for each party did not indicate the amount of labor expended. After the testimony was concluded, and after the trial judge had read six of the ten instructions given by him, the defendant requested the court to give an instruction as follows: "The jury are instructed that, if you find from the evidence that the value of the labor and materials furnished by the defendant Fisher to the plaintiff Adams in their haying operations involved in this action equaled or exceeded the value of the labor and materials furnished by the plaintiff Adams to the defendant in the said haying operations, then the plaintiff cannot recover in this action anything on account of his claim for said haying contract." The court refused this instruction because it was not offered until after six instructions had been read, and, further, because it pertains to an issue not raised by the pleadings. Under the pleadings (and we have reference now more particularly to the plaintiff's petition) the instruction should have been given. He was not entitled to recover upon this item in the event that the labor and material furnished by the defendant were equal to or in excess of that furnished by the plaintiff to the defendant under the terms of the verbal contract sued upon. This defect was not cured by any instruction given by the court. It is true that the defendant alleged

there had been a settlement made under this verbal contract before the parties had finished putting up hay, but this did not obviate the necessity of plaintiff proving his case. It may be well to observe, however, that defendant's general denial, in view of the evidence, was sufficient to require the instruction. The request did not come too late, as a statement of the law controlling plaintiff's right to recover should have been given in the absence of a request.

In the argument to the jury the plaintiff's then counsel stated, in substance, that this case was tried in the lower court and judgment rendered there in favor of the plaintiff, and that the defendant was responsible for the case being in the district court. Defendant's counsel excepted to the above remarks, and the court then stated: "The record in this case shows that this case was tried in the lower court, and a judgment was rendered in the lower court in favor of the plaintiff and against the defendant, and that the defendant had appealed the case to this court." Counsel then excepted to the statement of the court, whereupon the court replied: "There was not a man on the jury that did not know what the judgment of the lower court was, and there is no use in your trying to keep it from them." The court, however, did instruct the jury not to consider the objectionable remarks of plaintiff's counsel. It was clearly error for the counsel to have informed the jury as to the result of the trial in the lower court, and for the court to emphasize the fact, and, in addition thereto, reprimand opposing counsel for objecting. Nor can we see that the court's instruction to the jury to disregard the statements made cured the error. In such an event the court should give positive instructions to the jury not only to disregard the improper statements of counsel, but also to totally disregard the result of the trial in the lower court in arriving at their verdict. Many other errors are assigned. We have examined all of them, and do not find it necessary to make special reference thereto.

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

DUFFIE, GOOD and CALKINS, CC., concur.

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

REVERSED.

H. C. JOHANNES ET AL., APPELLANTS, V. THAYER COUNTY, APPELLEE.

FILED MARCH 5, 1909. No. 15,509.

Constitutional Law. Section 5514, Ann. St. 1907, in so far as it assumes to authorize an appeal from the decision of the county board upon the questions of public utility, is void.

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

M. H. Weiss and *J. T. McCuistion,* for appellants.

John P. Baldwin and *T. C. Marshall, contra.*

EPPERSON, C.

The appellants filed a petition with the county board of Thayer county, asking for the construction of a drain with a view of draining certain farm lands and public roads in that county. The petition was filed under the provisions of section 5500 *et seq.,* Ann. St. 1907. Upon receipt of said petition, the county commissioners viewed the premises and found that the said improvement ditch or drain was not necessary, and would not be conducive to the public health, convenience or welfare, and dismissed the appellants' petition. An appeal was taken to

the district court, where a trial was had, and the action of the county board sustained.

We have not examined the evidence. The only argument made by the appellants is that the proposed improvement would be conducive to the public health, convenience and welfare, and that the drain is necessary for the reclamation of the appellants' land. In *Tyson v. Washington County,* 78 Neb. 211, with which we are content, it was held in effect that the question of drainage is a matter of governmental policy, and that the power to exercise control over administrative bodies cannot be conferred upon the courts by the legislature, and that section 5514, Ann. St. 1907, in so far as it is assumed to authorize an appeal from the decision of the county board upon the question of public utility, is inoperative.

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

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

STATE, EX REL. BERNARD KREBS, APPELLANT, V. THOMAS HOCTOR ET AL., APPELLEES.

FILED MARCH 5, 1909. No. 15,529.

1. **Intoxicating Liquors:** LICENSE: REVOCATION. Power given to a board of fire and police commissioners by statute to license, restrain, regulate, or prohibit the sale of intoxicating liquors by ordinance is sufficient to authorize the board to adopt rules controlling the traffic, including the right to revoke a license upon the violation by the licensee of any statute, or city ordinance, or any reasonable rule adopted by the board for the control of the traffic.

2. ———: BOARD OF FIRE AND POLICE COMMISSIONERS: ORDINANCES. The manner for the adoption of ordinances by the city council of South Omaha, as prescribed by section 8308, Ann. St. 1907, does

not apply to ordinances adopted by the board of fire and police commissioners of that city.

3. ———: ———: ———. In the absence of a statute prescribing a manner for the adoption of ordinances, any reasonable mode which the board adopting them may follow is sufficient.

4. ———: VIOLATION OF ORDINANCES: COMPLAINT. A rule of the board of fire and police commissioners providing that any officer of the city may make complaint of the violation of law by a licensee does not prevent others from making such complaint, although not expressly given the right to do so.

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

McGilton & Gaines, for appellant.

S. L. Winters, A. H. Murdock and *W. C. Lambert, contra.*

EPPERSON, C.

Relator seeks a peremptory writ of mandamus requiring the respondents, who are the members of the South Omaha board of fire and police commissioners, to restore to him a liquor license which that board had issued and later revoked for alleged violations of the statute, the city ordinances, and the rules of the board. The lower court dismissed the complaint, and relator appealed. A complaint had been filed with the board accusing relator of selling liquor on Sunday. A hearing was had, upon notice to relator, who appeared and introduced evidence in his own behalf. The board found him guilty of the charges and revoked his license.

He now claims that the board had no power to hear and determine matters of evidence relating to an alleged violation of the liquor law. The city charter provides that said board "may, by ordinance, license, restrain, regulate, or prohibit the selling or giving away of malt, spirituous, vinous, mixed or fermented intoxicating liquors. * * * Provided, that any license issued by the board of fire and police commissioners * * * shall

be revoked by the board * * * upon conviction of the licensee of any violation of any law, ordinance, or regulation pertaining to the sale of such liquors, and proceedings of appeal or error taken to review such judgment of conviction shall in nowise affect the revocation of such license." Section 8414, Ann. St. 1907. Under the above proviso the respondents are required to revoke a license upon the conviction of the licensee of the violation of the liquor laws of the state or the ordinances of the city. And such power is complete, although no ordinance for that purpose had been adopted by the fire and police commissioners. But it was not the purpose of the legislature to restrict the power of said board to revoke licenses to cases where the licensee had been convicted in a criminal court. The power given in the first part of the section above quoted to restrain, regulate, or prohibit the sale of intoxicating liquors by ordinance is sufficient to authorize the board to adopt by-laws or rules controlling the traffic, including the right to revoke a license upon the violation of any statute or ordinance of the city pertaining to the traffic, or for a violation of any reasonable rule adopted by the board for the control of the traffic. *Miles v. State,* 53 Neb. 305; *Langan v. Village of Wood River,* 77 Neb. 444. These cases related to the powers given to a city council and board of trustees identical with the power conferred upon the respondents.

But it is argued that the ordinances or by-laws adopted by respondents were irregularily and defectively adopted, in that an aye and nay vote is not shown by the record to have been taken, nor does the record show who were present, nor had the resolution been previously read or offered, nor was it ever published. The record does show that a motion was made to adopt the rules alleged to have been violated, and that the motion carried. The statute does not provide the manner of adopting ordinances by the respondents. Such are not city ordinances within the meaning of section 8308, Ann. St. 1907, prescribing the manner of passing ordinances of the city by the city

council. There being no statute prescribing the manner for the adoption of ordinances, any reasonable mode which the respondents might adopt would be sufficient, and the so-called rules which the relator is alleged to have violated are ordinances within the meaning of the statute. The words "ordinances," "rules," "regulations," and "by-laws" are synonymous terms. 6 Words and Phrases, 5025. *State v. Dudgeon, ante,* p. 371. By such rules the respondents herein provided for the revocation of a license after notice to the licensee, and upon satisfactory evidence of his violation thereof. Their decision cannot be attacked by mandamus. And, again, the rules which relator assails are the rules under which his license was granted. If they are defective, he was not entitled to his license and therefore has nothing which may be restored to him. Neither can he complain that he had no notice of such rules. His license expressly provided that it may be revoked for any violation of the rules of the board, or ordinances of the city, or the provisions of the statute with respect to the sale of intoxicating liquors.

Further complaint is made that one of the rules is contrary to public policy and void, because it provides that any member of the police department or city official may file complaint accusing a licensee of a violation of the rules, and does not expressly provide that a complaint may be made by any other person. It is argued that under this rule no one but a city official or a member of the police department may file a complaint against a licensee. There can be no doubt but that a provision that no one but an officer could complain of a violation of the law by a licensee would be ineffectual. In the absence of a rule, it would seem to be the duty of the board to investigate any complaint lodged with them, if made by a responsible person in a position to know the facts. The rules adopted should not be construed as exclusively providing that no one but officers or members of the police department could complain. In any event the complaint upon which the

relator was tried was filed by one who was permitted to file the same.

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

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

GEORGE P. LEWIS, APPELLANT, V. N. P. MCDONALD ET AL., APPELLEES.

FILED MARCH 5, 1909. No. 15,539.

1. **Evidence: INTENT.** When the intentions of an interested witness become a matter for judicial inquiry, they are ascertained by a consideration of his conduct, and not by his declarations or testimony as to what his intentions were.

2. **Brokers: COMMISSION: EVIDENCE.** As between two brokers, through each of whom negotiations for the sale of land were made with a prospective purchaser, he who can show that his agency was the effective cause of the sale is entitled to recover the broker's commission.

3. ———: ———: ———. Plaintiff, a real estate broker having authority to sell defendant's land, visited the land with the purchaser, and thereafter continued negotiations which were never expressly terminated. Without any intervening agency, purchaser decided to buy, but made an arrangement with the interpleader, also a real estate agent, whereby the latter, with full knowledge of plaintiff's negotiations, solicited and received authority to sell the land, and a promise from the owner of a commission in case he effected a sale, attempting at the same time to procure the land for less money than purchaser was willing to pay. The interpleader promised to divide the commission with the purchaser. The defendant, not knowing of plaintiff's negotiations with the purchaser, agreed that interpleader should bind him by a written contract to convey. *Held*, That as between the brokers plaintiff's efforts were the effective cause of the sale, and he is entitled to the commission.

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

C. A. Robinson and *Albert & Wagner,* for appellant.

W. D. Oldham and *H. M. Sinclair, contra.*

EPPERSON, C.

Plaintiff, a real estate broker of Lexington, sued to recover a commission due upon a sale of defendant's real estate which plaintiff alleges was brought about through his agency. Defendant brought the sum sued for into court, and upon his motion one J. L. Mitchell, another broker of Lexington, was required to interplead, claiming that the sale was effected by him as defendant's agent and that the commission was due to him. The interpleader prevailed, and plaintiff appealed.

Prior to February 28, 1907, the defendant had listed the land in controversy with the plaintiff for sale. He had also listed it with the other brokers, but not with the interpleader. On that day the plaintiff offered the land to one Clifford who afterwards purchased. Clifford was desirous of buying land in that vicinity, and had spent some time in viewing farms which were for sale. He had visited several farms which the interpleader had the agency for, and thereby not being able to find desirable land visited the plaintiff for the purpose of ascertaining what he had. Plaintiff took him to the defendant's farm, a distance of about nine miles, and showed him the land, and with which the purchaser was favorably impressed, but did not at that time conclude to purchase. The conversations had between the plaintiff and the purchaser are of considerable value in ascertaining to what extent the plaintiff's efforts were effective in bringing about the sale. The plaintiff testifies that on their way home he had a conversation with the purchaser, in which the purchaser spoke favorably of the land, and asked plaintiff

if he would throw off any of his commission. Plaintiff told him that there was not much in it, but that he would pay the car fare to and from the purchaser's home. Whereupon the purchaser said: "I will tell you what I will do. If my title on the other piece of land is all right I will take this piece, and if it is not I may take it anyway, and if I see a half-section somewhere altogether I may take that." A few days later the purchaser said to the plaintiff: "Lewis, you are ahead yet," and still later that he would be back in about a week and see what he would do. These conversations are not expressly contradicted by the purchaser. He testified to the conversation between himself and the plaintiff as follows: "Before I left that afternoon I says: 'If I should conclude to take anything you have shown, or that you may show me, would you make any sort of a deal in regard to the commission?' He says: 'No, I don't do that kind of business. The best I would do would be to pay your car fare. Is not that good enough?' I says: 'That is fair, but there are some that would do better.'" A few days after his visit to the defendant's land with the plaintiff, the purchaser returned to his home at York, and on the 12th of March following again went to Lexington and renewed his search for desirable land, at this time doing business only with the interpleader. He was not satisfied with any land exhibited to him at that time, and on the morning of March 13 he told the interpleader that the defendant's land was as good a bargain as he could find; that if he (the interpleader) could get it according to the terms that they had agreed to he would buy it. By this he had reference to an agreement between them whereby interpleader gave to purchaser one-half of his commission on land sold to the purchaser. It must be remembered that the interpleader at that time had not been employed by the defendant nor authorized by him to make a sale of his land. He had done nothing toward effecting a sale. He had previously been endeavoring to sell other land to the purchaser instead. He knew of the negotiations between plaintiff and the purchaser

which had never terminated. Through an arrangement made early on the morning of March 13 between the purchaser and the interpleader, and after the purchaser had made up his mind to buy defendant's land, interpleader telephoned defendant, who resided in another county, informing him that he had a friend who might purchase the land, and wanted authority to sell the same and to bind the defendant by a written contract. He also asked for and received a promise of a commission in case he made a sale. In this conversation interpleader attempted to get the land for less money than was demanded by the owner. The owner did not know that the plaintiff herein had been negotiating with the purchaser when he entered into the agreement with the interpleader.

The question here involved is simply to determine which of the two brokers is entitled to the commission. The defendant acted in utmost good faith. He is willing to pay one commission, which he could possibly avoid by pleading the statute of frauds. This he has waived. Had it not been for the intervention by the interpleader during the negotiations for this sale by plaintiff, no doubt would exist but that the controversy between the plaintiff and defendant could have been quickly adjusted. In *Butler v. Kennard,* 23 Neb. 357, it is held: "Where the price of property and terms of payment are fixed by the seller, and a broker engages to procure a purchaser at this price and upon these terms, if, upon the procurement of the broker, a purchaser is produced with whom the seller himself negotiates and effects a sale, the broker is entitled to his commission." In the opinion we find the following: "It is a well-established rule in this as well as other states that, where a broker is employed to sell real estate, it is not necessary that the whole contract should be completed alone by him, in order to entitle him to his commission. But if, through his instrumentality, the purchaser and owner are brought in contact, and a sale is made through the instrumentality of the agent, he is entitled to his compensation; and this without reference to whether the

owner, at the time the sale was perfected, had knowledge of the fact that he was making the sale, through such instrumentality." See, also, the following cases: *Potvin v. Curran & Chase,* 13 Neb. 302; *Nicholas v. Jones,* 23 Neb. 813; *Craig v. Wead,* 58 Neb. 782. Under this rule and the facts in this case, we think that the plaintiff is entitled to recover, unless the agency and the efforts of the interpleader were such as to give him a greater right to the commission. As between two brokers, he is entitled to recover who can show that his efforts resulted in the sale of the land. If the sale is the result of efforts exercised by both the brokers, the rule seems to be that the one who first brought the seller and purchaser together is entitled to the commission. By bringing the seller and purchaser together we do not mean necessarily that he must introduce them to each other, but that, if his efforts result in bringing the minds of the two to an agreement resulting in the sale and purchase of the land, then, within the meaning of the law, he has brought them together. In the case at bar there can be no doubt but that it was through the agency of the plaintiff that the sale in controversy was negotiated. The interpleader had no part in negotiating the sale. He put forth no efforts whatever to bring about the transfer. He exerted himself only after the purchaser decided to buy. The motive which then prompted him to action seemed to be to secure as good a bargain as possible for his friend, the purchaser, and for himself a commission he never earned.

The purchaser saw the land only when it was shown him by the plaintiff. The only negotiating for the land was with the plaintiff. The plaintiff was the only human agency exercised in behalf of the defendant which was influencial in the transaction. It is true the purchaser testified that he would not have purchased through the plaintiff. In this he was mistaken. He further testified that he made up his mind to purchase on the morning of March 13 at the breakfast table, which was before the interpleader telephoned to defendant. His conduct was incon-

sistent with his intention expressed on the witness stand that he did not intend to buy otherwise than through the interpleader. He is interested in this action, and expects to receive one-half the commission recovered by the interpleader. We ascertained his intentions from his conduct, and not from his statements as to what they were. The lower court found that the interpleader was entitled to the commission for his services in making the sale. On what theory the trial court reached this finding we cannot discern. We cannot see anything in this case indicating that the interpleader did anything whatever to earn a commission. Nor can we see wherein his efforts resulted in the consummation of a sale or in any way influenced the purchaser to buy. Were the defendant contesting the demands of the interpleader, without doubt he would prevail, because interpleader, while pretending that he desired to represent the defendant, in fact was representing purchaser and attempting to get the land for less than the defendant was demanding therefor.

Holland v. Vinson, 124 Mo. App. 417, 101 S. W. 1131, is very similar to the case at bar, with a few distinguishing features making the case even stronger for the party standing in a position similar to that occupied by Mitchell in this case. There a real estate broker, who was suing for his commission, was unable to consummate the sale upon the terms authorized, but while the purchaser was still negotiating with him the owner authorized another agent to sell to the purchaser for a less amount. In the opinion the court said: "If such a course of business was tolerated a real estate broker never would feel sure of his commission. But it is not tolerated. The law will not permit one broker who has been intrusted with the sale of land and is working with a customer whom he has found, to be deprived of his commission by another agent stepping in and selling to said customer for less than the first broker is empowered to receive. The landowner does wrong to grant such authority to the interfering broker and is bound to pay the one who procures the buyer. * *

The conclusion is almost irresistible that the sale was concluded in the manner it was in order to beat plaintiffs out of their compensation. Whether that was true or not, the sale was made to their customer, and one whom they had procured by their own efforts, before he had refused to buy from them and while they were endeavoring to sell to him. The whole matter happened in a week."

Another Missouri case similar to this is *McCormack v. Henderson,* 100 Mo. App. 647, 75 S. W. 171. Plaintiff had solicited a sale of the property to the purchaser and visited him several times. Plaintiff left town on Monday and returned Friday. During his absence one McGregor, who was the purchaser's friend, was told about the property by the purchaser. McGregor then, at the purchaser's request, and as his representative, went to the defendant after the purchaser had decided that he wanted the house, and through him submitted to the defendant the highest price the purchaser would pay. The negotiations finally resulted in defendant fixing the price at less than that for which plaintiff was authorized to sell. Previously, however, the purchaser had decided not to buy through the agency of the plaintiff because he had taken offense at some language used by the plaintiff. The court held that the evidence was sufficient to show that the efforts of the plaintiff were the procuring cause of the sale, nothwithstanding defendant consummated it himself with McGregor, who was, in fact, the agent of the purchaser. The court said: "If it was through plaintiff's efforts, *of which there can be no doubt,* that McClintock came to the conclusion to purchase the fact that because he became dissatisfied with plaintiff and made the arrangement to purchase through McGregor did not have the effect of depriving plaintiff of his right to commission for his services. The evidence that McClintock had concluded to buy the property before he ceased negotiations with plaintiff was clear."

In *Reynolds v. Tompkins,* 23 W. Va. 229, the court held that where one broker finds a purchaser whom he negoti-

ates with for the sale of land, and when the sale is about to be consummated another broker meets the prospective buyer, and with full knowledge of the negotiations of the first broker sells the property to such buyer for a less price, and the owner ratifies such sale in ignorance of the negotiations of the first broker, the owner is not liable to the second, but to the first broker for commission. There are many cases holding that the first broker attempting to sell to the purchaser in a contest between brokers is not entitled to recover, but we are unable to find any case holding that a broker whose efforts have not resulted in the sale, and who steps in when the sale was substantially consummated, is entitled to prevail as against a former broker who has been successful in bringing the purchaser to the owner or whose efforts alone were effective in bringing about the sale.

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.

GUSTAVE TESKE, GUARDIAN, APPELLANT, V. MARTHA DITTBERNER ET AL., APPELLEES.

FILED MARCH 5, 1909. No. 15,386.

1. **Homestead: SELECTION: VOID CONTRACT.** Frederick Teske and wife for a valuable consideration orally agreed with Carl Teske that he should at their death have certain lands, in a part of which they had at the time a homestead estate. In an action by Carl against Frederick it was decreed that the agreement was void as to the homestead estate and valid as to the remainder of the land. *Held*, That the homestead estate should be appraised and ascertained as of the date of the oral agreement.

2. Contracts: CONSTRUCTION. The meaning of a sentence or part of a written instrument should be ascertained by considering all of the parts and provisions of the instrument together, and not by taking a single sentence or part standing alone.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

M. D. Tyler and *McKillip & McAllister,* for appellant.

William V. Allen and *Willis E. Reed, contra.*

GOOD, C.

On January 4, 1893, Frederick Teske and wife for a valuable consideration orally agreed with their son Carl Teske that at their death he should have certain lands. At that time Frederick Teske and wife resided upon and had a homestead estate in a part of the northwest quarter of section 24, township 21 north, range 2 west of the sixth P. M., in Madison county, Nebraska. This quarter section of land was a part of the land which by the terms of said oral agreement Carl was to have at the death of his parents. Mrs. Teske died in 1896, and a few months thereafter Frederick Teske, in violation of said agreement and without consideration, conveyed said quarter section to Martha Dittberner, their daughter. Thereupon Carl Teske brought an action against his father and sister to set aside said conveyance and enforce specific performance of said oral agreement. In due time the case reached this court, and during the pendency thereof in this court Frederick Teske died. This court finally held the oral agreement void as to the homestead estate of Frederick Teske, and valid and enforceable as to the remainder of the land. See *Teske v. Dittberner,* 70 Neb. 544. In obedience to a mandate from this court, the district court entered a decree awarding the homestead estate of Frederick Teske to Martha Dittberner and the remainder of the land to Carl Teske, and upon a motion of the plaintiff appointed commissioners to appraise and set apart

the homestead estate of Frederick Teske. The commissioners were directed to include the dwelling house, barn and outbuildings, and land contiguous thereto, not exceeding in all $2,000 in value as of the date of January 4, 1893. The commissioners appraised the buildings and land, and set apart the east 46 acres of the quarter section as and for the homestead of Frederick Teske. The plaintiff filed objections to this report, one of the grounds of objection being that the court erred in fixing January 4, 1893, as the date when the value of the homestead should be ascertained. The objections were overruled and the report of the commissioners confirmed. Plaintiff has appealed.

The principal question presented by this appeal is: Did the district court err in directing that the homestead estate of Frederick Teske should be ascertained and set apart as of the date of January 4, 1893. The plaintiff contends that the homestead should be ascertained and set apart as of the date of the conveyance to Mrs. Dittberner. As the land had risen in value, this would have given a smaller quantity of land for the homestead. Mrs. Dittberner would have received less land, and Carl Teske correspondingly more land, if the homestead had been ascertained as of that date. By the former judgment of this court in *Teske v. Dittberner, supra,* the oral agreement was held void as to the homestead estate of Frederick Teske. If the entire quarter section at the time of the making of the oral agreement had not exceeded in value the sum of $2,000, then the contract would have been void as to the whole of that quarter section. Plaintiff contends that the rise in value would have withdrawn from the void contract all that portion of the quarter section which by reason of the rise in value exceeded in value the sum of $2,000 at the date of the conveyance to Mrs. Dittberner. In other words, the mere rise in value of the land would make valid that which was before void. By the same process of reasoning, if the subject of the contract had been a single tract of 160

acres of the value of $4,000 at the time the contract was made, and if the land had declined in value until it did not exceed $2,000, the contract would become void in toto, although it was, when made, valid as to land of the value of $2,000. The mere decline in value of the land would render void a contract which was before valid. Such, we think, is not the rule. A contract that is void has no life and no validity, and the mere enhancement in the value of the land cannot breathe life or validity into it. A contract for the sale of land, valid when made, does not become void by the rise or fall in the value of the land. Whether the contract was valid or void must be determined at the date of its execution. If void when made, it remains void; and, if valid when made, it remains valid. The quantity of land to be affected by the contract or the land as to which it was void and as to which it was valid must be determined as of the date of the execution of the contract. *Dye v. Mann,* 10 Mich. 291. The district court properly directed the ascertainment in setting apart the homestead as of the date of the contract, January 4, 1893.

In the report of the commissioners there is contained a statement to the effect that they find the value of the dwelling house and the appurtenances to be $2,000. Defendants contend that this is equivalent to a finding that the value of the buildings with the land upon which they stood was of the value of $2,000, and that therefore no more than the ground upon which the buildings stood should have been included in the homestead. An examination of the entire report shows however that they found separately the value of each one of the buildings as of the date of January 4, 1893, and that the aggregate value of these buildings was $1,195, and they found the value of the land on that date, exclusive of the buildings, to be $17.50 an acre. Forty-six acres at that rate would amount to $805, which, together with the value placed upon the buildings, amounted to exactly $2,000. We think it is plain that the commissioners in making the

said statement had in mind the 46 acres of land and the buildings thereon. To ascertain the meaning of any part of the report the whole of it should be examined, and resort should not be had to a single isolated sentence. Applying this rule, it clearly shows that this contention of the plaintiff is groundless.

We find no error in the record. The judgment of the district court is right, and we recommend that it be affirmed.

EPPERSON, C., concurs.

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

AFFIRMED.

BARNES, J., dissenting.

I am unable to concur in the opinion of my associates. When this case was before us on a former occasion we held that the contract by which Frederick Teske agreed to convey all of his farm in Madison county, Nebraska, to his son Carl Teske, was valid, and binding on him as to all of the land therein described, except his homestead interest, and was void as to that interest only, because it was not signed and acknowledged by his wife, who was then living. The homestead interest then was what was retained by Frederick and his wife, and they undoubtedly were entitled to have it admeasured and set off to them at any time they chose to demand it. They made no such demand, but delivered possession of all of the land embraced in the contract to Carl, and lived with him for many years on the whole tract in accordance with the terms of the contract. Frederick finally became dissatisfied about some unimportant matter, when he left the home and went to Mrs. Dittberner's, to whom he then conveyed the whole of the land embraced in the contract. Now, having held that Frederick was bound by the contract to convey to Carl all of the land

except so much as would constitute a homestead, or in other words, his homestead interest, it follows that he could convey nothing to Mrs. Dittberner beyond that interest. Therefore, it seems plain that she obtained nothing by the deed in excess of that interest, which was so much of the land in value and extent as would then amount to $2,000. This she was then, and not before that time, entitled to have admeasured and set off to her. I am of opinion that we should so hold. To determine otherwise and declare that she was entitled to have so much of the land as would amount in value and extent to $2,000 at a date many years before she acquired any interest therein, would be to give her more than she received by Frederick's conveyance, and would result in depriving Carl of a portion at least of what he had earned, and was justly entitled to receive under his contract.

It therefore seems clear to me that the judgment of the trial court should be reversed and the cause remanded, with instructions to appraise the land and admeasure and set off to Mrs. Dittberner so much of it as at the date of her deed would amount in extent and value to $2,000.

FIRST NATIONAL BANK OF TEKAMAH ET AL., APPELLEES, v. LINNIE MCCLANAHAN, APPELLANT.

FILED MARCH 5, 1909. No. 15,535.

1. **Homestead, Proceeding to Set Off: STRIKING ANSWER.** On the day set for hearing on a petition filed by a judgment creditor under provisions of section 6 of the homestead act (Comp. St. 1907, ch. 36) to have the judgment debtor's homestead ascertained and set off, the wife of the judgment debtor filed an answer in which she set forth that the judgment debtor had deserted his family, and other facts showing her entitled to claim the homestead exemption, and also alleged that she and her husband each owned an undivided one-half interest in the premises levied upon, and claimed the homestead exemption out of the husband's undivided interest, which answer was stricken from the files upon the

ground that the statute did not require the filing of an answer, and that the homestead claims set up in the answer were different from that contained in the notice to the officer making the levy. *Held* to be error.

2. Homestead: SELECTION. The undivided half interest of a husband in lands owned by himself and wife as cotenants is subject to homestead exemption.

3. ———: ———. When a husband deserts his wife and family, leaving them in the possession of a homestead, the wife is entitled to the benefit of the same homestead exemption that existed in her husband at the time of his desertion.

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

Smyth & Smith, E. O. Kretsinger and *Singhaus & Clark,* for appellant.

Hopewell & Hopewell, contra.

GOOD, C.

Plaintiffs, who are judgment creditors of Andrew J. McClanahan, levied upon and advertised for sale as the property of said McClanahan the southeast quarter of section 11 and the south half of the southwest quarter of section 12, all in township 20 north, range 11 east of the sixth P. M., in Burt county, Nebraska. Defendant, who was the wife of said Andrew J. McClanahan, notified the sheriff that she claimed a homestead interest in the south half of said southeast quarter of section 11 and that part of the south half of the southwest quarter of section 12 which had not been washed away and destroyed by the Missouri river. Plaintiffs, pursuant to the provisions of section 6 of the homestead act, filed a petition for the ascertainment and setting off of defendant's homestead. On the day fixed for the hearing on said petition defendant filed an answer in which she set forth that she and her husband each as tenants in common owned an undivided one-half interest in said south half of the southeast quarter of section 11 and the south half of the south-

west quarter of section 12. She also alleged that her husband had deserted her and her family, and facts showing that she and her husband had occupied said land as a homestead prior to his desertion, and that she and her family had continuously occupied it as a home since his desertion. She asked that the homestead be set off out of the undivided half interest of her husband in said lands. Plaintiffs moved to strike the answer from the files upon the grounds: First, that the statute did not require the filing of an answer; and, second, that the homestead claim was different from that set forth in the notice served upon the sheriff. On the same day the defendant in open court asked leave to serve upon the sheriff an amended notice of her homestead claim to correspond with the facts set up in her answer. The trial court sustained this motion upon condition that defendant pay all the costs of the proceedings since the issuance of the execution and pay an attorney's fee of $25 to plaintiff's attorneys. Defendant excepted to the conditions imposed, and filed in the office of the clerk of the court an amended notice directed to the sheriff setting out her homestead claim in the same manner as she had in her answer; but she failed and neglected to comply with the conditions imposed as to payment of costs and attorney's fees. The defendant filed a motion to set aside the order of the court granting her leave to file an amended notice of homestead in so far as it imposed the terms of payment of costs and attorney's fees. This motion was overruled, and the motion of plaintiff's to strike defendant's answer was sustained. The court then entered an order sustaining plaintiffs' petition for appointment of appraisers on the original notice given to the sheriff, and appointed three freeholders to appraise and set off the defendant's homestead. The south half of the southeast quarter of said section 11 and that portion of the south half of the southwest quarter of said section 12 that had not been destroyed by the Missouri river was appraised at $6,800, and the appraisers reported that said

premises could be divided and the homestead set off without material injury to the premises. To this report the defendant objected, and moved to set the same aside upon the following, among other, grounds. First, that the court erred in striking defendant's answer and in refusing to permit defendant to serve an amended notice except upon the terms imposed by the court; and that the court had abused its discretion in imposing the terms of payment for attorney's fees and costs. The objections and motion were overruled, the report approved, and the appraisers ordered to set off the defendant's homestead out of the appraised lands. The appraisers set off to the defendant as her homestead the land contained in the south half of the southwest quarter of section 12, comprising a trifle less than 21 acres. To this report the defendant objected, and moved to set the same aside for the same reasons assigned in the objections and motion directed against the first report of the appraisers, and upon the further ground that the value placed upon the land by the appraisers was greatly in excess of its real value; that the court erred in overruling the objections to the first report of the appraisers, and that by the action of the appraisers the defendant's homestead had been set off out of the lands owned by her and her husband, instead of the lands of her husband, and that half of the value of the lands set off was represented by the land owned by her. This motion and objections were overruled, and the report confirmed, and execution ordered to be enforced against all the land levied upon except that which had been set apart as a homestead. The defendant duly excepted to all the adverse rulings of the court on all of her motions and objections, and has removed the case to this court by appeal.

Defendant complains of the action of the trial court in striking her answer from the files and in denying her leave to serve on the sheriff an amended notice claiming a homestead from the undivided interest of her husband in the land except upon the payment of costs and attor-

ney's fees. Plaintiffs insist that in such proceedings no answer is required, and that the terms imposed as a condition to serving an amended notice were within the discretion of the court and were reasonable. In proceedings by execution creditors to have the debtor's homestead ascertained and set off, the statute requires the creditor to file a petition, but there is no requirement of the statute that defendant shall file an answer. In *France v. Hohnbaum*, 73 Neb. 70, it was held that in such a proceeding the procedure is within the discretion of the district court, and, unless an abuse of this discretion is shown, the reviewing court will not interfere. In that case the judgment debtor filed an answer which the trial court refused to strike from the files on the motion of the judgment creditor. The ruling of the trial court was sustained. We are of the opinion that, where there are any peculiar features surrounding the rights of the homestead claimant such as appear in this case, it was entirely proper and perhaps necessary for the defendant to file an answer setting forth in the concise manner her homestead claim. In no other way can we perceive how the nature of defendant's homestead claim, and that it should be carved out of an undivided half interest in the real estate, could be properly brought to the attention of the court. The striking of defendant's answer was an abuse of discretion, as we view it, and constituted prejudicial error to the defendant, as we shall hereafter see.

With reference to the refusal of the trial court to permit the defendant to serve an amended notice except upon terms, we perceive no error for the reason that there was no occasion for the serving of an amended notice. The object of such notice to the officer having the execution is to stay him in his proceeding to sell the land, and warn the judgment creditor that a homestead is claimed. No further steps in the proceeding to sell can then be had until the judgment creditor files his petition and has the homestead appraised and set off. The notice has served its purpose. The sheriff was prevented from taking any

further steps, and the judgment creditor was apprised that a homestead claim had been made against the land. He acted upon the notice and filed a petition to have the homestead set off. No other or further notice to the sheriff was necessary. It was then a matter for the court to determine from the petition of the plaintiffs and such other pleadings, as might be properly filed in the proceeding.

The defendant complains because the homestead set off, although appraised at $2,000, was really of the value of but $1,000, because in the appraisal was included property which was not subject to the homestead claim. If defendant was the owner of an undivided one-half interest in the land which was set off as a homestead, and if she was entitled to have the homestead carved out of her husband's undivided half interest, it is clear that the defendant has been awarded a homestead of the value of $1,000, while the value limit fixed by statute is $2,000. In many states a homestead cannot be acquired in lands that are held in co-tenancy, but such is not the rule in this state. One of the principal objects of the homestead law is to protect the debtor and his family in the possession of a home. The homestead law has always been liberally construed in this state with a view to promoting its beneficent purposes. It is no concern of the creditor that the debtor's interest in the land is an undivided interest or that it may be less than a fee title to all the premises out of which he claims a homestead. In *Giles v. Miller,* 36 Neb. 346, it was held that "a homestead may be claimed in lands held in joint-tenancy," and that "an undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption." Under the rule laid down in that case Andrew J. McClanahan was entitled to a homestead exemption out of his undivided half interest in the lands in controversy. When he deserted his wife and family, leaving them in the possession of the home, the

right to claim the same homestead exemption passed to his deserted wife and family. Again, section 2 of the homestead act (Comp. St. 1907, ch. 36) authorizes the selection of the homestead from the separate property of either the husband or wife, but from the property of the wife only with her consent. In this case the wife has not consented, and is strenuously objecting to the homestead being selected from her separate property. Without that consent it cannot be taken from her property. It naturally follows that the homestead set off to the defendant, while appraised at $2,000, is of the value of $1,000, for her undivided half interest in the land set off as a homestead cannot be considered as a part of the homestead.

We recommend that the orders of the district court directing the appraisement, and setting off of the homestead and the confirmation of the report of the appraisers be reversed and set aside and the cause remanded, with directions to restore to the files defendant's answer, and for further proceedings according to law.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the orders of the district court directing the appraisement and setting off of the homestead and the confirmation of the report of the appraisers are reversed and set aside and the cause remanded, with directions to restore to the files defendant's answer, and for further proceedings according to law.

JUDGMENT ACCORDINGLY.

JOSIAH E. REED, APPELLEE, V. VILLAGE OF SYRACUSE, APPELLANT.

FILED MARCH 5, 1909. No. 15,465.

1. **Master and Servant:** INJURY: NEGLIGENCE: QUESTION FOR JURY. Where a village, engaged in supplying water and manufacturing gas for its own use and for sale to private consumers, so installs a tank for the storage of gasoline that it leaks into the pumping pit of the waterworks and causes an explosion in which an employee of the village is injured, the question whether such explosion is attributable to negligence on the part of such village is for the jury.

2. ———: ———: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. Where an explosion of gasoline in the pumping pit of a village waterworks followed the lighting of a match by an employee who had no knowledge of the presence of the gasoline, but detected an odor of gas which he supposed was escaping from a fixture, and the evidence shows that such is the ordinary method to detect leaking fixtures, the question whether the employee was guilty of contributory negligence in striking the match is for the jury.

3. ———: ———: ASSUMPTION OF RISK. The danger of an explosion from the presence of gasoline in the pumping pit of a waterworks station, of which an employee had no notice, is not one of the ordinary and obvious hazards of his employment which he assumes by accepting such employment.

4. ———: ———: LIABILITY. A water commissioner appointed in pursuance of the provisions of subdivision 15, sec. 69, art. I, ch. 14, Comp. St. 1903, has, subject to the supervision of the board of trustees, general management and control of the system of waterworks, and the village owes to persons employed by him in connection with such business the duty to provide a reasonably safe place for the conduct of their employment.

5. **Appeal:** HYPOTHETICAL QUESTION: REVIEW. Where a hypothetical question is objected to on the ground that it is an inaccurate statement of the facts which the evidence tends to establish, such objection will not be considered on appeal unless the argument points out the particular defect in the question.

6. ———: DAMAGES: INSTRUCTIONS. Where the evidence clearly shows that the injuries suffered by the plaintiff are of a serious and permanent character, and the damages awarded, it is conceded, are not excessive in amount, it is not prejudicial error for the court to instruct the jury that the plaintiff is entitled to recover damages for his impaired earning capacity.

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

D. P. West and *John C. Watson,* for appellant.

Pitzer & Hayward, contra.

CALKINS, C.

The village of Syracuse had for some years operated a system of waterworks, and in 1904 began the manufacture of gas for municipal use and for sale to private consumers. The pump for supplying water was installed in a pit in the pumping station, and a large tank in which to store gasoline for the manufacture of gas was buried in the ground outside, but near the pit of the pumping station. The plaintiff was a helper employed by the village water commissioner to, among other things, fire the boiler and manage the engine and pumps while pumping water. August 24, 1904, in the execution of his said duties, he descended into the pit to start the pumps. There was a gas burner placed in this pit to light the same at night and during dark days. The plaintiff detected, as he says, a slight odor of gas, and, thinking the fixture might be leaking, lighted a match to test the same. A violent explosion followed, in which plaintiff was severely burned, suffering serious and permanent injuries to his health, strength and ability to labor. He brought this action, alleging that the explosion was caused from gasoline which had leaked from the storage tank, and, percolating through the earth, penetrated the walls of the pumping pit, as the result of the negligence of the defendant in the installation of said storage tank. There was a verdict for the plaintiff, and from a judgment thereon the defendant appeals.

1. At the close of plaintiff's case the defendant asked the court to direct a verdict on the ground that the undisputed evidence failed to show the defendant guilty of neg-

ligence. The storage tank was constructed of 3-16 inch sheet iron or steel, and was 35 feet long and 5½ feet in diameter, and cylindrical in shape. The evidence established that to keep such tanks from straining and consequent leakage at the seams they should be unloaded from the car by means of cradles resting on timbers cut to fit the circumference of the tank; that a foundation should be prepared, either by building piers concave in form to fit the tank, or placing concave iron or wooden saddles upon level piers of masonry; that a clearance space should be left under the pipes running from the tank to prevent the same from being wrenched by the uneven settlement thereof, and that in all cases a test of the tank and pipe work should be made after the installation thereof to detect leakage. None of the above precautions were observed by the defendant in installing the tank in question. It was rolled off the cars upon timbers and into a hole dug in the ground without preparing any foundation for it to rest upon. There were no precautions taken to prevent the wrenching of the connecting pipes by the unequal settlement of the tank, and a test of the work was entirely omitted. Upon examination of the tank after the explosion, it was found to be leaking in several places, especially at the pipe connections, and the earth around the tank was more or less saturated with gasoline. The pump pit was walled with ordinary rubble masonry, plastered on the inside with cement. It was not of a design calculated to keep water out of the pit, and there was more or less seepage of ground water into the pit, there being seven or eight inches of water in the pit at the time of the explosion. There being no other source indicated from which it could have entered, the conclusion is almost irresistible that the gasoline from the leaky tank had seeped through the ground and into the pit in the same manner and perhaps with the water which had come through the walls. These facts were clearly sufficient to justify the court in submitting the question of defendant's negligence to the jury. Villages that lawfully engage in

commercial enterprises are liable to the public the same as individuals. *Todd v. City of Crete,* 79 Neb. 671.

2. It is argued that the plaintiff's own evidence established contributory negligence on his part, and that for that reason the court should have directed a verdict for the defendant. It is claimed that the act of the plaintiff in lighting the match constituted such contributory negligence. While the act of lighting a match where the presence of any considerable quantity of inflammable gas is suspected would be carelessness of a culpable kind, it is in evidence that such is the ordinary way of detecting slight leakages from fixtures or burners. The plaintiff testified that he only discovered a slight odor of gas, which he supposed was produced by a small leak in the vicinity of the fixture. The facts therefore presented a case peculiarly suitable for submission to the jury, which is ordinarily the judge of what constitutes negligence and contributory negligence, and which should not be constrained by the court except in cases so plain that different minds might not honestly draw different conclusions.

3. It is argued by defendant that, if a servant agrees to undertake employment in a business conducted in a certain way, he thereby assumes all the obvious dangers and hazards of such business, and that therefore the plaintiff in this case assumed the risk of the injury which he suffered. It is not pointed out how the presence of gasoline, which had escaped from a leaky and improperly installed tank and percolated through the earth to the pumping pit of the waterworks, is one of the ordinary and obvious dangers and hazards of operating the pumps of said waterworks. Such danger appears to us neither ordinary nor obvious, and it was not, therefore, assumed by the plaintiff.

4. The defendant insists that the relation of master and servant did not exist, and for that reason there should have been no recovery. The charter act under which the defendant was organized provided for the appointment of a water commissioner, concerning whom it is enacted that

he shall, under the supervision of the board of trustees, have general management and control of the system of waterworks. Comp. St. 1903, ch. 14, art. I, sec. 69, subd. 15. Such officer was appointed, and he employed the plaintiff. That the city paid the water commissioner a gross salary, out of which he paid the plaintiff, does not alter the case. The status of the water commissioner was fixed by law. He cannot, therefore, be an independent contractor, and the doctrine of such cases does not apply.

5. The defendant assigns as error the action of the court in overruling objections to certain hypothetical questions that were propounded to Mr. Munn, a civil engineer, and to Mr. Mount, a boiler manufacturer. It is objected that these questions did not correctly assume the facts which the evidence introduced established or tended to establish. The defendant does not point out any fact included in these questions which should have been omitted, nor does it specify any fact omitted which should have been included. It therefore fails to present any question to the court for its consideration. We have, however, examined these questions; but have been unable ourselves to discover any defect which is open to these objections.

6. Objection was made to the seventh instruction, given by the court on its own motion, on the ground that there was no evidence to "show what caused the leakage or that there was, in fact, any leakage." This is sufficiently disposed of by what we have already said in reference to the refusal of the court to direct a verdict.

The objection to the eighth instruction, that it assumed the existence of the relation of master and servant, is disposed of by paragraph 4 of this opinion.

The eleventh instruction told the jury that they had a right to allow the plaintiff compensation "on account of his impaired earning capacity in the future." This is complained of as allowing the jury to come into the field of mere probability and conjecture. The injuries suffered by the plaintiff were of a most serious nature and perma-

nent in their character. He was burned over two-thirds the entire surface of his body, and his survival violated all the probabilities of medical prognosis. There were permanent changes in the structure of some of his organs, and adhesions of the muscles of his hands and one of his arms. The functions of the skin over a large portion of his body were permanently impaired, and his nervous system greatly weakened. It was frankly admitted upon the trial that his injuries were of a nature so grave that, if he was entitled to recover in any amount, the award of the jury was not excessive, and the defendant could not for this reason have been prejudiced by the instruction complained of.

Other objections are made to other instructions, and to the refusal of the court to give various instructions requested by defendant; but they raise no questions not hereinbefore determined, and we do not deem it necessary to consider them in detail.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

CHARLES E. GIBSON, APPELLANT, V. LEVI GUTRU ET AL., APPELLEES.

FILED MARCH 5, 1909. No. 15,504.

1. **Receivers: POWERS.** Where a note made payable to the order of a corporation is really owned by a third party, and such corporation becomes insolvent, its effects passing to a receiver, such receiver may indorse such note to the real owner, and thereby vest in him the legal title thereto.

2. **Mortgages: RENEWALS: ACTION.** Where a defendant gave to the holder of a promissory note secured by mortgage a renewal note,

the sole consideration of which was the original note and mortgage, such holder of said original note is not entitled to maintain an action on the renewal note after a decree and sale has been had in a suit upon the original mortgage, and while such decree and sale remain in force and unsatisfied.

3. **Notes: ACTION: DEFENSES: QUESTION FOR JURY.** Where the defense to an action upon a promissory note transferred for value before maturity and in the due course of business is that the indorsee had notice of a defect in the consideration, the court should not instruct the jury for the defendant, unless the uncontradicted evidence shows that the plaintiff had such notice, or establishes facts from which the only reasonable inference to be drawn is that he had such notice or took the paper under such circumstances as show bad faith or a dishonest purpose on his part.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

James M. Nichols, C. A. Robinson, H. M. Sinclair and *W. D. Oldham,* for appellant.

H. Halderson, contra.

CALKINS, C.

In 1894 the defendant purchased a tract of land situated in Box Butte county subject to a principal mortgage of $275 and to a second or interest mortgage for $18. Default had been made upon this mortgage, and after the commencement of a suit to foreclose the same the defendant applied for a renewal to the Globe Investment Company, in whose name the original mortgage appears to have been held. In response to that application the company made a statement of the amount due, and offered to renew the note for $275 upon payment by the defendant of interest and costs. The note in suit was executed in pursuance of such arrangement, and the defendant paid a certain amount of money to apply on the interest and costs. But a dispute appears to have arisen as to the amount which should be paid on that account, the representative of the investment company demanding a payment of $19 more than defendant had paid, and this demand

culminated in a threat made on the 6th day of March that, if he failed to pay the sum at once, said company would complete the foreclosure of the loan. About this time the Globe Investment Company failed, and a receiver was appointed to wind up its affairs. It appears that the note in question did not belong to the Globe Investment company, but to one Chaplin of Georgetown, Massachusetts, who on the 21st day of October, 1896, sold the same to the plaintiff. A dispute having arisen between the plaintiff and the receiver regarding the payment of costs claimed to have been advanced by the receiver upon other paper purchased by the plaintiff, the note in question was not immediately delivered; but on June 13, 1899, the plaintiff and the receiver having come to an understanding upon these matters, the latter indorsed the note in suit to the plaintiff. Meanwhile the foreclosure suit, which was in the name of one J. L. Moore, an officer and director of the investment company as trustee, proceeded to a decree and sale, at which the property was bid in in the name of said Moore as such trustee. This sale was confirmed, but no deed was executed in pursuance thereof. Upon these facts the court below directed a verdict for the defendant, and the plaintiff appeals.

1. The defendant contends that the indorsement of the note in question to the plaintiff by the receiver of the insolvent company, in whose name it was taken, was insufficient to vest the legal title thereto in the plaintiff. No authorities are cited to sustain this proposition, nor are we referred to any legal principle by which it is upheld. The legal title to the note in question was first in the investment company, and it passed to the receiver by virtue of his appointment. When he indorsed it to the plaintiff, the legal title vested in the latter. The equitable title was in Chaplin, and when the receiver was appointed in September, 1895, he held that title for the benefit of Chaplin. When in October, 1896, Chaplin made the sale to plaintiff, the receiver then held the title for the benefit of the plaintiff; and when the receiver afterwards

indorsed it to the plaintiff, the legal and the equitable title were vested in the same person. Since at the beginning of this action the plaintiff had both the legal and the equitable title, the fact that some of his indorsers actually held the same for the benefit of another is immaterial. The only absolute property or right of ownership which the law recognizes and which courts of law protect by their legal actions and remedies, whether in land or things personal, must arise and be acquired in certain fixed, determinate methods, which alone constitute the titles known to the law, using that word in its strict and true sense as a means of acquiring property. Pomeroy, Equity Jurisprudence (3d ed.), sec. 366.

2. The plaintiff contends that the facts shown concerning the status of the foreclosure suit would not constitute a defense to this note in the hands of the original payee. It is argued that the evidence shows that the defendant has lost nothing by the failure to satisfy the original mortgage, and that he sold the land with the understanding that said mortgage was satisfied, and received full compensation for the same without deducting anything on account of the existence thereof. Whether the evidence would justify this conclusion it is not necessary for us to determine, for we think the defendant was entitled to have such mortgage satisfied, and that an action could not be maintained upon the renewal note while the decree upon the original mortgage was in full force and effect.

3. But a failure of consideration is not a defense to a negotiable note in the hands of a *bona fide* holder for value, who acquired it before maturity in due course of business and without notice of such defect. The note in question was dated September 1, 1894, and was due September 1, 1899, so that whether the date of the purchase or actual indorsement is taken as the date of the transfer the plaintiff received it before maturity. The plaintiff is the only witness who testifies to the facts of the transaction

by which he became the owner of the paper. He states that he had been in the business of handling western land and mortgages for some 20 years; that he bought the note in question on October 21, 1896, from George J. Chaplin, paying for the same in cash by a check which he forwarded him by mail on October 21, 1896, covering the cost of this and other notes that he purchased from him at the same time; and that on June 13, 1899, the note was indorsed and delivered to him by Mr. Wyman, receiver of the insolvent company. He states that he had no knowledge of any defense or claim of defense to the note.

It is to be observed that the real question was whether the plaintiff knew that this was a renewal note, and that the original note which it was given to renew had not been satisfied, or whether he was under the circumstances guilty of negligence or of want of proper caution. It is claimed by defendant that the evidence shows that the plaintiff knew of the fact of this being a renewal note at the time he testified, and that it therefore follows that he must have known it at the time of the purchase. But this is not necessarily true. The questions whether the holder of current negotiable paper has taken it with or without notice of defenses between prior parties, and whether he has exercised good faith in the transaction or has been guilty of negligence or a want of proper caution, are always questions of fact to be submitted to a jury when the evidence is conflicting or when from the facts proved different minds might honestly draw different conclusions. 1 Thompson, Trials, sec. 1239. And, while we deem it unnecessary to determine whether the facts before the court would have sustained a verdict for the defendant had the question been submitted to the jury, we are satisfied that it did not justify a peremptory instruction by the court for the defendant. The only way a conclusion that the defendant had notice of this fact could be reached would be by inferences drawn from the facts to which he testified, and these inferences, if made at all, must be made by the jury.

The court should have only directed a verdict when the uncontradicted evidence established the fact of the plaintiff's knowledge of the existence of the defense to said note, or facts from which the only reasonable inference to be drawn was that he had such knowledge or took the papers under such circumstances as evidenced bad faith or a dishonest purpose on his part.

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

DUFFIE, 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.

IN RE ESTATE OF JAMES H. POPE.

FRED C. CAULTON, APPELLEE, V. LYDIA E. POPE, EXECUTRIX, APPELLANT.

FILED MARCH 5, 1909. No. 15,519.

1. **Executors and Administrators:** DEVISE: CROPS. Unless reserved, crops standing upon the ground pass to the devisee and not to the executor. *Andersen v. Borgaard*, *ante*, p. 8, followed.

2. **Wills:** DEVISE: CROPS. Where land is let and rent reserved in a share of the crops, the title to the land and to the landlord's share of the crops are not severed, but remain in the landlord and pass by his devise of the land.

3. **Executors and Administrators:** BOND: DEVISE: RIGHT OF POSSESSION. Where an executor, who is also residuary legatee, gives the bond provided by section 165 of the decedent act (Comp. St., ch. 23) conditioned to pay debts and legacies, it is the duty of such executor, upon giving such bond, to surrender the possession of property specifically devised to another, and such executor is by the giving of such bond estopped to claim the right of possession of such property until the final settlement of the estate.

4. ———: CLAIMS: STIPULATIONS. Where a devisee of specific property files a claim in the county court against the estate of his testator,

in which is included a claim against the executor for money received from crops growing upon the land so devised, and upon appeal to the district court it is stipulated that no question will be raised as to whether such claim is a personal or official liability on the part of the executor, this court will not disturb a judgment directing the allowance of such claim on the ground that an action should have been brought against the executor, the question as to whether the stipulation is an attempt to confer jurisdiction not being raised.

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

John J. Sullivan and *Louis Lightner,* for appellant.

Charles G. Ryan and *Martin & Ayres, contra.*

CALKINS, C.

James H. Pope died leaving a will, by the terms of which he devised to the plaintiff 320 acres of land, upon which there was at the date of his death a growing crop of corn. The remainder of his estate was devised to the defendant, his widow. The allowance of the will having been contested by the plaintiff, the defendant was appointed special administratrix and continued so to act until, the will being established, she was appointed executrix. She then gave a bond under section 165, ch. 23, Comp. St. 1903, conditioned to pay all the debts and legacies of the testator, and qualified as such executrix. While acting as special administratrix, she took possession and removed from the premises devised to the plaintiff the above mentioned crop of corn, which after her qualification as executrix she on the 26th day of June, 1905, sold for $884.02. The plaintiff filed a claim against the estate of the deceased in the county court for various items, including the value of this corn, which was there contested by the executrix. The cause, being removed to the district court by appeal, was referred to the Honorable A. M. Post to hear and determine. Before the referee it was stipulated that, "as to the liability of said Lydia E. Pope in the corn mat-

ter herein presented for determination, no question will be raised as to whether it is a personal or official liability on the part of the defendant in the event of there being any liability found." The referee found: First, that upon the death of Pope the plaintiff became seized of the land devised to him, together with the corn growing thereon, subject to the rights of the personal representatives of said deceased to the possession of said property pending the settlement of said estate; second, that the said Lydia E. Pope acted within her rights as special administratrix in taking possession of said corn, but that her action in selling the same after giving bond as residuary legatee was a conversion of said property, for which she was liable to claimant; and, third, that the district court was in the exercise of its appellate jurisdiction clothed with the plenary powers of the county court in examination and allowance of claims, and should upon reasonable terms and in order to avoid circuity of action direct the allowance of said claim on appeal. The report of the referee was affirmed by the district court, and from so much of the judgment thereon rendered as required defendant to account for the corn in question said defendant appeals.

1. The question whether growing crops on land devised by will pass to the devisee under the will or to an executor has recently been considered by this court in the case of *Andersen v. Borgaard, ante,* p. 8. The conclusion there reached was that, unless reserved, crops standing upon the ground, matured or not, pass to the devisee. This we regard as decisive of the principal question in the instant case.

2. The defendant, however, contends that the land devised was leased, and that the estate therein had passed for the time being to the lessee, leaving in the deceased a right to recover rent, but no present estate in the land. It is a general rule that the conveyance of a reversion carries with it the rent accruing and becoming due after the date of such conveyance (*Eiseley v. Spooner,* 23 Neb.

470), but this question it is not necessary to determine in this case. The document referred to as a lease is so denominated upon its face, but it is really an agreement to farm on shares, the so-called tenant agreeing to deliver to the owner of the land a certain portion of the crop raised thereon. In such case the title to the land and to the share of the deceased in the crops was never severed. *Sims v. Jones,* 54 Neb. 769. It follows that the fact that the land was being farmed by a cropper does not prevent the application of the rule in *Andersen v. Borgaard, supra.*

3. The defendant argues that under section 202, ch. 23, Comp. St. 1903, which provides that the executor or administrator shall have the right to the possession of the real and personal estate of the deceased until the estate shall have been settled, or until delivered over by order of the probate court to the heirs or devisees, the plaintiff did not have the right of possession of this corn until the estate was settled. It may be conceded that under this section the executor or administrator may ordinarily retain possession of the real and personal property of the deceased until it is judicially ascertained whether all or some portion of such property is necessary to discharge the debts of the deceased. In this case, however, the defendant gave a bond undertaking to pay all debts and legacies, and thereby secured exemption from the provisions of the statute under which an executor is required to return an inventory of the estate. While such a bond does not destroy the lien of the creditor nor operate as a final settlement of the estate (*Thompson v. Pope,* 77 Neb. 338), it estops the obligor from saying that it is necessary to retain property of a devisee or legatee for the purpose of securing or paying creditors. Whatever the creditors of the estate might be entitled to do or to have performed for them, it is clear that an executor and residuary legatee, after having availed herself of the benefits secured by the execution of such a bond, cannot justify her retention of property devised to an-

other on the ground that it may be necessary to use it to pay the debts which she has thus undertaken to discharge.

4. It is contended that the county court had no jurisdiction of the subject of this controversy. It is said that its power must be derived from section 214, ch. 23, Comp. St. 1903, which confers authority to examine, adjust and allow claims against the deceased or against the estate of the deceased, but no power to render a personal judgment against an administrator or an executor either in his personal or official capacity. On the part of the plaintiff it is contended that the stipulation made before the referee, already referred to, eliminates this question from the case. At the time this stipulation was made the referee was entering upon the consideration of the plaintiffs claims against the estate of the deceased. The other items of his claim were clearly against the deceased, and it seems to have been in the minds of the stipulating parties that the claim for the corn did not belong to that class, and that it was uncertain whether it was an official liability of the defendant as executrix or whether it was merely a claim against her personally as an individual. The obvious purpose of the stipulation was to waive formalities, and investigate this question upon its merits with the other questions then before the referee, and to avoid the necessity for bringing other and further actions. It was in this view that the learned referee reached his third conclusion of law that the court might, in order to avoid circuity of action, direct the allowance of said claim in this proceeding, and with that conclusion we are constrained to agree. We reach this result more readily because it involves no substantial right, and a reversal of the judgment would only lead to another suit between the parties, the result of which would be determined by the conclusions at which we have already arrived in this opinion.

The appellant having declined to raise the question whether the stipulation was void as an attempt to confer jurisdiction, that point is not decided.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

CURTIS-BAUM COMPANY, APPELLEE, V. SAMUEL LANG, APPELLANT.

FILED MARCH 5, 1909. No. 15,524.

1. Replevin: DEFENSES: EVIDENCE. Where a sheriff or constable seizes property by virtue of a writ of attachment regularly issued, and being sued in replevin for the possession of the property by a stranger to the action, justifies under the writ, he is not required to prove the debt of the attaching creditor, except in cases where such property was by him taken from the possession of such stranger to the action.
2. Attachment: JURISDICTION. An affidavit for attachment which alleged that the defendant is about to remove his property out of the county with intent to defraud his creditors justifies a justice of the peace in issuing an attachment, and gives him jurisdiction of the property of the defendant seized in the county under such writ when followed by the service provided by section 932 of the code.

APPEAL from the district court for Platte county: CONRAD HOLLENBECK and JAMES G. REEDER, JUDGES. *Reversed.*

A. M. Post and *R. P. Drake,* for appellant.

R. W. Hobart and *Albert & Wagner, contra.*

CALKINS, C.

One Dr. Neef, of Humphrey, in Platte county, on about the 15th day of April, 1906, purchased of the Bennett Company of Omaha a piano, giving his note therefor, which contained a provision that the title to the piano and right of possession should not pass from the Bennett

Company until the note was fully paid. On the 13th day of September, 1906, this and other property was seized by the defendant, a constable in and for Platte county, who claimed the right to take the same under orders of attachment issued by a justice of the peace against the property of the said Neef. On the 10th day of November, as the constable was about to sell the property in question, the plaintiff, to whom the note mentioned had been indorsed, brought this action in replevin for the possession of said piano. On the trial of the case in the district court the plaintiff offered in evidence the note in question and the indorsement thereof, but did not attempt to prove that the same was filed with the clerk of the county with the affidavit required by section 26, ch. 32, Comp. St. 1905. The defendant offered in evidence the docket of the justice of the peace and the files in the several cases in which it was claimed attachments were issued, including such writs of attachment and the return thereon, which were by the court excluded, and a verdict directed for the plaintiff. From the judgment rendered upon this verdict the defendant appeals.

1. Error is assigned in various forms, but, reduced to its simplest terms, the question is whether the court erred in excluding dockets of the justice and the papers in the various attachment cases. It appears from an inspection of the record that these papers were first admitted in evidence, and that the defendant then asked permission of the court "to correct the clerical error changing the word August to October." This was denied, and the papers excluded. Whatever may have been the actual facts, we are bound by the record presented to us, and an examination of the papers attached to the bill of exceptions and certified to be the papers which were offered and excluded shows that each of the cases was continued to the 29th day of October. If in fact these papers as offered and rejected by the court showed the cases continued to the 29th day of August, there has been an error in the settling of the bill of exceptions, behind which we cannot go.

The papers offered tended to show that on the 13th day of September, 1906, suits were begun against Neef before a justice of the peace for Platte county, and affidavits for attachment filed, which charged that "he had removed from the county to avoid summons, and is a nonresident of the county, and is about to remove his property or a part thereof out of the county with the intent to defraud his creditors"; that an undertaking was given in each case, upon which attachments were issued against the property of Neef and placed in the hands of the defendant as constable; that he on the same day levied said attachments upon the said piano and other property found in the residence last occupied by Neef in the village of Humphrey; that the return upon the summons showed that the defendant Neef was not found in the county, and the justice adjourned the cases until the 29th day of October, whereupon the plaintiff proceeded to publish in a newspaper printed in the county a notice, stating the names of the parties, the time when and by what justice of the peace and for what sum the order was issued; that on the 29th day of October the justice rendered judgment against Neef and made an order for a sale of the attached property, which the defendant was proceeding to execute on the 10th day of November, when this suit was begun and the property was taken away from him.

The plaintiff contends that it was necessary for the defendant to show, in addition to the facts above mentioned, that the attachment plaintiffs were *bona fide* creditors of Neef. The statute in regard to conditional sales (Comp. St. 1905, ch. 32, sec. 26) makes the same void as to "attaching creditors." *Peterson v. Tufts,* 34 Neb. 8. We do not overlook the rule adopted by this court in *Oberfelder v. Kavanaugh,* 21 Neb. 483, that an officer who in the execution of an order of attachment seized property found in the possession of a stranger to the attachment proceeding, in a subsequent action of replevin by such stranger, is required to establish both the alleged indebtedness of the attachment defendant and the regu-

larity of the proceeding. That rule would apply had the property in this case been taken from the possession of the plaintiff; but the plaintiff having surrendered possession to Neef does not come within the rule, and we are satisfied that it should not be extended to cases in which the officer does not take the property from the possession of a stranger to the writ.

2. It is contended that since section 60 of the code requires an action to be brought in the county where the defendant resides or may be summoned, and the affidavit for attachment sets forth that he is a nonresident of the county, the justice had no jurisdiction. It has already been settled in this state that an absconding debtor is rightly suable by attachment in the county of his late residence where his property remains and is subject to seizure. *Gandy v. Jolly*, 34 Neb. 536; *Smith v. Johnson*, 43 Neb. 754. The fifth ground for attachment before a justice of the peace (code, sec. 925) is that the defendant is about to remove his property or a part thereof out of the county with intent to defraud his creditors. We think the reasoning of the cases above cited applies to this ground of attachment, and that it would render it nugatory to say that the defendant must reside or be served with summons in the county from which he is so attempting to remove his property with intent to defraud his creditors. It follows that an affidavit for attachment which alleges that the defendant is about to remove his property out of the county with intent to defraud his creditors justifies a justice of the peace in issuing an attachment, and gives him jurisdiction of the property of the defendant seized in the county under such writ when followed by the service provided by section 932 of the code.

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

DUFFIE, 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.

WILLIAM D. LASHMETT, APPELLEE, V. JOHN PRALL, APPELLANT.

FILED MARCH 5, 1909. No. 15,537.

1. **Judgment:** RES JUDICATA. Where in a suit in the nature of a creditor's bill it appeared that the judgment creditor was indebted to the judgment defendant upon a promissory note in an amount equal to or greater than the amount of the judgment, and his petition was dismissed on the ground that being so indebted he suffered no injustice from the legal obstacles which he sought to remove, such dismissal does not operate to satisfy the judgment.
2. ——: REVIVOR: DEFENSES. In a proceeding to revive a dormant judgment by motion, the judgment debtor cannot plead as a defense to such motion an independent cause of action existing in his favor against the judgment creditor.

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

O. A. Abbott, for appellant.

A. M. Robbins and *C. I. Bragg, contra.*

CALKINS, C.

This was an application to revive a judgment which had become dormant. It appears that, after the recovery of the judgment, a transcript thereof was filed in Loup county, where the plaintiff prosecuted a suit in the nature of a creditor's bill to set aside certain transfers of land which it was alleged the defendant had made without consideration and in fraud of the rights of the plaintiff as a judgment creditor. In such action the defendant interposed the defense that the plaintiff was indebted to him

upon a promissory note for a sum exceeding the amount of such judgment. The district court found for the plaintiff, and the case was brought here, where it was held in an opinion by AMES, C. (2 Neb. (Unof.) 284), that, since the plaintiff was indebted to defendant in a sum equal to or greater than the amount of the judgment, the legal obstacles which he was invoking the aid of a court of equity to remove were inflicting no injustice upon him, and he was not therefore entitled to any relief. The judgment of the district court was thereupon reversed and the action dismissed.

The proceedings of revivor in the instant case were begun in January, 1906, and the defendant, in response to an order to show cause why the judgment should not be revived, set up the proceedings and opinion in the former case, and alleged that the plaintiff was thereby estopped and precluded from alleging or proving that any amount was due plaintiff upon said judgment. There was no allegation in the answer that the note was still owned by defendant, nor that it remained unpaid; but the plaintiff, in a reply filed by him, alleged that more than five years had elapsed "since said pretended note has matured," and that no action had been commenced on the same. This reply, while admitting the proceedings in the former case both in the district and supreme courts practically as alleged in the answer, further set up that, after the filing of said opinion, the defendant filed and this court overruled a motion asking the court to amend and complete its judgment by setting off the amount due on the judgment held by plaintiff against the amount due on the note held by defendant, and render a judgment for the remainder, or, in case such relief be denied, that the cause be remanded with leave to file a petition on the note and have a trial at law. The district court found generally for the plaintiff, and entered an order reviving the judgment, from which the defendant appeals.

1. The defendant contends that the effect of the former decision of this court upon plaintiff's judgment was such

that the plaintiff may not claim any right or have any remedy upon such judgment until he shall show that his debt upon the note has been satisfied. To concede this would be to say that the judgment was conditionally satisfied, a status which, so far as we are advised, is unknown to the law. The former decision of this court did not determine that the existence of the indebtedness upon the note extinguished the judgment, nor that the defendant was entitled to set the same off against the plaintiff's claim under the judgment. In the opinion it was expressly said that the defendant was not seeking to set off his note against the judgment, and that the upholding of his defense left the judgment and whatever legal processes were provided for its enforcement unimpaired. Not only this, but the court upon an application made after filing the opinion, as we have seen, expressly refused to set off the amount due on the judgment against the amount due on the note, or even to remand the cause with leave to file a petition on the note and have a trial thereon at law.

2. The defenses which may be urged against a motion to revive a dormant judgment are not enumerated in the statute, but such motions are undoubtedly governed by the same principles as applied to the writ of *scire facias* when it was used at common law to revive judgments. The rule was that the only allowable pleas to a *scire facias* upon a judgment were: First, *nul tiel* record, under which the defendant might deny the existence of the original judgment or allege that it was entirely void; and, second, payment, including release, satisfaction or discharge of the original judgment. 1 Black, Judgments (2d ed.), sec. 493. Set-off and counterclaim was in no case available as a defense to such a proceeding, and no cases are cited to the effect that any different rule obtains where judgments are revived by motion. It matters not that the court by its former decision sustained the validity of the note, for, assuming the note to be a valid and existing obligation, the plaintiff would not be entitled to plead it as a defense to a motion to revive the judgment.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

PETER E. OLSON, APPELLANT, V. NEBRASKA TELEPHONE COMPANY ET AL., APPELLEES.*

FILED MARCH 20, 1909. No. 15,574.

1. **Master and Servant:** CONTRACT: VALIDITY. A contract by which a master seeks to impose upon his servant duties and obligations which the law imposes upon the master, and to relieve the master from liability for negligence on his part, is against public policy and void.

2. **Negligence:** QUESTION FOR COURT. Where the question of negligence is presented by the pleadings, and there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question is for the court. *Brady v. Chicago, St. P., M. & O. R. Co.*, 59 Neb. 233.

3. **Electricity:** ELECTRIC LIGHT COMPANIES: NEGLIGENCE. Where the ordinances of a city require an electric light company to maintain its electric light wires in a taut condition to avoid swinging contacts, and to keep such wires properly insulated, and, wherever it is necessary for such electric light wires to cross the line of a telegraph or telephone line, to string its said wires at a distance of not less than five feet from the wires of said telegraph or telephone line, a failure on the part of said electric light company to comply with all or any of such requirements is negligence which will render it liable to any person who, without fault on his part, is injured by reason thereof.

4. **Master and Servant:** INJURY: QUESTIONS FOR JURY. And in such a case, where the defenses of assumption of risk and contributory negligence are relied upon, it is error to withdraw the case from the jury, unless such defenses are established by evidence so clear that reasonable men would not be warranted in reaching a different conclusion.

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* Rehearing denied. See opinion, 85 Neb. ——.

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

E. T. Farnsworth, for appellant.

Greene, Breckenridge & Matters, contra.

REESE, C. J.

This action was brought in the district court for Douglas county against the defendants Nebraska Telephone Company, which, for brevity, we shall designate the "Telephone Company," and the Omaha Electric Light & Power Company, which we shall designate the "Light Company," to recover for personal injuries which plaintiff claims to have received on or about June 28, 1906. The allegations of the petition substantially are that plaintiff was employed by defendant telephone company as a "ground man"; that his duties were to assist in stringing cables along the street for the purpose of suspending them to upper ends of the poles; that he was not acquainted with the danger attending the work of hanging the cable, and only consented to perform that work temporarily; that this work necessitated his working at a height of about 30 feet from the ground; that the telephone company negligently and carelessly provided him with a metallic car for the purpose of doing said work, well knowing that the same was not a safe and proper seat for performing said labor when said seat or car was likely to come in contact with the live wires of the light company where the same "intersect each other"; that defendant telephone company "negligently and wilfully required plaintiff to work upon said car, without it having any covering, insulation or protection whatever to prevent plaintiff while working on the same from coming in contact with any live wires which might be allowed to remain out of repair, and near said telephone wires"; that while performing said work he was proceeding north on Twenty-fourth street, and as he approached certain cross-wires of the light company,

and not knowing that they were in any way unsafe, and while seated upon the car furnished by the telephone company, and using all care and precaution on his part to avoid injury, he turned partially around in said car for the purpose of examining an apparent defect in one of the overhead hooks or fastenings which he had just passed, and while his attention was directed to said hooks an electric light wire, "which said defendants had carelessly, wilfully and negligently permitted to become and remain unprotected and out of place, and in contact with the wires of said telephone company, swayed and moved against said metallic car upon which plaintiff was seated, thereby conveying a heavy and dangerous current of electricity to said car and over said wires, and his hand came in contact with said wires, and thereby was formed what is termed and known as a short circuit between said wires and said metallic car and the body of this plaintiff, and he received thereby and therefrom an electric shock, which overcame and overpowered him to such an extent that he was rendered unconscious, and he lost his hold on said car and was thereby forcibly and violently thrown to the ground, breaking his left leg below the hip and receiving what is known as a compound fracture of said limb," and other serious injuries; "that the defendants carelessly and negligently failed, omitted and neglected to give plaintiff any notice or warning of the unprotected and unsafe condition of said electric light wire and to warn him of the fact that said wires crossed the telephone wire within a few inches therefrom and rendered same unsafe"; that he had no knowledge whatever that said wires were dangerous or in a dangerous condition, and had no knowledge whatever that there was any danger in working near the same; that defendants had ample notice of the dangerous condition of said wires; that plaintiff was free from any negligence, heedlessness or want of precaution on his part; that prior to the injury he was a robust, healthy man, of the age of 24 years, and that his earning capacity

was the sum of $3 a day; that the injury he received had rendered him a cripple for life, for all of which he prayed damages. The separate answers of the defendants denied generally the allegations of plaintiff's petition, and pleaded assumption of risk and contributory negligence. The reply is a general denial.

There is really no conflict in the evidence as to any of the matters inquired of on the trial. It shows that at the time plaintiff received the injuries complained of the defendant telephone company was inclosing its wires along Twenty-Fourth street in a lead cable, about 1¼ inches in diameter. This lead cable was suspended from a strong woven wire called "the messenger," and ran parallel with and about six inches below the messenger wire, being supported at short intervals by wire hooks, somewhat in the form of a figure 8, so that the cable would be permanently suspended from and supported by the messenger wire. It would appear that the linemen who had strung the cable had placed the wire hooks in position, but had not securely fastened them, and at the time of the injury it was plaintiff's work to pass along that wire and with a pair of metal plyers securely fasten the hooks. In order to do this he was seated on an iron saddle with an iron frame extending to the top of the messenger wire and attached to a wheel which ran upon the wire. The saddle was provided with a wooden seat. After fastening a hook he would pull himself along to the next and repeat the operation. The telephone wires ran north and south along the west side, and the electric wires of the light company along the east side, of Twenty-Fourth street. At the intersection of Twenty-Fourth and Grant streets one or more of the electric light wires crossed Twenty-Fourth street, some of the witnesses say diagonally, and passed under the telephone wires. Plaintiff was working northward. When he had reached, or nearly reached, the electric light wires, he turned partially around in his saddle to remedy some defect which he had discovered in the fastening which he had just passed, or

was just passing. While in the act of doing this, the witnesses say there was a flash, and plaintiff received an electric shock which caused him to fall from the saddle to the pavement below, a distance of about 30 feet. He was picked up in an unconscious condition and taken to a hospital. His injuries are clearly shown to have been very severe and of a permanent character.

Defendants introduced in evidence as exhibit 3 an accepted notice to linemen, an exact copy of which will be found set out in the opinion of Mr. Commissioner DUFFIE in *Ault v. Nebraska Telephone Co.*, 82 Neb. 434, and which, on account of its length, we will not repeat here. Defendants also introduced in evidence as exhibit 2 an application of plaintiff for employment by defendant telephone company. When plaintiff rested, the defendant telephone company moved the court to direct a verdict in its favor, basing said motion upon exhibits 2 and 3, above referred to, which motion the court sustained. This was error. The application, exhibit 2, corroborates plaintiff's contention that, when he was employed by the defendant telephone company, it was as a ground man. Exhibits 2 and 3 having been both signed by plaintiff on the same day, viz., February 20, 1905, it is evident that exhibit 3 was handed to plaintiff at the same time that he filed with the defendant telephone company exhibit 2. Conceding that exhibits 2 and 3 would be binding upon plaintiff, they could only be binding upon him in his employment as a ground man. Plaintiff might be willing to assume all responsibilities said to be placed upon him by exhibit 3, while working as a ground man, but be unwilling to assume such responsibilities while suspended in the air 30 feet above the pavement, and it may well be assumed that when he commenced the work of "riding the cables," about two weeks prior to June 28, 1906, all recollection of papers which he had signed on the 20th of February of the year previous, a year and four months, had passed from his mind. The evidence shows that, prior to commencing work for the defendant telephone

company in Omaha, he had worked for the same company in other parts of the state; the city of Seward being named as one of the places where he had so worked. It is very evident that the papers, exhibits 2 and 3, were signed by him at the time he began this outside work for the telephone company, where no such dangers as attended his employment on Twenty-Fourth street in the city of Omaha were present. Under such circumstances, the court was not warranted in deciding as a matter of law that exhibits 2 and 3 precluded a recovery by plaintiff.

But there is another reason why exhibit 3 should not have been held as a matter of law to constitute an absolute defense to plaintiff's action. As above shown, this same accepted notice, of this same defendant, was under consideration by this court in *Ault v. Nebraska Telephone Co., supra.* In considering that document, this court, speaking through Mr. Commissioner DUFFIE, said: "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." The reasoning of the commissioner is well supported by his citations and many others. See 26 Cyc. 1094, and note 9. We have again considered the question, and are unanimously of the opinion that the rule is sound and salutary that any contract by which an employer seeks to impose upon his servant duties and obligations which the law imposes upon him, and to relieve himself from liability for negligence on his part, is against public policy and void.

After sustaining the motion of defendant telephone company to direct a verdict in its favor, the trial proceeded as against the defendant light company. A motion by the light company for a directed verdict was overruled and the case submitted to the jury, who returned a verdict in favor of defendant. Upon that branch of the case plaintiff contended that, exhibits 2 and 3 having been entered into between plaintiff and defendant telephone company, the defendant light company was not entitled to any benefit which might flow therefrom. This point was overruled by the court, and defendant was allowed in argument to the jury to discuss the two exhibits referred to. In this it seems to us that the trial court was inconsistent. If the defendant light company was entitled to the benefit of exhibits 2 and 3, it was entitled to such benefit to the same extent as the defendant telephone company. If it was not entitled to the benefit to the same extent as the telephone company, then it was not entitled to any benefit at all, and plaintiff's contention should have been sustained.

But, aside from this, there are other good reasons why the judgment in favor of the defendant light company cannot be sustained. There was introduced in evidence the "rules and requirements of the electrical department of the city of Omaha for the installation and operation of electric wires and apparatus." These rules appear in ordinances passed by the mayor and city council of the city, the regularity of which is not questioned. Rule 28 provides: "Wires must cross each other at right angles as near as possible, and, where it can be done, must cross on arms secured to poles or fixtures." * * * "Wires must be drawn taut to avoid swinging contacts, and in such cases the stretches must be short." Rule 30 provides: "Telegraph, telephone, and all other wires of like character must not be attached to the same arm with electric light and power wires, and, when possible, must run on a separate line of poles and fixtures. When running on the same poles wires must be kept at all points

five feet apart." Rule 33 provides: "All wires designed to carry an electric light or power current must be covered with a substantial, high-grade insulation not easily worn by friction, and whenever the insulation becomes impaired it must be renewed at once." Rule 46 provides: "That wires used as conductors for electric lighting purposes, and supports for the same, shall be erected or placed along the opposite side of any street or alley that is occupied by the wires of any fire alarm and police telegraph, telegraph or telephone company." Rule 47 provides: "Whenever it is necessary for an electric light conductor to approach or cross the line of any fire alarm and police telegraph, telegraph or telephone line, the same shall not approach or cross at a distance of less than five feet either above or below said fire alarm and police telegraph, telegraph or telephone wire, and shall be securely fastened on supports placed as near as practicable to said fire alarm and police telegraph, telegraph or telephone lines, or shall be carried in troughs or boxes across the route of said fire alarm and police telegraph, telegraph or telephone line, so constructed and placed as to prevent the electric light and police, telegraph or telephone lines coming in contact in case either should break or become detached from fixtures."

Thomas Olson, brother of plaintiff, testified that, when his brother was injured, he was telephoned to, and arrived at the point where the injury occurred some 15 or 20 minutes thereafter; that he made an examination of the wires while standing upon the pavement below, which would be a distance of about 28 to 30 feet from the wires; that the electric wires crossed about 12 inches below the telephone wires. As to the condition of the wire his testimony is as follows: "Q. What was the condition of the wire, if you know, at the place where it was near the telephone wire? A. The insulation, for one thing, was all worn off. The wire was bare where this car was standing up against the wire. I noticed that in particular. Q. Noticed the car near the wire? A. It was standing up

against the wire. The wire was touching this car at that time, and the wire was bare. Q. You may state the condition of that electric light wire, with reference to being tight or slack or otherwise. A. It was very slack. Q. State whether or not the wire that you speak of was inclosed in a trough. A. It was not."

The witness Yost testified that on the day of the accident he examined the place, and that his attention was called to the electric light wire. "Q. You may tell the jury the condition of that wire, as nearly as you can. A. The electric light wire, the insulation, the wrapping, was off of it badly along there, and it was—well, as near as I could judge from the ground, it was from, I should say, 12 to 18 inches from the telephone wire. Q. Did you notice the wire, as to whether it was tight or not? A. It was not tight."

The witness Leo Huntley, who was passing along the street just before plaintiff met with the injury, had stopped and was watching plaintiff and saw him fall. He testified: "I seen him fixing the wires there. Then he turned around to fix some of the others they had there, and there was a flash, and then he fell. Q. Did you notice this electric light wire particularly then, with reference to its being tight or slack? A. It was slack." On cross-examination we have the following: "Q. Was there anybody moving the electric wire there? A. It was moving around up there. It was swinging around up there— Q. Who was moving it? A. I do not know. I guess the wind was."

This testimony by these witnesses stands entirely uncontradicted. No attempt was made by the defendant light company to disprove the testimony that its wires at the point where they crossed the wires of the telephone company were only separated therefrom by a distance of from 12 to 18 inches, instead of 5 feet, as required by the ordinances of the city; that the insulation at that point was worn off and entirely gone from their wire, in violation of the requirements of the city ordinances, and that

their light wire was loose and swinging, instead of being taut, as required by the ordinances of the city. In the light of this uncontradicted testimony it was the duty of the court to charge the jury as a matter of law that the defendant light company was guilty of negligence in these particulars; but, instead of so doing, the court gave instruction number 5 as follows: "It is made the duty of the Omaha Electric Light & Power Company to cause all their wires which carry a current of electricity, to be covered with a substantial, high-grade insulation, not easily worn by friction, and, whenever the insulation becomes impaired, it must be renewed at once, and, if you find from a preponderance of the evidence that at the point mentioned in plaintiff's petition the wire of the defendant Omaha Electric Light & Power Company was not covered with a substantial, high-grade insulation, but that it had become worn and exposed, and that it came in contact with the chair or car on which the plaintiff was riding, then you should take all those circumstances into consideration in determining the question as to whether or not the defendant was guilty of negligence." The giving of this instruction was error. Plaintiff was entitled to have the jury told as a matter of law that all of the facts set out in instruction number 5 had been established by the uncontradicted evidence and that they established negligence on the part of the defendant light company. In *Union P. R. Co. v. McDonald,* 152 U. S. 262, which was an action for personal injuries, the trial court instructed the jury as a matter of law that the defendant was guilty of negligence and submitted to them the question of contributory negligence. A verdict and judgment in favor of the plaintiff for $7,500 was sustained by the supreme court. The court by Harlan, J., say: "Upon the question of negligence, the case is within the rule that the court may withdraw a case from the jury altogether, and 'direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the

court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.' " This is quoted and approved in *Southern P. Co. v. Pool,* 160 U. S. 438.

By instruction number 7, the court said: "Negligence is the failure to exercise such care, prudence and forethought as under the circumstances duty requires should be given or exercised. It may consist of the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do. Such negligence on the part of the plaintiff, which is the proximate cause of his injury, would defeat a recovery." Ordinarily this instruction might probably be sustained, but in the present case, considering the disposition which had been made of the case as to the defendant telephone company and the submission to the jury of the question of defendant's negligence by instruction numbered 5, we think the last sentence in instruction numbered 7 was calculated to mislead the jury. After defining negligence in the first part of the instruction, the court said: "Such negligence on the part of the plaintiff, *which is the proximate cause of his injury,* would defeat a recovery." We think the words italicized should have been omitted or the phraseology materially changed. If the word "if" had been substituted for the words "which is," it would to some extent have relieved the sentence from a possible construction by the jury that the court by the words used was saying to them that the plaintiff had been guilty of *such* negligence and that it *"is* the proximate cause of his injury." We think there is considerable force in the contention made by plaintiff in his brief that "this instruction leaves nothing for the jury to consider, because it says in so many words that it was Olson's negligence that caused the injury."

Without setting out in full, we do not think that instruction numbered 4 should have been given in the language used. There was no question about plaintiff's right

to be where he was at the time of the injury. The defendant light company had a right to assume, in fact it knew, that the defendant telephone company would from time to time be sending men up its poles and stringing wires at the point where the lines crossed, and, for these reasons, we think that instruction numbered 4 was calculated to confuse, rather than aid, the jury in their deliberations.

Instruction number 9 is complained of by plaintiff, but the error in that instruction, if any, was without prejudice, as the jury never reached the question of the extent of plaintiff's injury.

The question as to whether or not plaintiff was himself guilty of negligence in the matter was, notwithstanding exhibits 2 and 3, clearly a question for the jury, and should have been submitted to them as to both defendants. Conceding that it was his duty to be on the lookout for any defects or dangers incident to his employment, it does not follow that he was required to be on the lookout for dangerous situations, the existence of which he had no reason to suspect, and which the ordinances of the city expressly forbade. Under the evidence before them, the jury would be justified in finding that plaintiff had no reason to suspect that he would come in contact with electric light wires at all, and would not have done so if the defendant light company had strung its wires at the intersection five feet above or below the wires of the telephone company; that the accident would not have occurred if the electric wires had been strung taut, as required by the ordinances; that, if they had been so strung, there would not have been the swinging motion testified to by the witnesses, which possibly caused the wire to come in contact with the iron seat upon which the plaintiff was riding; and that the accident would not have occurred if the wires had been properly insulated, as required by the city ordinances. All of these facts, together with the fact that plaintiff while riding on the car, after passing one of the hooks, partially turned in his seat to complete

the fastening of the hook, or to do something else which his observation led him to believe ought to be done, and the fact that the saddle may have moved forward slightly while he was so turned in his seat, and the further fact that at that time the wind was blowing dust in his eyes, as he testifies, were questions for the jury to consider, under proper instructions, in determining whether or not plaintiff was himself guilty of negligence in failing to observe the uninsulated and slack condition of the electric light wire and its close proximity to the telephone wire or to the iron seat upon which he was riding.

For the errors above enumerated, the judgment of the district court is reversed as to both defendants and the cause remanded for further proceedings in harmony herewith.

REVERSED.

BARNES, J.

I dissent from so much of the opinion as reverses the judgment as to the Nebraska Telephone Company, and concur in the remainder of the opinion.

A. C. TOLIVER, APPELLEE, V. PRIOR L. STEPHENSON ET AL., APPELLANTS.

FILED MARCH 20, 1909. No. 15,507.

1. 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." *Gibson v. Sexson*, 82 Neb. 475.

2. ———: ———. It is the duty of a mortgagor of mortgaged real estate while he holds the legal title thereto to pay the taxes levied thereon. That duty follows the title to the land to his grantee. Such grantee cannot while holding the fee title purchase the property at a foreclosure sale for taxes, and thereby

defeat the mortgage. The purchase would have only the effect of a payment of the taxes and redemption from the decree of foreclosure.

3. **Mortgage Foreclosure:** DECREE. In a proceeding to foreclose a mortgage securing a debt evidenced by a promissory note, no issue of payment or other diminution of the debt having been presented, the note and mortgage having been held valid and transferred to plaintiff for value, the plaintiff was entitled to a judgment for the full amount due upon the debt.

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

L. K. Alder, for appellants.

P. D. McAndrew, contra.

REESE, C. J.

The petition is one for ordinary foreclosure of a real estate mortgage. The defendants Prior L. and Hannah M. Stephenson are the mortgagors. The mortgage and note bear date January 1, 1890, and were made to Edward H. Guyer. The amount named in the mortgage and note as the debt was $230, due January 1, 1895, with interest at the rate of 7 per cent. per annum from the date thereof until maturity, and 10 per cent. thereafter. The mortgage was duly recorded on the 12th of January, 1890. The interest had been paid to July 1, 1894. It is alleged that plaintiff was the holder of the note and mortgage, and that the amount due at the time of the commencement of the suit was $443. The defendant Frank A. Stephenson answered, alleging that during the years 1896, 1897, 1898 and 1899 the defendant Prior L. Stephenson was the owner in fee of the mortgaged property, and that the taxes for said years were not paid, and that all thereof were due and delinquent on February 1, 1901; that on that date the county of Brown instituted its action to foreclose the liens thereon created by said taxes; that Prior L. Stephenson, the then holder of the legal title, was made a party, as well as Guyer, the then holder of the mortgage; that

on the 23d day of April, 1901, a decree foreclosing the tax lien was entered, finding due the sum of $45.50 and costs of suit; that on the 23d day of September of that year a sale was made by the sheriff to the answering defendant, which sale was confirmed on the 7th day of the following October, and on the 10th of said month the sheriff made and delivered to him a deed to the property, under which he took possession, making valuable and lasting improvements thereon to the extent of $310; and that during the whole of said time the said Edward H. Guyer was the owner and holder of the note and mortgage declared upon, as shown by the records of the county, no assignment having been recorded, and defendant purchased said land in good faith without notice of any transfer of said note, if any had been made. The answer also pleaded the statute of limitations. The reply admitted the ownership of the land by Prior L. Stephenson at the time the taxes were assessed and levied, and that the foreclosure proceedings were had, but denied the other averments of the answer. It is further alleged that at the time of the foreclosure of the tax liens the said Prior L. Stephenson was not the owner of the real estate in question; that during said time, and at the time of the purchase by defendant Frank A. Stephenson at the sheriff's sale, the said defendant was the owner in fee of said premises, having purchased the same from said Prior L. Stephenson and received a deed therefor on the 30th day of January, 1901; that he was not made a party to said foreclosure proceedings, and that Edward H. Guyer, who was made a party, had before that time sold and transferred the note and mortgage to one Marion E. Sweeney, through whom plaintiff derived his title, and who had no interest in the note or mortgage; and that defendant Frank A. Stephenson withheld his deed from record until October 23, 1901, after he had made his pretended purchase, and that said pretended purchase was fraudulent and void. A trial was had, which resulted in a finding and decree in favor of plaintiff for the sum of $337.34, and the usual decree of

foreclosure. From this decree defendant Frank A. Stephenson appeals. Plaintiff presents a cross-appeal, alleging that the court erred in the amount found due upon the note, and that the decree should have been for $566.44 claimed as the true amount of principal and interest.

1. From an examination of the bill of exceptions it is clear that, at the time the land was bid in at the sheriff's sale under the decree of foreclosure for the delinquent taxes, the defendant Frank A. Stephenson, the purchaser, was the owner of the fee title to said land, and under the rule in *Pitman v. Boner,* 81 Neb. 736, and *Gibson v. Sexson,* 82 Neb. 475, he could take nothing by his purchase as against other subsisting liens and interests. The payment of the amount of the bid, which it is shown was more than the taxes and costs, was simply a payment of the taxes due upon the land of which he was the owner, and therefore he gained nothing by the purchase except that he paid the taxes which it was his duty to pay. But it is claimed that the foreclosure proceedings to which Guyer was made a party, and who then owned the mortgage, cut off the rights of the mortgagee, and he and his assigns are now estopped thereby. It must be conceded that the purchase at sheriff's sale by the holder of the legal title was nothing more or less than a redemption. As the payment was made within the time in which the redemption could be made under the provisions of section 497 of the code, the payment or redemption has the effect of satisfying the decree, and the suit is at an end.

2. It is alleged in the petition that no part of the debt secured by the mortgage had been paid, except the interest to July 1, 1894. The note is for $230. The specified rate of interest is 7 per cent. per annum until maturity, and 10 per cent. thereafter. There is no plea of payment in the answer. The interest on the note from July 1, 1894, to January 1, 1895, the time of the maturity of the note, was $8.05. The interest from January 1, 1895, to the 6th day of January, 1908, the date of the entry of the decree (13 years and 6 days), was $299.40, the total interest

being $307.45, which, added to the principal, would make $537.45. The sum found due by the decree, being $337.34, was $200.11 less than the amount actually due. We find nothing in the record explaining any reason for this error, and conclude that it is either clerical or that there was a mistake in the computation. In either case the correction should be made.

The appeal of the defendant is dismissed, and the cross-appeal of plaintiff sustained. The judgment of the district court is reversed and the cause remanded to that court, with directions to enter a decree of foreclosure for the full amount due upon the debt.

REVERSED.

JOHANNA M. JARMINE ET AL., APPELLEES, V. CHARLES A. SWANSON ET AL., APPELLEES; LOUISE MOLLIN, APPELLANT.

FILED MARCH 20, 1909. No. 15,621.

Judgment: VALIDITY. J., a married man and the head of a family, died seized of certain real estate occupied by himself and family as their homestead. In the administration of his estate, the land was set off to the widow by the county court as her homestead, giving her the title "in fee simple." She afterwards sold the property, conveying it by warranty deed. Through mesne conveyances S. became possessed of the title held by the widow, and executed a mortgage thereon for value to M. The widow died, and the children of herself and J. brought an action to remove the clouds upon their title created by the deed to S. and his mortgage to M. M. defaulted. S. answered, contesting the suit of plaintiffs, but the question of the indebtedness of S. to M. was not put in issue in any form. The final decree was in favor of the heirs, and, after the provision that the mortgage did not constitute a lien on plaintiffs' land, it was further declared that it did not constitute "a personal liability on the part of the defendants." Defendant M. appeals. *Held*, That the provision in the decree which sought to destroy the liability of S. to M. was void.

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

James G. Reeder and *Louis Lightner,* for appellant.

William V. Allen and *H. Halderson, contra.*

REESE, C. J.

This is an appeal from a decree rendered by the district court for Boone county. The heirs of Christian Johnson, deceased, instituted the suit against Charles A. Swanson and Louise Mollin, alleging that the said Christian Johnson died seized of the northwest quarter of the southeast quarter of section 10, township 22, range 5, in Boone county; that he left surviving him Anna Johnson, his widow, and the plaintiffs, their children, as his sole heirs at law; that in the administration of the estate, upon the application of the widow, the land was set off to her as her homestead, giving her the title in fee simple, which the court had no power or jurisdiction to do, and the said order was void; that the defendant Charles A. Swanson through several mesne conveyances derives his title from the said Anna Johnson, now deceased; that Swanson had executed a mortgage to the defendant Mollin to secure the sum of $600; and that Johnson's deed and the Mollin mortgage are clouds upon the title which plaintiffs have inherited from their father, Christian Johnson. The prayer is for a cancelation of Swanson's deed and the Mollin mortgage and the removal of the cloud upon their title created thereby. Mollin failed to answer and default was entered against her. Swanson answered and a trial was had, the finding and decree being in favor of plaintiffs. Mollin only has appealed. There is no bill of exceptions.

In the decree of the court the following language occurs: "It is ordered, adjudged and decreed by the court that the alleged mortgage lien of the defendant Louise Mollin on the land in suit, be and the same is hereby, adjudged to be null and void, and not to constitute a lien upon the said premises *or a personal liability on the part*

of the defendants Charles A. Swanson and Lena Swanson." There was nothing in the pleadings anywhere placing the liability of Swanson to Mollin in issue, and therefore any order affecting their rights as between themselves must necessarily be void. As there was nothing in the petition submitting any such issue or seeking any such order, the defendant had the right to assume that the decree would be within the issues, and that her demand against the Swansons personally would remain unaffected without reference to the validity of the lien sought to have been created by the mortgage. It requires no argument nor citation of authorities in support of the proposition that the court had no jurisdiction, power or authority to make any such order, and that it was void. As Swanson and Mollin were not adversely interested, no order could be made, as between them, which would bind them in a subsequent action brought by Mollin for the collection of the debt secured by the mortgage. *Wiltrout v. Showers,* 82 Neb. 777. By a perusal of the whole decree it is quite clear that the language referred to was inadvertently used, and was probably not detected by the court, as later on in the body of the entry the same order is entered in substance, but without the use of the objectionable language.

It is insisted by the appellees Jarmine and Swanson that appellant has mistaken her remedy; that, if the decree was void or erroneous, the mistake, if such it was, should have been called to the attention of the trial court and a correction requested, and that, in the absence of such proceeding, no appeal can be had. It is also urged that, "if the judgment covered matter not embraced in the issue, it is to that extent void; that there can be no appeal from a void judgment." Many cases are cited supporting the contentions of appellees, but it is believed that many of them are not in point. It is true, however, that the decree might have been corrected upon a timely motion seeking that remedy. Whether that proceeding is

exclusive is not so clear. We may assume for the purposes of this case that, if a defendant makes default and a judgment or decree is rendered against him in accordance with the averments of the petition, he should apply to the court rendering the judgment to set aside the default and judgment and permit him to answer, but that is not this case. Appellant was entirely willing that plaintiff should have all the relief asked. Had the course suggested been pursued, there was nothing that could be presented by way of answer or traverse which would afford relief. The only thing that could have been done would have been to correct the void part of the decree. It is not an appeal from a legal judgment, but from one that is void in part. The right of appeal is secured by the constitution of this state (art. I, sec. 24) and by the statutes. This right is fully recognized by the former decisions of this court, and full force given to the constitutional provision in *Curran v. Wilcox*, 10 Neb. 449, *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100, and *Zweibel v. Caldwell*, 72 Neb. 47, 53, none of which, however, are similar to this case. In *Northern Trust Co. v. Albert Lea College*, 68 Minn. 112, it was held by a majority of the court that the power of the court to grant relief in a judgment by default is limited to that demanded in the complaint, and, where such judgment was not justified by the pleadings and prayer for relief, the error could be reviewed and corrected by an appeal from the judgment.

That the entry referred to is erroneous and void is apparent. It is of no force, a mere nullity, and may be attacked by direct proceedings as well as collaterally, should the question of its validity ever arise. See *Banking House of A. Castetter v. Dukes*, 70 Neb. 648; *Woodward v. Whitescarver*, 6 Ia. 1; *Doolittle v. Shelton*, 1 Greene (Ia.) 271; *White v. Iltis*, 24 Minn. 43; *Cooper v. American Central Ins. Co.*, 3 Colo. 318.

The judgment of the district court, in so far as it assumes to adjudicate the rights of the defendants Swanson and Mollin as between themselves, is reversed and the

cause remanded to correct the same by eliminating that part of the decree.

REVERSED.

CITIZENS BANK, APPELLEE, V. HENRY E. FREDRICKSON, APPELLANT.

FILED MARCH 20, 1909. No. 15,408.

1. **Notes for Accommodation.** F. at the request of the B.-H. Mfg. Co. executed and delivered to it his two promissory notes of $1,000 each to be used by the company in raising money to relieve it from a condition of financial embarrassment. The company at the same time left three automobiles in the possession of F. to protect him from loss, and with the understanding that he could sell the machines and apply the proceeds to the payment of his notes. It was also agreed that the notes might be renewed from time to time, if necessary, and if the machines were redelivered to the company it would return the notes to F. *Held*, That the notes were accommodation paper.

2. ———: DEFENSES. It is no defense to an action on an accommodation note by the indorsee against the maker that it was made without any consideration, or that it was understood between the maker and the payee that the latter was to take care of it; and this, although the holder had, when he took the note, full notice of the circumstances under which it was made.

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

Lysle I. Abbott, for appellant.

McGilton & Gaines, contra.

BARNES, J.

This suit was based on a promissory note executed and delivered by the defendant to the Beardsley-Hubbs Manufacturing Company, dated the 19th day of November, 1902, and by it indorsed to the plaintiff before maturity. It was admitted by the defendant that the plaintiff was the purchaser of the note before due, for value, and in the due

course of business; but it was claimed in the answer and on the trial that plaintiff's ownership was with notice of the equities between the defendant and the original payee of the note. The case was tried before Honorable W. A. Redick, one of the judges of the district court for Douglas county, and a jury, and a verdict was rendered for the defendant. Plaintiff filed a motion for a new trial, which was sustained, the verdict was set aside, and the cause was again set down for trial. There was a second trial before the Honorable George A. Day, another judge of said county and district, and at the close of all of the evidence the court directed the jury to return a verdict for the plaintiff. This was done, judgment was duly rendered on the verdict, and the defendant has appealed to this court.

It appears without controversy that on July 18, 1902, one Volney S. Beardsley, an officer of the Beardsley-Hubbs Manufacturing Company, came to the city of Omaha for the purpose of attempting to dispose of some automobiles which his company had shipped to the defendant, and who, for some reason, had refused to purchase them, and then and there entered into an agreement with the defendant as follows: "Omaha, Nebraska, July 18, 1902. Received from H. E. Fredrickson two notes, one for $1,000 due in sixty (60) days from date, one for $1,000 due in four months from date without interest, which paper is given as accommodation paper to be used by us while we leave the following automobiles in your hands on consignment for sale: One number one Stanhope with top. Two number three combination Stanhopes. As soon as any of the above machines are sold, H. E. Fredrickson is to remit us for same and the proceeds indorsed on this accommodation paper. In event the paper becomes due before the machines are sold we agree to renew the paper without interest until the machines are sold or, should we reship the machines, before doing so will return these two notes canceled. We agree to make you a flat price on these machines of $750 each, which price has nothing to do

with any future business, and will do all in our power to assist you in closing any business on the sale of our machines by referring inquiries to you. The machines are to be kept clean and stored by you, and are not to be run out unless to show to a prospective buyer. Yours very resp., The Beardsley-Hubbs Mfg. Co., Volney S. Beardsley, Treas. & Mg'r"; that in pursuance of said agreement the defendant executed two notes of $1,000 each to the Beardsley-Hubbs Manufacturing Company, and delivered them to Beardsley, who thereupon left the cars described in the foregoing agreement with the defendant on consignment; that Beardsley took the two notes to Shelby, Ohio, where his company was located, and they were thereupon used for the purpose for which they were executed, by selling and delivering them to the plaintiff; that thereafter such transactions and arrangements were had that one of the notes was taken up and returned to the defendant and the other one was renewed; that there was paid upon the renewal note, which is the one in suit, $600, leaving a balance of $400 due thereon, which, together with interest, was sought to be recovered in this action. It further appears that the Beardsley-Hubbs Manufacturing Company was in financial difficulty at the time the notes were executed, and Beardsley informed the defendant of that fact. It also clearly appears that the original notes were given as accommodation paper in order to enable the payee to raise money thereon and thus relieve itself from that condition; that after the note in suit was executed, and about the 1st of December, 1902, the Beardsley-Hubbs Manufacturing Company failed in business, and was succeeded by the Shelby Motor Car Company, which last-named company took over the assets and assumed the debts and obligations of its predecessor; that some time thereafter, and while the note in suit was in the hands of the plaintiff bank, defendant returned the cars mentioned in the agreement, and which were still in his possession when the note in suit was executed, to the Shelby manufacturing company; that the company

acknowledged the receipt of the cars and promised to return the note, but never did so, for the reason that it failed in business, became a bankrupt, went into the hands of a receiver, and was unable to comply with its agreements.

The defense interposed was that the note in suit was without consideration; that, when the plaintiff discounted it, it did so with full knowledge of the terms of the contract between the Beardsley-Hubbs Manufacturing company and the defendant; that the Shelby Motor Car company, the successor of the payee of the note, failed, refused and neglected to comply with the terms of the contract, and therefore the defendant was fully and completely discharged from any and all liability upon the note.

The defendant contends that he was induced to execute the note in suit by reason of having in his possession for display the three machines described in the contract above quoted, with the privilege of selling them at a profit; that an accommodation note is one without consideration as between the maker and the accommodated party; that therefore the note in suit was not accommodation paper, and no right of action can be predicated thereon by the bank as against him. In *Greenway v. Orthwein Grain Co.*, 85 Fed. 536, we find a most excellent description of what constitutes accommodation paper, which we quote as follows: "Accommodation paper constitutes a loan of credit, without consideration, by one party to another, who undertakes to pay the paper and indemnify the lender against loss on its account. It is paper which is made, indorsed, or accepted by one party, without consideration, for the accommodation of another, for the purpose and with the intention that the latter shall obtain money or credit upon it of some third party. The accommodated party can maintain no action upon it against the accommodation maker, because the latter has received no consideration for it from him. But, if the party accommodated uses the paper in the ordinary course of business to obtain money, credit, or any other thing of value from a third party, the

law imputes the consideration which he receives to the accommodation maker, indorser, or acceptor, because the latter, by placing his name upon the paper, has, in effect, requested him who advances the consideration upon it to pay that consideration to the party accommodated. It was for that very purpose and with that intention that he placed his name upon the paper; and when a stranger has given a valuable consideration for it to the accommodated party in reliance upon this purpose and intent, the accommodation maker cannot be permitted to say that he has not himself received that consideration. It is therefore no defense against one who has acquired accommodation paper, with knowledge of its character, but in good faith, in the ordinary course of business, and for value, that the accommodation maker actually received no consideration for it." The note in question is described in the contract and in the pleadings as accommodation paper, and the defendant's counsel states: "The giving of these notes was beyond question a great accommodation to the Beardsley-Hubbs Manufacturing Company." Again, the machines which were left with Fredrickson on consignment bore no relation to the notes, but were held by him as security for the performance of the Beardsley agreement. In *Miller v. Larned,* 103 Ill. 562, it was said: "Accommodation paper is either a negotiable or non-negotiable bill or note made by one who puts his name thereto without consideration, with the intention of lending his credit to the party accommodated." So we are of opinion that the district court was right in holding that the note in question was accommodation paper.

If this be true, it follows that the fact that the note was without consideration as between the defendant and the Beardsley-Hubbs Manufacturing Company is no defense to the plaintiff's action. Such was the view entertained by the supreme court of Minnesota in *Rea v. McDonald,* 68 Minn. 187, where it was held that an accommodation maker or indorser of a bill or note cannot make the defense of a want of consideration as against a

person who, in the regular course of business, and for value, has taken it before maturity, although the latter knew when he received the instrument that it was accommodation paper. In *Thatcher v. West River Nat. Bank*, 19 Mich. 196, it was said: "It is no defense to an action on a promissory note by an indorsee against the maker, that it was made without any consideration to the maker, or that it was understood between him and the payee that the latter was to take care of it; and this, although the holder had, when he took the note, full notice of the circumstances under which it was made." In *Miller v. Larned, supra,* it was held that, as to the holder of an accommodation note into whose hands it has come in the usual course of business for a valuable consideration, the maker will have no defense, and it makes no difference that the holder may have taken the note with full knowledge that it was accommodation paper. The case of *Rea v. McDonald, supra,* was one where the accommodation makers, under an agreement with the accommodation payee, took security to protect themselves from loss. To that extent that case and the one at bar are practically the same, and it was there said: "The proof is clear that defendants expected Blethen would discount the paper for his own benefit, and, having this expectation, they attempted to protect themselves from loss by taking security from him. At the request of Blethen, and that he might receive its benefits, the defendants loaned their credit in the shape of a promissory note, in which the bank of New England was named as a payee. He used this note at the bank, either by discounting the same and causing the amount thereof to be placed to his credit on deposit account, or by using it to pay a pre-existing debt. In either case, and with or without knowledge that it was accommodation paper, the bank received it in good faith, and a good consideration passed between the latter and the defendants."

From the foregoing authorities it seems clear that, unless the defendant has shown the existence of such an

intimate relationship between the plaintiff in this case and the Beardsley-Hubbs Manufacturing Company as to in fact and as a matter of law constitute the plaintiff an original payee of the note in question, it is impossible for him to escape liability thereon. Upon this point the record contains some evidence that at least a part of the stockholders of the bank were also stockholders of the Beardsley-Hubbs Manufacturing Company. It appears that this evidence was introduced for the purpose of establishing the fact that the plaintiff had notice of all of the conditions of the agreement between the defendant and the payee of the note, and of the equities existing in favor of the defendant by reason of the transactions which occurrred between them. It is doubtful if the evidence is sufficient to establish notice, much less any such intimate relationship between the bank and the manufacturing company as would put the plaintiff in the position of a payee of the note. If we were to consider the equities of this case, it seems clear that they preponderate in favor of the plaintiff. It parted with its money on the faith and credit of the note in question, and, unless the defendant is held liable, the balance due thereon will be wholly lost to the plaintiff. Again, the defendant was fully protected by his possession of the cars described in the contract with the payee of the note, and the fact that he voluntarily parted with his security is not the plaintiff's fault.

We are therefore of opinion that the defendant failed to establish any defense, either by his pleadings or his evidence to the plaintiff's cause of action. It follows that the verdict rendered on the first trial was properly set aside; that the directed verdict in the second trial was the only one which could have been rendered in this case; and, for the foregoing reasons, the judgment of the district court is

AFFIRMED.

THOMAS L. SLOAN, APPELLEE, V. ALFRED HALLOWELL, APPELLANT.

FILED MARCH 20, 1909. No. 15,587.

1. **Judgment by Default: SETTING ASIDE.** When a judgment on default has been entered against a defendant, which he seeks to have vacated, good practice requires him to exhibit to the court such matters in excuse of his default as he is able, and, in addition thereto, that he has a meritorious defense, either in whole or in part, to the action.

2. ———: ———. Where the ground of defendant's motion is that the petition on which the judgment was rendered is not sufficient to state a cause of action, the pleading will be liberally construed, and if, when so considered, it is found sufficient to sustain a judgment by default, the motion should be overruled.

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

Hiram Chase and *J. A. Singhaus,* for appellant.

Thomas L. Sloan and *Curtis L. Day, contra.*

BARNES, J.

This action was brought in the county court of Thurston county, where the plaintiff, after a trial on the merits, had judgment. The defendant prosecuted an appeal to the district court. The plaintiff, who is an attorney at law duly admitted to practice in all the courts of this state, sought to recover the amount of a retainer fee alleged to be due him from the defendant. In due time he filed his petition in the district court, and the defendant attacked the same by motion, requesting the court to strike paragraph 2 therefrom. His motion was sustained, and time was given him to answer the petition as it then stood. Later on, at a regular session of the district court, the defendant having failed to file his answer, a judgment was rendered against him by default. Upon this point the transcript contains the usual recital that the defendant was in default of answer; that he was duly called in open

court, and came not, but made default; that plaintiff thereupon produced his evidence; that the court upon such evidence found the facts in his favor, and duly rendered its judgment thereon. Some time afterwards the defendant filed a motion to set aside the judgment and default, and to be let in to defend. He tendered no answer as to the merits, and there is nothing in the record which shows or tends to show that he had any meritorious defense to the plaintiffs' cause of action. In place of such an answer, he tendered a general demurrer, and thereupon the district court overruled his motion. From that ruling defendant has brought the case here by appeal.

His first contention is that the petition does not state facts sufficient to constitute a cause of action, and therefore the judgment should have been set aside. Defendant's argument proceeds on the theory that the action is one upon account. If this were true, there would be some merit in his contention. We find, however, that the action is one by an attorney at law against a client to recover a retainer fee. Without setting forth the petition, it is sufficient to say that the pleading is not one to be commended, yet in our opinion it is sufficient to sustain a judgment by default. It alleges the employment of the plaintiff by the defendant to represent him in a criminal action which was about to be commenced against him. It states the amount charged defendant as a retainer. It contains a statement of the services actually rendered in behalf of the defendant under such employment and alleges that the plaintiff rendered a statement of account to the defendant therefor; that such statement stands undenied, and also unpaid, and concludes with the usual prayer for judgment. It seems to be somewhat deficient in failing to allege that the plaintiff is an attorney at law, but we think this allegation, while entirely proper, was really unnecessary because the district court, as well as this court, will take judicial notice of the fact that the plaintiff is an attorney and counselor at law, and a practitioner in good standing in all the courts of this state.

Section 136 of the code provides: "Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in the pleading." See, also, 1 Elliott, Evidence, sec. 56, note 118. We are therefore of opinion that the petition is sufficient to support a judgment against the defendant.

We come now to consider defendant's motion to set aside the judgment, and to be let in to defend. As above stated, no plea to the merits accompanied his motion. By section 606 of the code it is provided: "A judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid cause of action." In *Bond v. Wycoff,* 42 Neb. 214, it was held that, where a judgment on default has been entered against a defendant which he seeks by motion to have vacated, the motion must be accompanied by an answer showing a meritorious defense, either in whole or in part, to the action, and that, if no defense is alleged, it is not error to overrule the motion to vacate the judgment. The same rule was announced in *Mulhollan v. Scoggin,* 8 Neb. 202, *Fritz v. Grosnicklaus,* 20 Neb. 413, *Dixon County v. Gantt,* 30 Neb. 885, and in many other cases.

It follows that the district court did not err in overruling the defendant's motion, and its judgment is therefore

AFFIRMED.

ISAAC SHEPHERDSON, APPELLANT, V. GEORGE W. CLOPINE ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 15,623.

1. **Appeal: MISCONDUCT OF PARTIES: REVIEW.** During the progress of the trial, defendants requested the court to order the jury to view the *locus in quo*, and offered to pay the expense thereof. The order was not made at that time, but on the day following the court stated that if the offer was still open he would make

the order. Defendants replied that the offer was still good, and thereupon the order was made. The jury, in charge of a bailiff, drove to the premises in question, and at noon ate dinner at the home of one of the defendants, thus partaking of his bounty without charge or payment therefor. The trial was concluded on the following day and resulted in a verdict for the defendants. Plaintiff failed to interpose an objection or reserve an exception to the order, and, being aware of the fact that the jury ate dinner at the home of one of the defendants without his presence or the presence of his counsel, failed to call that matter to the attention of the court and arrest the progress of the trial. *Held*, That he could not, after verdict, complain of the order or avail himself of the misconduct of the defendants in providing dinner for the jury.

2. New Trial: MISCONDUCT OF JURY: OBJECTIONS. A new trial should not be granted for the misconduct of the jury where it affirmatively appears that such misconduct was known to the complaining party in time to have enabled him to call it to the attention of the court before the jury retired to consider their verdict.

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

A. H. Byrum and *Morlan, Ritchie & Wolff*, for appellant.

J. P. A. Black, Owsley Wilson and *Dorsey & McGrew, contra.*

BARNES, J.

This was an action brought in the district court for Franklin county to recover damages alleged to have accrued to the plaintiff by the overflowing of his land, for which he claims the defendants were responsible. There was a verdict for the defendants and judgment thereon, and the plaintiff has appealed to this court.

But one assignment of error is presented for our consideration, and so the determination of this case rests upon the single question, which is: Should the plaintiff be granted a new trial for the misconduct of the defendants hereinafter set forth?

It appears that during the progress of the trial the defendants requested the court to order the jury to view the

locus in quo, and offered to pay the cost of such examination if the court would make the order. The order was not made at the time, but on the following day, and while the trial was still in progress, the court stated that if the offer was still open he would make the order for the jury to view the premises. Defendants stated that the offer was still good, and thereupon the order was made. The following day the jury, in charge of a bailiff, and accompanied by counsel on both sides, drove to the premises in question. At or about noon counsel for the defendants made inquiry about dinner and thereupon one of the defendants informed him that he had prepared dinner for the jury at his house. One of the jurors asked about dinner, and was informed that, "Dinner is on the table right now." Thereupon the jury, accompanied by the bailiff, ate dinner at the home of one of the defendants, thus partaking of his bounty without charge or payment therefor. The trial was concluded on the following day without objection by the plaintiff, and the jury returned a verdict for the defendants. It also appears that the attorney for the plaintiff, who was designated by the court to accompany the jury, was not invited to dinner by the defendants, but was compelled to go elsewhere for his meal, while the attorney for the defendants ate his dinner with the jury. So it appears that the jury spent the dinner hour at the home of one of the defendants and partook of his bounty without the presence of counsel for the plaintiff, and this alleged misconduct is assigned as error.

It is contended on the part of the defendants that the plaintiff was aware of what occurred at the time; that plaintiff's attorney was present when the jury were invited to partake of the meal, and knew of their acceptance of the invitation; that, having failed to interpose an objection and arrest the trial, the plaintiff cannot now avail himself of such misconduct. In considering this question we find that it is almost universally held that a new trial will not be awarded to the losing party for misconduct of the jury, where it is known to him, and he fails to call it to the

attention of the court immediately, but waits to speculate upon the verdict. We further find that for misconduct of the prevailing party the rule is somewhat different, and the authorities upon this question are divided. We are of opinion, however, that, when the order complained of was made, it was the duty of the defendants to direct the attention of the court to the danger of such a proceeding. Without doubt a mere suggestion at that time would have been sufficient to prevent the making of the order in that objectionable form, and the court would have provided by the order that the expenses attendant thereon should follow the judgment. We are therefore of opinion that the plaintiff by failing to interpose an objection to the order, and by reserving no exception thereto, cannot now question its validity.

It is suggested in the plaintiff's brief, and it was urged by counsel upon the oral argument, that he could not safely object to the order of the court because such an objection would tend to prejudice the jury against his client, and for the same reason he did not deem it prudent or proper to raise the objection at any time before the submission of the case and that the first time he could safely avail himself of such an objection was on his motion for a new trial. We are all agreed that this is not a sufficient excuse, that by failing to object to the order he tacitly, if not openly, agreed to it, and, if he failed at that time to avail himself of his right to an exception, it was a misfortune for which we can afford him no relief. A somewhat similar question was before the supreme court of Iowa in the case of *Hahn v. Miller,* 60 Ia. 96. In that case it appears that the defendant rode in a sleigh with the jury when they were taken to view the *locus in quo.* No objection was made at the time by the plaintiff, when he could have prevented the act, and it was held that such misconduct could not be urged on a motion for a new trial as a ground for disturbing the verdict.

As to the matter of the misconduct of the jury in going to the home of one of the defendants for dinner: It

appears that the trial proceeded for at least one day thereafter, and yet plaintiff failed to call that matter to the attention of the court, as he might have done, but again concluded to await the result of the trial, and to thus a second time speculate upon the verdict. It therefore seems clear that by his own conduct he has waived his right to complain of that transaction. We are all of opinion, however, that the making of the order complained of should be condemned, and yet, the plaintiff having failed to make timely objection to any of the proceedings of which he now complains, we cannot relieve him from the consequences of such failure.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

THEODORE STANISICS, APPELLANT, V. HARTFORD FIRE INSURANCE COMPANY, APPELLEE.

FILED MARCH 20, 1909. No. 15,550.

1. **Insurance Contract: ENFORCEMENT.** A contract of insurance is a contract of indemnity, and any person attempting to enforce a claim under such a contract must show an interest in the subject matter of the contract.
2. **Appeal: FINDINGS BY COURT.** The findings of the district court in a law action tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be disturbed unless the evidence is clearly insufficient to support them.

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

Samuel J. Tuttle, for appellant.

R. W. Barger and *Hall, Woods & Pound, contra.*

LETTON, J.

This was an action to recover upon a policy of fire insurance issued to one Parks. The policy had attached a

mortgage clause by which the loss was made payable "to Rena L. Salisbury or assigns, mortgagee or trustee or successor in trust as hereinafter provided." The plaintiff claims to be the owner of the mortgage by assignment from Rena L. Salisbury, and bases his right of recovery upon the mortgage clause.

The evidence discloses a very peculiar state of facts. The building which was insured was a dwelling situated upon a ten-acre tract of land near Lincoln. In 1903 the land belonged to certain nonresidents for whom the plaintiff Stanisics was apparently acting as agent. He purported to sell it and procured a deed of conveyance to be made to one Fred Williams, who had no interest in the matter, and who received the title for Stanisics' benefit. He then caused Williams to transfer the property to one Estella McMasters, who was then a minor, and then procured her to execute certain notes and a mortgage on the property for the sum of $1,800 payable to one Rena L. Salisbury. Miss McMasters had no interest whatever in the property, and merely acted in the matter to accommodate Stanisics. He had originally applied to Williams to allow him to have the notes and mortgage made payable to him, but Williams refused to permit this to be done, and suggested that Mrs. Salisbury, who was then visiting at Williams' home and who was a nonresident of this state, might be willing to do it. Upon this suggestion, with her consent, the name of Mrs. Salisbury was inserted in the notes and mortgage without consideration, and she indorsed and assigned them in blank without recourse on her. The papers were then delivered to Stanisics. No one but the plaintiff up to this time had any interest in the property. In fact, this is expressly admitted in the plaintiff's reply. Soon afterwards the plaintiff procured Estella McMasters to convey the property to Clarence G. Parks without any consideration to her. The only disputed facts in the case arise from this transaction, the defense claiming that Parks had no insurable interest in the property, but that he merely took

the naked legal title for the benefit of Stanisics who continued to be the real owner, while the plaintiff contends that Parks was an actual *bona fide* purchaser, and that the $1,800 mortgage given to Mrs. Salisbury and assigned by her was given in order to effectuate the sale to Parks and with his full knowledge and consent, he having previously informed plaintiff that he could not be sure that his wife would sign a mortgage, and, plaintiff not desiring to sell under a contract for future payments, the mortgage was made to carry out the terms of sale.

At the time these transactions were had, it would seem that there was an insurance policy of $600 upon the property, but a few weeks later a new policy was issued for $1,000 containing the mortgage clause upon which this suit is based. The house burned in August. Estella McMasters is the daughter of one Mrs. Blake, who kept a rooming house, where Parks, who is a piano salesman roomed while in Lincoln. Parks and Mrs. Blake both swear that Stanisics was present at her home with a notary at the time the deed was made from her daughter to Parks, and that Parks then gave a deed back to Stanisics for the property. They also say that the whole transaction was for Stanisics' benefit; that Parks had not met Stanisics before this time, had not seen the land, and did not see it for some weeks after. They testify that at Stanisics' suggestion Parks made some improvements upon the house; that he bought some furniture from Mrs. Blake and placed it in the house; and that he procured a policy of insurance to be made upon the furniture and collected the insurance after the fire. Parks further testifies that Stanisics, through Mrs. Blake, furnished the money to pay the insurance premium, and that, as he and Stanisics came from the insurance agent's office, Stanisics told him he had better leave town because the building was liable to burn, and he might go to the penitentiary; that he left and went to Hastings, and that the building burned while he was gone. In rebuttal Stanisics denies making this statement, and adheres to his explanation of the reasons why the

deeds were made in blank and why the blank assignment of the mortgage was made. The case was tried to the court without the intervention of a jury. The court made specific findings of fact, the most important of which are, in substance, that the transfer to Parks was without consideration; that Parks was financially irresponsible; that he permitted the property to be conveyed to him at the request and solicitation of the plaintiff; that he was not a *bona fide* purchaser; that the improvements made by him upon the premises were made by money furnished indirectly by the plaintiff, and were made at the request of the plaintiff and for his express benefit, and that Parks had no other interest in the premises except for reimbursement or compensation for his trouble and services in the matter. The court then found generally for the defendant and rendered a judgment dismissing the case.

The appellant insists that, upon the findings of the court below, the judgment should be for the plaintiff. He predicates this argument upon the fact that the court found that Parks moved furniture into the house and made repairs and additions thereto, and contends that this is equivalent to a finding that Parks had an insurable interest in the property. But he overlooks the legal effect of the further findings that the improvements were made at the instance and request of the plaintiff, and that Parks had no interest in the premises. The findings must be considered as a whole, and thus considered they will not support a judgment for the plaintiff. The principal complaint of the appellant is that the court drew the wrong conclusion as to the respective credibility of the witnesses, and that it should have found that Parks was a *bona fide* purchaser of the property. It seems to be conceded that if the story of Mrs. Blake and Parks is true, and that of the plaintiff untrue, there can be no recovery, and with this view we coincide. We think the evidence is amply sufficient to sustain the findings of the court as to the relations which Parks bore to the plaintiff, and as to his interest or lack of interest in the prop-

erty. The plaintiff claims as assignee of Mrs. Salisbury; but at the time she assigned the notes and mortgage she had absolutely no interest in either mortgage or property. Divested of shams and subterfuges, the effect of the conveyance from Williams to Estella McMasters and of the mortgage from her to Mrs. Salisbury and the assignment of the mortgage to the plaintiff is the same as if the plaintiff had conveyed his own property to himself, executed notes and a mortgage thereon to himself, and indorsed and assigned them to himself. It is clear that such a mortgage and assignment are ineffective to constitute a basis for a claim of right as long as they are in the original owner's hands, and that all this juggling with the title made no real change in the actual ownership of the property. When the mortgage was made to Mrs. Salisbury, she had no interest in the property. When she assigned the notes and mortgage, she had no such interest, and, when the policy was issued, neither she nor her assignee had any mortgage interest to which a contract of insurance in favor of either of them as mortgagee could attach. A contract of insurance is a contract of indemnity, and any person attempting to enforce a claim under such a contract must show an interest in the subject matter of the contract. Strictly speaking, that which is insured is not the property itself, but the interest of the person, who is indemnified against a loss occurring to him by reason of injury to the property or its total destruction. The district court found that at the time the policy of insurance was issued to Parks he had no insurable interest in the property, and that it was in fact the property of the plaintiff. Taken in connection with the lack of insurable interest in Mrs. Salisbury, this is not sufficient to support a contract of insurance for the benefit of her assigns. In such a case as this, the court will look behind the scenes, and will consider the facts as they actually are, and not as they appear to be. Questions as to the legal rights of the parties which might arise in case the district court had found that Parks was

the real owner of the property at the time the policy was issued might be very interesting, but these we are not called upon to determine. The findings of the district court in a law action tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be disturbed unless the evidence is clearly insufficient to support them.

The evidence sustains the findings, and the judgment of the district court must be

AFFIRMED.

WILLIAM H. RADFORD ET AL., APPELLEES, V. THOMAS WOOD, APPELLANT.

FILED MARCH 20, 1909. No. 15,552.

Waters: OBSTRUCTIONS: INJUNCTION. R. constructed a dam across the intake of a subsidiary channel of a natural watercourse, and thereby retained all of the water in said river in the main channel. R. had not secured permission from the riparian owners on the main channel below said dam to thus increase the flow of water, nor had he proceeded under any statute to secure that right. R. brought an action to enjoin W., the owner of an island in the main channel of the river five miles below his dam, from destroying said obstruction, and W. filed a cross-petition to compel R. to remove it, and also prayed for damages. *Held*, That, as R. did not have lawful authority to construct said dam, a court of equity would not protect him in maintaining it, but, as the evidence was conflicting and left the court in doubt as to whether said obstruction damaged W., he would, under the circumstances of the case, be relegated to his action at law for damages.

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

Warren Pratt and *W. H. Thompson,* for appellant.

W. D. Oldham and *H. M. Sinclair, contra.*

ROOT, J.

Action and cross-action for injunction. Plaintiffs prevailed, and defendant appeals.

The Platte river in the location where this controversy arose is divided into three channels. The middle channel, approximately 1,100 feet, and the south one, about 270 feet wide, need only be considered. The south channel is separated from the main one by Elm Island. Plaintiffs about four years preceding the commencement of this action constructed a series of dams between various small islands in the intake of the south channel, and thereby deflected into the main channel the waters that otherwise would have flowed down and through the former course. In consequence, the lands either owned or controlled by plaintiffs and other lands situated upon Elm Island and south of the south channel were rendered more arable, and Elm Island more accessible, than theretofore. Defendant owns an island containing about 200 acres situated in the main channel about 5 miles south of the intake of the south channel. Public bridges, forming part of the highway, connect said island with the mainland, and for many years it has been a valuable farm. During the latter part of May and early days in June in each year water, caused by melting snow in the mountains, flows down said river, and during that period only the waters of said stream cause any concern to riparian owners along said watercourse. Later in the year the waters subside so that in August and September all of said channels are practically dry. The land adjacent to said stream, and forming the islands therein, is loose and porous and the substratum sand. The water table in said lands rises or lowers in accord with the height of the water in the adjacent channel of the river.

Plaintiffs claim that defendant has threatened to and, if not restrained, will destroy the aforesaid dams which have been constructed at great cost and expense, and that defendant is insolvent. Defendant, while denying any intention to summarily interfere with said obstructions, alleges in his cross-petition that they are unlawful, and, as a result of their maintenance, an increased flow of water in the main channel has inundated his

farm and destroyed his crops; that thereby the banks of said island have been and now are continuously eroded, and the area of his farm has been and will continue to be diminished, and, in addition to a judgment for alleged accrued damages, asks for a mandatory injunction to compel plaintiffs to remove said obstructions. The court found generally for plaintiffs, granted them a perpetual injunction, and dismissed defendant's cross-petition without prejudice to an action at law.

Upon one point the facts are undisputed, and that is that the dams under consideration were constructed and are now maintained so as to obstruct and prevent the flow of water in a channel that has been a watercourse from time immemorial, and that plaintiffs constructed said dam without any authority of law. If any riparian owner of lands lying upon the south channel were complaining, it is clear that he would be entitled to relief. Defendant is not in that position, but the flow of water past his premises, instead of being diminished, is increased and, he avers, accelerated. The owner of land upon a natural watercourse is entitled to have the flow continue in its usual quantity and at its natural height, unless by appropriate proceedings known to the law some person has secured the right to alter natural conditions. If by reason of unlawful interference with the stream above his land the water is obstructed or drawn down, or made to run in unusual quantities or in an unusual manner, to his actual injury, the riparian owner has his action. *Gerrish v. Clough,* 48 N. H. 9, 2 Am. Rep. 165; *Merritt v. Parker,* 1 N. J. Law, 460; *East Jersey Water Co.* v. *Bigelow,* 60 N. J. Law, 201; *Tillotson v. Smith,* 32 N. H. 90, 64 Am. Dec. 355; *Pixley v. Clark,* 35 N. Y. 520. Plaintiffs neither secured permission from the lower riparian owners on the main channel to deflect therein the waters of the south channel, nor proceeded under any statute to improve their land and assess damages and benefits that might accrue by reason thereof, nor are they draining ponds or providing for the disposition of surface water

only. It does not seem to us that a court of equity should issue its mandate to protect plaintiffs in the enjoyment of a nuisance, even though it will not at the request of every person abate that nuisance.

Concerning defendant's cross-petition, we find that the evidence is not so clear and convincing upon the issue of whether said dams have damaged or will damage defendant as to justify an injunction in his favor. The writ should not issue unless the right therefor is clear, the damage complained of irreparable, and an action at law will not afford adequate relief. *Westbrook Mfg. Co. v. Warren,* 77 Me. 437. The trial judge evidently did not find the evidence so satisfactory as to warrant him in assessing such damages.

We have read the evidence carefully, and find it in hopeless and irreconcilable conflict upon the question of whether the deflection of the current of the south channel has caused defendant any damage. His property is about five miles down stream, and no one owning property on the main channel between defendant's island and the intake of the south channel has complained that his property had been injuriously affected by the construction of said dams, and the testimony shows that the water in the main channel has not overflowed the river banks for many years last past. The evidence shows, and we take judicial notice of the fact, that the thread of the stream in the Platte fluctuates from year to year, and, at times, during the year; that, as the current shifts from one side of the stream to the other, the banks are often eroded or accreted, and more or less changes are made in the contour of the islands in the river. The causes for such deflections and changes, although at times apparent, are often obscure. Defendant's evidence tends to prove that the closing of the intake referred to will, when the Platte is well filled with water, raise the crest of the water in the main channel five inches, and with this change that the water table of the adjacent lands, including defendant's island, will be uplifted that much; but

the testimony seems undisputed that during the first and second years of the maintenance of the dams no damages whatever accrued to defendant's land, and whether the erosion of the banks of that island in the next succeeding two years was caused by the closing of said intake or by some unexplained change in the current of said river is a matter of more or less speculation. The water marks observed and known along said channel fail to indicate that the water in the main channel during the third and fourth years said dams were maintained was higher than during the preceding years, for which defendant does not claim damages.

On the entire record we are satisfied that an injunction should not issue for the benefit of either party, and that defendant should be relegated to his action at law. The judgment of the district court, therefore, is reversed, and plaintiffs' petition and defendant's cross-petition dismissed at plaintiffs' costs, but without prejudice to an action at law by defendant, and without prejudice to an action in equity in a proper case.

JUDGMENT ACCORDINGLY.

GEORGE A. QUINBY ET AL., APPELLEES, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 20, 1909. No. 15,598.

1. Trial: INSTRUCTIONS. "An instruction submitting to the jury as an issue of fact a question material to the case, regarding which there is no evidence to support a finding, is erroneous." *Chamberlain Banking House v. Woolsey*, 60 Neb. 516.

2. Carriers: LIABILITY. Q., a shipper, was notified by the agent of the railway company to load his horses promptly at 6 o'clock. Q. agreed with the carrier that, in consideration of free transportation for one person, he would furnish a caretaker to accompany said horses, would load and unload them, and care for the stock

while in the car and yards of the carrier. Immediately after the horses were placed in the car both the shipper and caretaker departed, and said animals were left in the yards of the carrier. An hour later a stranger noticed that the horses were in an excited condition, and were kicking, biting and trampling each other. The evidence did not tend to prove that said condition arose from any cause other than the inherent propensities of the horses and the delay in starting the car on its trip. *Held*, That the carrier was not liable to the shipper for his loss.

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

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

John H. Linderman, contra.

ROOT, J.

Action for damages because of the alleged negligence of defendant. Plaintiffs prevailed, and defendant appeals. The verdict responded separately to two causes of action, and it was not argued at the bar that the verdict was wrong as to the second cause of action, and the judgment to that extent will be affirmed.

Concerning the first cause of action, plaintiffs in December, 1906, owned and desired to ship from Lexington, Nebraska, to Denver, Colorado, 20 valuable draft horses. In order that said horses might be transported with dispatch, plaintiffs waited for a fast freight. Defendant's agent in the afternoon of December 7 notified plaintiffs that they must load the horses by 6 o'clock or the car would not be included in said train. Plaintiffs loaded the horses as directed, and the car remained on the sidetrack opposite the loading chute. In consideration of free transportation to Denver and return for a caretaker, plaintiffs agreed with defendant to load, unload and reload said horses, and to feed, water and tend them in the stock yards and while in the car and on the premises of defendant at plaintiffs' cost and risk, and assumed the

risks arising from the stock being wild, unruly, weak, or in maiming each other or themselves. Immediately after the horses were loaded Mr. Quinby and the caretaker went up town from the railway yards. The caretaker ate his supper, and returned to the depot, and there remained until after 7 o'clock, when he was notified that the horses were injuring each other. About an hour after the horses were loaded a witness, not connected with either party hereto, was attracted to the car, and noticed that one horse was down and the others were "milling," whereupon he went up town to notify Mr. Quinby. Another individual soon thereafter noticed that the horses were stampeded, were pushing, crowding, kicking and biting each other, and some of them were piled up in a heap in one end of the car. Plaintiffs, when notified, refused to do anything for the horses, and a volunteer and defendant's employees opened the car door and unloaded the car. One horse was dead, another died soon thereafter. Two animals were seriously, and others considerably, injured.

The charge of negligence is that the defendant negligently and carelessly left the carload of horses on the side-track for three hours after dark, and then negligently and carelessly operated a train on the main track, and thereby caused said horses to stampede and become injured. Defendant claimed immunity because of the contract aforesaid, because of its alleged lack of negligence, and for the reason that the injuries were occasioned by the natural propensities of the animals. The evidence on the important facts does not conflict. It is undisputed that horses, when loaded into a car, are liable to become nervous and frightened, and, when in that condition, will crowd, kick, bite and push each other and endeavor to get out of the car, and in consequence may "pile up"; that, as soon as the car is propelled by the engine the animals will brace themselves and stand quiet, and thereafter a recurrence of "car fright" is not likely to happen. Witnesses who were experienced ship-

pers testified that horses should not be loaded until the locomotive was ready to take the car out of the yards, although trouble might not happen and horses might remain for more than an hour in the car before it was moved, and not injure themselves or each other. The fast freight did not arrive in Lexington until 7 o'clock on the evening in question. There is some evidence to indicate that one other freight train was then in the yards at that point, but no evidence whatever to show that, while the car loaded with these horses was standing on the siding, any train passed on the main track. There is no evidence to show when the horses were first frightened, but about 7 o'clock, when their plight was discovered, they were steaming with perspiration, and must have been in that excited condition for some time.

Over defendant's objections witnesses were permitted to testify to the probable effect that would result from operating a train on the main track while horses were standing in a car on the side-track, and the court instructed the jury that, if the horses were unnecessarily and negligently left on the side-track near the main line for 1½ hours after dark, and during that time defendant by negligence and carelessness in operating a train on its main track stampeded the horses and caused the injuries to them, plaintiffs should recover. There is not, as we read the record, any evidence whatever that defendant operated any of its trains negligently, or even that a passing train frightened the horses. So far as a deduction of cause from effect may be drawn, the only reasonable inference in the state of the record is that the horses were seized with car fright, induced by their inherent propensities, a condition for which defendant is not responsible. 1 Hutchinson, Carriers (3d ed.), sec. 335; *Evans v. Fitchburg R. Co.*, 111 Mass. 142, 15 Am. Rep. 19.

It is argued that a common carrier of live stock is an insurer, and *Nelson v. Chicago, B. & Q. R. Co.*, 78 Neb. 57, is cited. In that case it was held, upon the facts, that

it was for the jury to say whether a delay in the transportation of fat cattle was unreasonable, and the recovery was not for injuries caused by the propensities of the animals, but for a deterioration resulting from an unnecessary and unreasonable delay in their transportation, something without the control of the shipper, but within that of the carrier.

It is also suggested that the burden was on defendant to show that the injuries resulted from a cause for which it was not liable. This rule might apply if the injuries had occurred while the horses were in course of shipment, but in the case at bar the injuries were not occasioned by the transportation of the stock, nor was the car in any manner defective, nor had it been moved from the exact point where it was loaded. The plaintiffs had agreed to care for the horses while in defendant's yards, and had furnished a caretaker for that purpose. Defendant, unless notified that the caretaker had abandoned the animals, or unless charged with knowledge or notice of such facts as would lead a reasonable person to believe that the caretaker had not been furnished or had abandoned his charge, had a right to rely on plaintiffs caring for the animals while in the car awaiting shipment. 2 Hutchinson, Carriers (3d ed.), sec. 642. Nor is it claimed that the caretaker had abandoned his charge. Had the caretaker been attending to his duty, he might have quieted the animals when they first became restless, or, if he could not do so, he could easily have unloaded them with little effort on his part. It was not a part of the carrier's duty, under the circumstances of this case, to detail an employee to watch the horses and report if they were becoming restless. and the burden was on plaintiffs to show that the injuries resulted from defendant's negligence. *Chicago, B. & Q. R. Co. v. Williams,* 61 Neb. 608; *Chicago, St. P., M. & O. R. Co. v. Schuldt,* 66 Neb. 43.

We conclude that the evidence did not warrant the court submitting to the jury so much of its charge as re-

ferred to the negligent operation of trains on defendant's track, and, for that reason, the judgment must be reversed. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516. Furthermore, we are of opinion that the evidence introduced on the trial of this case is insufficient to sustain a judgment on plaintiffs' first cause of action.

The judgment therefore is reversed as to the first, and affirmed as to the second, cause of action; and each party will pay its own costs in this court.

JUDGMENT ACCORDINGLY.

LEWIS BENEDICT ET AL., APPELLEES, V. EDNA L. MINTON ET AL., APPELLANTS.

FILED MARCH 20, 1909. No. 15,615.

Specific Performance: PLEADING: SUFFICIENCY. Plaintiffs requested specific performance of a contract. Defendants admitted the execution of said contract, but not all of the facts essential to entitle plaintiffs to a decree. Defendants also pleaded facts which, if true, constituted a defense to the petition. *Held*, That the district court erred in sustaining a general demurrer to said answer.

APPEAL from the district court for Frontier county: ROBERT C. ORR, JUDGE. *Reversed.*

Starr & Reeder, for appellants.

J. A. Williams, contra.

ROOT, J.

Plaintiffs alleged that on December 11, 1905, plaintiff Benedict owned in fee simple certain lands, and on said day, without consideration, signed, acknowledged and delivered to defendant Edna Minton a deed conveying said real estate to her upon the following conditions: "This deed not to become absolute until after my death, I re-

taining the use and control of the land during my life; my intention being to retain a life lease to the above premises. It is also agreed and understood that should I desire to sell the land during my lifetime that the grantee will join me in a deed, providing I pay her for the improvements she and her husband place on the land." Plaintiffs further alleged that defendants had not improved said land; that Benedict sold said real estate to plaintiff Lindbloom, and defendants refuse to convey. The prayer is for a specific performance of said contract.

Defendants answered by way of general denial, except as to specific admissions, denied that said deed was without consideration, and alleged: That theretofore the land had been conveyed by them to Benedict to secure the payment of $300, and the conveyance, although in form an absolute deed, was a mortgage; that, when said deed was executed, it was orally agreed that defendants should have the use of said land during Benedict's lifetime and should deliver to him one-fourth of the crops grown on said farm, and that the grantee should also nurse and care for the grantor when he was sick or in need of care; that Benedict is an aged person afflicted with cancer, and that defendants took him into their home, boarded, nursed and cared for him, and thereby returned to him more than $300 in value; and that they are ready and willing and offer to continue such care and nursing and to deliver to said Benedict one-fourth of the crops grown on said farm during his natural life. To this answer plaintiffs filed a general demurrer, which was sustained. Defendants elected to stand on their answer, and a decree was rendered in favor of plaintiffs. Defendants appeal.

Defendants assert that the petition does not state facts sufficient to constitute a cause of action in plaintiffs' favor, and, under the well-established rule that a demurrer to an answer searches the record and will be applied to a defective petition, that the action should be dismissed. We do not agree with counsel. Section 10854, Ann. St. 1907, commands the court to construe instruments creat-

ing, conveying, or requiring the creation or conveyance of real estate, or an interest therein, so as to carry into effect the true "interest" (intent) of the parties, so far as that intent can be collected from the entire instrument and in accord with the rules of law. Acting in conformity with the liberal spirit of the statute, we have refused to be bound by highly technical rules of construction with reference to conveyances of real estate, but give to each word and sentence in those documents such significance as will carry into effect the true intent of the parties thereto. *Rupert v. Penner,* 35 Neb. 587; *Albin v. Parmele,* 70 Neb. 740. Assuming that all of the facts stated in the petition are true, we are not willing to hold that plaintiffs are not entitled to any relief. On the other hand, all of those facts were not admitted in the answer, and if the affirmative allegations therein are true, and plaintiffs cannot qualify or avoid them, plaintiffs are not entitled to the relief they demand. We have not been favored with briefs or argument on this point, and shall not pursue the subject further.

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

REVERSED.

STATE, EX REL. LOUIS V. SHEFFER, APPELLANT, V. ABEL B. FULLER ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 16,023.

1. Drainage Districts: ACT AUTHORIZING: VALIDITY. That part of chapter 153, laws 1907 (Ann. St. 1907, sec. 5598 *et seq.*), which authorizes the commissioners of one county upon a proper petition to establish the boundaries of a drainage district so as to include land in an adjoining county, is not void.

2. ———: BOUNDARIES. The boundaries of drainage districts created under said act may lawfully overlap.

3. ———: ———: CHANGES. The commissioners at any time before the rights of third persons have accrued may alter the boundaries

of such proposed district, but, if a change is made, they must give the landowners within said district three weeks' notice of the election, and therein correctly describe the boundaries of the proposed district.

4. ———: ———: ———. In case the commissioners, after establishing the boundaries of a proposed district under said act, publish notice of the election provided by statute, and thereafter, before election, modify such boundaries, but do not change the notice, a landowner within the altered district who did not participate in said election may, if he acts promptly, maintain an action in *quo warranto* to dissolve said district and oust its directors from office.

APPEAL from the district court for Saunders county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

H. A. Reese, for appellant.

T. F. A. Williams, contra.

B. E. Hendricks, amicus curiæ.

ROOT, J.

Action in *quo warranto* to dissolve the Salt Creek Valley Drainage District and oust respondents from acting as directors thereof. A general demurrer to the petition was sustained, and, relator electing to stand upon his pleading, the action was dismissed. Relator appeals. The drainage district, if organized, was created under the act of March 27, 1907 (Ann. St. 1907, sec. 5598 *et seq.*). The terms of the statute are referred to and thoroughly discussed in *State v. Hanson,* 80 Neb. 724, and reference is made thereto for an understanding of the act.

1. It is argued that the statute is void in so far as it assumes to authorize the creation of a drainage district within two or more counties; that the proceedings in the case at bar were instituted and carried on in Saunders county, where the greater part of said district is situate, and that, as relator's land is in Cass county, they are void as to his real estate. We have not been cited any

authority to sustain the proposition advanced and are not inclined to adopt it. It is competent for the state to authorize the creation of governmental agencies for the enforcement of its police power, and for the legislature to clothe county commissioners, supervisors, or any other administratrive officer or board with authority to establish a district for the reclamation of swamp, overflowed or wet lands, or lands so subject to inundation as to destroy their utility or to constitute a menace to the public health. The fact that such bodies of land may extend into two or more counties does not render the legislature powerless to include contiguous tracts into one district for the more convenient exercise of the police power. *Hagar v. Reclamation District,* 111 U. S. 701; *Reclamation District v. Hagar,* 66 Cal. 54; *Shaw v. State,* 97 Ind. 23; *Hudson v. Bunch,* 116 Ind. 63; *Updegraff v. Palmer,* 107 Ind. 181; *People v. Draper,* 15 N. Y. 532. That the county board wherein the greater area of the proposed district is situated should act is a reasonable provision. Nor does the act amend the statutes relating to the powers and duties of county commissioners. *Nebraska Telephone Co. v. Cornell,* 59 Neb. 737.

2. Relator alleges that his land is within the limits of another proposed drainage district, and that the law does not authorize or contemplate the overlapping of those districts so that real estate may be subject to separate assessments in as many distinct districts. The statute does not refer in specific terms to the overlapping of districts, nor does it forbid their formation. While some complications may arise in the prosecution of public improvements on land within two or more districts and in assessments to pay therefor, yet we are of opinion that the objection made is not a serious one. Relator's land can only be assessed for, and to the extent of, benefits actually bestowed by virtue of the improvements made by any particular district. The assessments can only be laid after notice, and, if the levy is not supported by the facts, the landowner has an ample remedy by appeal to the courts

wherein upon inquiry the truth may be ascertained and a judgment rendered that will amply protect him in his property rights. If his land may be improved by the construction of ditches or dykes in two or more districts, he ought to pay to the limit of those benefits. To hold otherwise would permit the owner of a large tract of land included in a district which had not benefited that land to any appreciable extent to receive the advantage of an improvement made by another district, and yet escape payment therefor. In *Shannon v. City of Omaha,* 73 Neb. 507, we sustained a municipality in the creation of a second and smaller sewer district within the boundaries of a larger one, and upheld special assessments laid in the smaller district, and we think that the principle therein announced is pertinent in the instant case.

3. The application for the formation of said district was filed September 25, and five days later an order was made by the commissioners of Saunders county fixing the boundaries of said district. An election was called for October 26, and notices were duly published in a newspaper in Cass and one in Saunders county. This notice, as the statute required, described the boundaries of the proposed district as fixed by the county commissioners. On the 23d of October certain persons, owning about 1,000 acres of land within the proposed district, appeared and made a showing that their lands were already within a drainage district created for the purpose of reclaiming lands adjacent to Wahoo and Clear creeks, and that neither equity, justice nor the public welfare warranted including said lands within the boundaries of respondent district, and thereupon, without notice, said commissioners entered an order modifying their first one and excluding the aforesaid land from respondent district. Notice was not given of the making of the second order except to the seventeen parties who had petitioned for the creation of respondent district. October 26, the day fixed in the published notice, an election was held, and a majority of the votes cast favored the creation of a drainage district,

and directors were elected who have since qualified. Relator did not attend or vote at said election, nor did the owners of a majority of the acres included in said territory thus vote. Section 5601, Ann. St. 1907, provides that "any one asking shall be given a hearing as to the boundary," but provision is not made for notice or that the commissioners may not proceed forthwith. The board might well have postponed immediate action. Their orders under said statute are not subject to review by appeal or error proceedings, but their discretion while acting under said statute is practically unlimited. In *State v. Ross,* 82 Neb. 414, in construing the power of a county board in drainage proceedings initiated under sections 5500 *et seq.,* Ann. St. 1907, it was held that a preliminary order made might lawfully be revoked where the rights of third parties had not accrued. No provision is made in either statute for a reconsideration of an order made by the commissioners. In *Clark v. Nebraska Nat. Bank,* 49 Neb. 800, it was held that, if an *ex parte* order is made by a court or judge, the party affected thereby may in a proper case have it set aside, and must request the court to so act before appealing to this court. While the commissioners do not exercise judicial power or act according to the course of the common law under said statute and their orders cannot be reviewed in direct proceedings, yet, upon principle, we incline to the belief that the commissioners had authority, before the electors had voted, to establish the drainage district, to modify their order first made, and change the boundaries of the tentative district, and that it was the duty of landowners therein to bring to the commissioners' attention any facts that would tend to prove that a mistake had been made in fixing the limits of the proposed district.

The vital proposition in this case is whether, under the circumstances, notice not having been given of the change in the boundaries of the proposed district, the election was void. In *State v. Hanson,* 80 Neb. 724, we held that an election under said act was not an election within the

meaning of the constitution or the general statutes, but the district could only become legally organized and endowed with power to perform its functions by an affirmative vote of a majority of the votes cast at said election. The statute does not direct that actual notice shall be given the landowners of the limits of the proposed district, but that notice shall be published once each week for three weeks in a newspaper published at the county seat of every county wherein any of the land of the proposed district is situated. The notice must contain the title to the act and a description of the boundaries of the proposed district as fixed by the county commissioners.

We are of opinion that landowners have a right to rely upon the district being formed, if created at all, in conformity with said notice, and, if the commissioners change those boundaries so that the notice does not truly describe them, any landowner who did not have knowledge of the change or participate in that election may, by timely appeal to the courts, successfully challenge the legal existence of said district. *City of Atlanta v. Gabbett,* 93 Ga. 266; *Payson v. People,* 175 Ill. 267.

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

REVERSED.

IDA A. KIMMERLY, APPELLEE, V. JOHN W. MCMICHAEL ET AL., APPELLANTS.

FILED MARCH 20, 1909. No. 15,563.

1. **Homestead:** QUIETING TITLE: DECREE. In a suit by a divorced woman to quiet her title to the former homestead, the court may find that the property was not her separate estate and at the same time subject it to her lien for alimony by canceling a void deed which had been executed in violation of her homestead rights, where the pleadings and proof warrant such relief.

2. **Pleading:** CONSTRUCTION. After decree a petition in equity not attacked by motion or demurrer will be liberally construed by the

supreme court for the purpose of upholding the proceedings of the trial court.

3. **Judgment**: PLEADING: DECREE. In a suit in equity the relief to which plaintiff is entitled under his petition and proofs may be granted pursuant to his general prayer, where defendants understand the issue and resist his allegations by evidence.

4. **Alimony**: DECREE: RES JUDICATA. Allowance of alimony in lieu of a wife's interest in her husband's property is not an adjudication which prevents her from recovering a decree canceling a void deed formerly executed in violation of her homestead rights and interfering with her lien for alimony.

5. **Appeal**: HARMLESS ERROR. A decree in equity should not be reversed for a mere technical error which does not prejudice any party to the suit.

6. **Homestead**: INCUMBRANCE: VALIDITY. A mortgage on a homestead worth less than $2,000, when executed by the husband, but neither signed nor acknowledged by the wife, is void.

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

William Mitchell, for appellants.

O. C. Tarpenning, contra.

ROSE, J.

Defendant John W. McMichael and plaintiff were husband and wife from March 26, 1898, to July 9, 1906. The district court for Saunders county granted the wife a divorce July 9, 1906, restored her maiden name of Ida A. Kimmerly and allowed her alimony in the sum of $1,000. The present suit was brought in the district court for Grant county. The subject of litigation is a house and lot in Hyannis worth between $500 and $1,200. Plaintiff deeded the property to her husband March 16, 1904. When they were bound by the marriage relation January 23, 1906, the husband attempted by means of a deed in which his wife did not join to convey the property to his codefendant Perry A. Yeast. The trial court found that at the time of the attempted transfer to Yeast the real estate was the homestead of the McMichaels, canceled

Yeast's deed and confirmed the title in grantor, where the property may be subjected to plaintiff's lien for alimony. Defendants appeal.

The principal objection to the decree is that it has no support in the pleadings. It is strenuously argued by defendants that the decree fails to respond to any allegation or prayer of the petition; that it grants plaintiff relief unasked; that it subjects the property to the decree for alimony under a petition to quiet plaintiff's title; that plaintiff pleaded no interest in the property as a family homestead; and that she did not pray for the protection of any homestead right. All these propositions are included in a single inquiry into the sufficiency of the petition to support the decree.

The petition is not skillfully drawn, but one paragraph contains an averment that plaintiff and her husband made the house and lot in Hyannis their home, and lived and resided there March 16, 1904, and for a long time prior thereto. In another paragraph it is alleged that the real estate described in the petition was March 16, 1904, "and a long time prior and at all times since, the homestead of this plaintiff." It is true the record shows that plaintiff pleaded she owned the property in her own right; that she bought it with her own money; that it was her separate estate; that she prayed for relief accordingly; that she offered proof in support of such averments; and that the trial court found against her on this branch of the case. It does not follow, however, that she thus lost her right to a decree canceling the deed which was executed by her husband in violation of her homestead interests, if her petition and proof warrant such relief. The averments of the petition as to the homestead were not attacked by motion or demurrer, but were separately denied in different paragraphs of the answer. Defects in plaintiff's allegations did not mislead or prejudice defendants. They understood that plaintiff had asserted her homestead rights as they existed March 16, 1904, when plaintiff transferred the title to her husband, and as they existed

January 23, 1906, when the husband deeded the property to his codefendant Yeast. Defendants also understood that the homestead mentioned in the petition was the homestead of both husband and wife. Both parties to the suit offered proof of the existence and place of the homestead January 23, 1906. When McMichael was testifying as a witness for defendants, he was asked on direct examination: "You may state whether the property in controversy was the homestead of you and your family at the time you sold the property in controversy to Perry A. Yeast in January, 1906." His answer was, "No, sir." Defendants adduced other testimony of like import, and also attempted to prove that the family homestead consisted of a house and a quarter section of land three miles from Hyannis. The court heard the testimony on both sides of the issue as to the homestead and on abundant evidence found in favor of plaintiff.

After proof has been adduced on both sides of a controverted issue and a final decree entered, the petition, when not assailed by motion or demurrer, should be liberally construed by the reviewing court and sustained, "if the essential elements of plaintiff's case may be implied from its terms by reasonable intendment." *Sorensen v. Sorensen*, 68 Neb. 483; *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 674; *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1; *Bennett v. Bennett*, 65 Neb. 432; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33; *American Fire Ins. Co. v. Landfare*, 56 Neb. 482. Under the rule stated, plaintiff's petition, as it appears in the record presented by defendants, must be held sufficient to support the decree. After judgment undue importance should not be attached to technical objections to a petition in a suit in equity fairly tried and correctly decided, where the complaining parties understood the issue, adduced proof thereon and submitted the controversy to the court without attacking the pleading by motion or demurrer.

The decree is said to be erroneous because it grants plaintiff relief for which there is no prayer. There is a

specific prayer for the cancelation of the deed from McMichael to Yeast, and "for such other and further relief as equity may demand." In *Wood v. Speck,* 78 Neb. 435, Mr. Commissioner EPPERSON said: "Generally, under the rule of equity pleading, if a litigant is not entitled to the relief specifically asked for, he may, nevertheless, recover under the general prayer whatever the proof shows he is entitled to, if consistent with the allegations of his pleading." Under this rule the relief granted in the present case was within the prayer of the petition.

It is asserted the decree must be reversed on the ground that it invades property rights adjudicated in defendants' favor in the suit for divorce. It was therein decreed that "plaintiff have and recover from defendant as alimony in lieu of her interest in property of defendant the sum of $1,000." There is no conflict whatever between the decrees. In the present case the trial court did not award plaintiff any additional property or take any from McMichael, but restored to him the title to the homestead. Yeast's deed was canceled, but he was not a party to the divorce suit and the judgment therein settled no property rights or controversies between him and plaintiff. Under a statute of this state, alimony may become a lien on the homestead, though the title thereto is in the husband when the divorce is granted. *Best v. Zutavern,* 53 Neb. 604; *Fraaman v. Fraaman,* 64 Neb. 472. Plaintiff's right to assert and enforce such a lien and to a decree canceling a deed executed in utter disregard of her homestead interests was not decided against her in the suit for divorce. The validity of the deed through which McMichael attempted to convey the family homestead in violation of law was neither presented nor adjudicated in the decree for alimony. The plea of *res judicata* cannot be sustained.

Defendants pleaded in their answer that McMichael deeded the house and lot in Hyannis to Yeast in consideration of the settlement and release of a debt of $600. It developed during the trial that this debt was secured by a mortgage on the property described in the deed. The

mortgage antedated the deed about a year, and was not signed or acknowledged by mortgagor's wife. The district court canceled the mortgage, though it was not mentioned in plaintiff's petition, and this is assigned as error. The error was without prejudice to defendants and is not sufficient cause for reversal. The mortgagor testified the debt was canceled by the execution of the deed. Yeast, the holder of the mortgage, states positively on his examination as a witness in his own behalf that he makes no claim whatever under it. In addition, the record shows conclusively that it had no greater significance than the void deed by which it was replaced. It was a mortgage on the homestead and was neither signed nor executed by mortgagor's wife. The homestead being of less value than $2,000, the mortgage thereon was absolutely void. *Interstate Savings & Loan Ass'n v. Strine,* 58 Neb. 133; *Kloke v. Wolff,* 78 Neb. 504; *Whitlock v. Gosson,* 35 Neb. 829; *Solt v. Anderson,* 71 Neb. 826; *Horbach v. Tyrrell,* 48 Neb. 514; *Havemeyer v. Dahn,* 48 Neb. 536. It follows that in so far as the mortgage is involved no benefit would accrue to either of defendants from a reversal of the decree.

There is no prejudicial error in the proceedings of the district court, and the judgment is

AFFIRMED.

TRUIE COLLISTER, APPELLEE, V. ARTHUR RITZHAUPT, APPELLANT.

FILED MARCH 20, 1909. No. 15,622.

1. Bastards: INSTRUCTIONS: REVIEW. Where testimony has been admitted on behalf of defendant in a bastardy case in violation of the rule that his reputation for chastity is not an issue, he cannot predicate error on a proper instruction to the jury to disregard it.

2. ———: ———: ———. Where the testimony adduced on both sides of a bastardy case has been fully submitted to the jury

by proper instructions, it is not error to refuse a requested instruction making prominent a circumstance relating to the period of gestation.

3. ———: COMPLAINT: WAIVER. In a bastardy case, a defendant who appears before a justice of the peace and enters into a recognizance to appear at the next term of the district court to answer the accusation against him, without objecting to the complaint, waives the objection that it fails to state the child, "if born alive, may be a bastard."

4. ———: ———: ———. A defendant who appears before the district court in a bastardy case and pleads not guilty to the charge, without objecting to the complaint, waives the objection that it fails to state the child, "if born alive, may be a bastard."

APPEAL from the district court for Frontier county: ROBERT C. ORR, JUDGE. *Affirmed.*

L. M. Graham and *Morlan, Ritchie & Wolff,* for appellant.

J. L. White and *E. P. Pyle, contra.*

ROSE, J.

Defendant was charged with the paternity of plaintiff's illegitimate child, a jury found him guilty, and the trial court directed him to pay for its support the sum of $1,500 in quarterly instalments of $25 each. From this judgment defendant appeals, and urges the following grounds for reversal: (1) The verdict is not sustained by sufficient evidence; (2) the trial court erred in giving an instruction which directed the jury to disregard testimony in relation to defendant's chastity and virtue; (3) there was error in the failure of the court to give an instruction directing the attention of the jury to testimony relating to the period of gestation; (4) the complaint omits a statutory requirement.

1. Every syllable of testimony offered by both parties has been carefully examined and considered in connection with section 5, ch. 37, Comp. St. 1907, providing that in a case of this kind the jury, on behalf of defendant,

shall "take into consideration any want of credibility in the mother," and "any variations in her testimony before the justice and that before the jury." The result is that no reason exists for setting aside the verdict for insufficiency of evidence.

2. It is argued that the court erred in instructing the jury as follows: "The jury are instructed that some testimony has been introduced in regard to the character of the defendant for chastity and virtue. You are further instructed that the character and reputation of the defendant for chastity and virtue are not at issue in this case, and you will entirely disregard such testimony." This instruction was given to cure error in the admission of testimony on behalf of defendant, who undertook to prove by his landlady his reputation for chastity. When she was testifying as a witness for defendant, she was asked: "What, if anything, have you heard in regard to his being unchaste, or any claim of it, prior to this case?" Over the objection of plaintiff the court permitted the witness to answer this question in violation of the rule that the character and reputation of defendant for chastity and virtue are not in issue in a bastardy case. *Stoppert v. Nierle,* 45 Neb. 105; 5 Cyc. 662. The instruction is criticised because the court failed to limit its application to defendant's "previous" reputation for chastity, and because it permitted the jury to disregard proper evidence that defendant's conduct showed he was not on intimate relations with plaintiff. Defendant's questions on his own behalf brought out the only testimony relating to his reputation for chastity, and "such testimony" alone the jury were directed by the trial court to disregard. There was no direction to disregard testimony that the witnesses for defendant had observed no act showing his intimacy with plaintiff. As applied to the erroneously admitted evidence, the instruction correctly stated the rule. *Stoppert v. Nierle,* 45 Neb. 105. Having led the court into the error which the instruction was intended to correct, defendant is not in a situation to demand a reversal for mere

lack of refinement in a correct instruction to the jury to disregard the testimony improperly admitted in his favor. If an instruction more specific was desired, it should have been requested.

3. The third point argued is that the court erred in refusing to give the following instruction: "If you find from the evidence that the plaintiff was on or about September 2, 1907, delivered of a bastard child, as alleged, which is still alive, and if you find from the evidence that the probable period of gestation of this child differed from the length of time between the birth of the child and the date when the plaintiff testified the intercourse occurred, this is a circumstance to be considered by you in deciding whether the preponderance of the evidence is that the defendant is the father of the child." To show this instruction should have been given, it is asserted that the child was born 263 days after the time fixed by plaintiff in her testimony as the date of her first act of intercourse with defendant, and that the testimony of the physician who was present at the birth of the child showed the probable period of gestation was about 300 days. In this connection it is argued that the charge of bastardy creates in the minds of jurors a strong prejudice against defendant; that coition is necessarily secret, and that, owing to the sympathy of mankind for women in trouble, jurors are prone to listen to plaintiff alone and close their eyes to circumstances which discredit her story. For these reasons, it is said the court erred in refusing to give the instruction quoted. In the unhappy situation in which defendant describes himself as a suitor, the record shows the trial court repeatedly erred in admitting testimony in his favor, and gave among other instructions the following: "The court instructs the jury: The charge made against the defendant is, in its nature, one well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty, growing out of the nature of the unusual circumstances connected with the commission of such an offense, in de-

fending against the accusation." The whole case was submitted to the jury by instructions favorable to defendant. The physician testified, in substance, that the normal period of gestation was 280 days; that for healthy, vigorous children the longest period was about 320 days, and the shortest about 210 days; and that, from his examination of plaintiff's child, he thought the period of gestation was about 300 days. The latter statement, indefinite as it is, was qualified still further by other testimony of the witness. In answer to the question, "As a physician, can you tell about the period of gestation upon examining the child after its birth?" he replied: "You can in some cases, if you have a good history of the case." The record contains evidence on behalf of plaintiff to sustain a finding that the child was born 277 days after the first act of coition between the parties to this suit. The jury were duly cautioned by instructions to consider the credibility and interest of the witnesses, and were often reminded that the burden of proof was on plaintiff to establish her complaint by a preponderance of the evidence. The testimony was easily understood by the jury, and the special reference to the particular circumstance singled out and made prominent by the instruction was not essential to defendant's rights. The record shows that he had a fair trial without the requested instruction, and there was no error in refusing to give it.

4. The last point presented is: "The complaint does not state facts sufficient to constitute a cause of action against the defendant and does not state facts sufficient to give the court jurisdiction." This question was raised for the first time in the district court by an oral objection to the introduction of evidence. It is based on the failure of plaintiff to insert in the complaint before the justice of the peace the words of the statute that the child "if born alive, may be a bastard." The prosecution is a civil proceeding. *Cottrell v. State,* 9 Neb. 125; *Kremling v. Lallman,* 16 Neb. 280; *Strickler v. Grass,* 32 Neb. 811; *In re Walker,* 61 Neb. 803. In this state rights conferred by

statute upon defendant in a bastardy proceeding may be waived by him. *Strickler v. Grass,* 32 Neb. 811. Irregularities in the preliminary steps may be waived by defendant the same as in other civil cases. *Strickler v. Grass,* 32 Neb. 811; *Rose v. People,* 81 Ill. App. 128, 5 Cyc. 665. The transcript shows that defendant appeared before the justice of the peace, and entered into a recognizance to appear at the next term of the district court to answer the accusation against him, and was released from custody thereunder. This was a waiver of any defect in the information, since, without objection thereto, he obligated himself to answer the accusation in the district court. *Cook v. People,* 51 Ill. 143; *Collins v. Conners,* 81 Mass. 49. Defects in the information having been waived, the filing of the transcript gave the district court jurisdiction. *Altschuler v. Algaza,* 16 Neb. 631.

The record further shows that defendant October 8, 1907, after the child had been "born alive," and when it was "a bastard," appeared in the district court pursuant to his recognizance, and, "being asked by the court whether he is guilty or not guilty of the *offense charged,* answered, 'Not guilty,' which plea was entered on the complaint." The plea of not guilty was entered without objection to the sufficiency of the complaint, and at the trial thereunder it was conclusively shown that the child was "born alive" and was "a bastard." Objections to the complaint were waived by defendant. *State v. Johnson,* 89 Ia. 1; 5 Cyc. 665. It is therefore unnecessary to consider the merits of the objection that the complaint omits a statutory requirement.

There is no error in the record of which defendant can complain, and the judgment is

AFFIRMED.

VACLAV HRUBY ET AL., APPELLANTS, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLEE.

FILED MARCH 20, 1909. No. 15,483.

Appeal: LAW OF CASE. "When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point." *Mead v. Tzschuck*, 57 Neb. 615.

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

F. Dolezal, for appellants.

A. H. Burnett, contra.

FAWCETT, J.

This case is here for the second time. A complete statement of the issues and review of the evidence may be found in the opinion of HOLCOMB, J., 70 Neb. 5. On the first trial in the district court there was a verdict and judgment for plaintiff. On appeal to this court the judgment was reversed and the case remanded, for the reason that the evidence was not sufficient to sustain any verdict in favor of the plaintiff. On the second trial in the lower court the jury were directed to return a verdict in favor of the defendant, which was done, and judgment rendered thereon, from which judgment this appeal is prosecuted.

It is conceded that the evidence in the record now before us is substantially the same as that which was presented on the former hearing. Appellants' main argument here is that our former decision was wrong. That question was fully discussed and considered on the application for a rehearing of the former decision, and decided adversely to plaintiff's contention. The evidence upon the former hearing seems to have received very full and

careful consideration by the court, and we must decline to further review it.

The judgment of the district court is therefore

AFFIRMED.

FRANKLIN BANCHOR, APPELLANT, V. CHARLES A. LOWE, APPELLEE.

FILED MARCH 20, 1909. No. 15,614.

Pleading: AMENDMENT AFTER DECREE. Plaintiff in his petition to redeem from a tax sale made a clerical mistake by which he described the land as the S. W. ¼ instead of the N. W. ¼, and at the same time filed a *lis pendens* correctly describing the land. The mistake was not discovered until after a decree had been entered, which also contained the misdescription. Plaintiff promptly, after discovering the mistake, upon due notice to counsel for defendant, moved the court for leave to amend so as to correct the error. The district court overruled the motion. *Held*, Error. Code, sec. 144.

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

W. C. Brown, for appellant.

H. M. Duval and *C. E. Lear, contra.*

FAWCETT, J.

On February 21, 1905, defendant Charles A. Lowe purchased the N. W. ¼ of section 14, township 33, range 17, in Keya Paha county, at a judicial tax sale for the taxes of the years 1894 to 1899, inclusive. Plaintiff was the owner of the land. On February 5, 1907, plaintiff filed a petition to redeem from such tax sale, but, by a clerical error, described the land as the S. W. ¼ instead of the N. W. ¼. Summons was duly served. On March 9, 1907, defendant appeared by Duval & Amspoker, his at-

torneys, and moved to strike the petition, for the reason that it had not been signed and verified, which motion was sustained. Plaintiff thereupon filed what he termed an alias petition, which was duly signed and verified. This petition seems to have been copied from the original, and contains the same clerical mistake. Defendant made no further appearance in the case. On May 7, 1907, plaintiff obtained a decree, which found the amount necessary to redeem, the sum of $77.86, and decreed redemption upon the payment of that sum into court. The decree contains the same misdescription of the land. Plaintiff's attorney testifies that defendant's attorney was present in court at the time the decree was entered, and assisted in making the computation of the amount necessary to redeem for insertion in the decree. This defendant's attorney denies. After the adjournment of that term of court plaintiff's counsel discovered the error in the description, and on July 11, 1907, filed a motion supported by affidavit for leave to amend the petition so as to correctly describe the land sought to be redeemed. On November 11, 1907, the court entered an order finding that notice of the motion for leave to amend had been served on the defendant on May 7, 1907, and that defendant was present in court by attorneys C. E. Lear and H. M. Duval, and that plaintiff was in court by his attorney W. C. Brown, but, on consideration of the motion, overruled and denied the same. To this order plaintiff duly excepted, and has brought the case here for review.

We think the court erred in not permitting the amendment to be made. Section 144 of the code provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading

or proceeding to the facts proved." As early as *Deck v. Smith,* 12 Neb. 393, we held that this section confers upon the court an almost unlimited power of amendment "in furtherance of justice"; and this is still the rule. In this case the record shows that on the same day plaintiff filed his original petition he also filed a *lis pendens,* which correctly described the land. This, together with the fact that no other lands in the county were similarly involved, was sufficient to advise the defendant that plaintiff's action was to redeem from tax sale his land which defendant had purchased. It would be a great injustice, and would violate both the letter and spirit of section 144 of the code, to permit defendant to obtain plaintiff's land for the mere pittance of a tax when plaintiff was making a timely attempt to redeem the same. No injustice would have been done the defendant by permitting the amendment, while a great injustice was done the plaintiff by denying it. It was for just such cases as this that section 144 of the code was adopted.

The judgment of the district court is reversed and remanded, with directions to permit the plaintiff to amend his petition as prayed.

REVERSED.

COLFAX COUNTY, APPELLANT, V. BUTLER COUNTY, APPELLEE.

FILED MARCH 20, 1909. No. 15,567.

1. Counties: BRIDGE REPAIRS: LIABILITY. The county of Colfax served notice upon the county of Butler, in substance, requesting it to join in and to pay one-half of the cost of the repair of a wagon bridge over the Platte river, which request being ignored by Butler county, Colfax county proceeded under a contract to build practically a new bridge costing about $22,000. *Held,* Butler county not liable to Colfax county for any part of the cost of building such bridge.

2. ———: ———: NOTICE. A notice served upon a party sought to be charged thereby should fairly state the intention of its author and the scope of the enterprise contemplated by him.

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

John J. Sullivan, C. J. Phelps and *B. F. Farrell,* for appellant.

A. V. Thomas, E. C. Strode and *L. S. Hastings, contra.*

DEAN, J.

This is an appeal from Butler county, wherein the county of Colfax, appellant, hereinafter called plaintiff, brought an action against the county of Butler, appellee, hereinafter called defendant, to recover $11,050.96, being one-half the cost of building a wagon bridge by plaintiff over the Platte river. At the conclusion of the trial the court directed the jury to return a verdict in favor of the defendant, upon which judgment was rendered, and plaintiff appeals.

The petition, in substance, alleges the continuous and uninterrupted existence ever since 1884 of a public road running north and south through both of said counties, which crosses the Platte river at a point near the city of Schuyler by means of a wooden wagon bridge about one-half mile in length; that on June 6, 1904, the plaintiff's board of commissioners adopted a resolution by its terms reciting the unsafe condition of the bridge and plaintiff's desire to repair it, and that defendant be requested to enter into a joint contract with plaintiff providing for each of the said counties to pay one-half of the expense of such repair; that on August 15, 1904, the plaintiff's county board adopted another resolution similar to the resolution of June 6, but, in addition, reciting that "an emergency exists," and "that the public good requires immediate action," and providing "that a contract, drawn by the

county attorney of said county of Colfax, be entered into with Charles G. Sheeley for the said repairs of said bridge" in the event of the failure of Butler county to join in a contract for said purpose, and also providing "that a copy of this resolution and of said contract be served upon the board of supervisors of said county of Butler," and that said Butler county be requested "to incur and pay one-half the necessary expense of repairing the same in accordance with the terms of said contract"; that on August 16, 1904, as alleged by an amendment of plaintiff's petition, both resolutions were served upon the defendant by delivering certified copies thereof to the chairman of the county board of said defendant county; that on said August 16 a certified copy of the resolution of August 15, 1904, was left with the county clerk of the defendant county; that plaintiff on August 29, 1904, as alleged in said amendment, entered into a contract with Charles G. Sheeley, a bridge builder, "providing for all needful repairs of said bridge; * * * that the cost of said repairs * * * was $21,705.46."

The defendant's answer denies every allegation of plaintiff's petition except the one alleging the corporate capacity of the parties litigant, and alleges that certain residents of Schuyler entered into a written agreement with plaintiff to pay $7,000 of the cost of building the bridge in suit, provided the plaintiff would undertake the enterprise, which said agreement was accepted by plaintiff, and in consideration thereof plaintiff contracted for the building of said bridge; that prior to executing said contract and entering upon the work in pursuance thereof no demand was made on defendant by plaintiff to repair said old bridge or to join in such contract; that plaintiff, instead of repairing said bridge, fraudulently constructed a new bridge with the fraudulent purpose of deceiving and misleading defendant and its taxpayers; that the cost of said bridge was exorbitant; that upwards of $6,000 of the amount sought to be recovered is for the cost of building ice breaks which are no part of the bridge. The plain-

tiff's reply is in the usual form of denial of new matter in the answer.

The action is sought to be maintained under sections 6146, 6147 and 6148, Ann. St. 1907, plaintiff relying more particularly upon the proviso clause of said section 6147, which is as follows: "Provided, that if either of such counties shall refuse to enter into contracts to carry out the provisions of this section, for the repair of any such bridge, it shall be lawful for the other of said counties to enter into such contract for all needful repairs, and recover by suit from the county so in default such proportion of the cost of making such repairs as it ought to pay, not exceeding one-half of the full amount so expended." In the specification of errors relied on, counsel for plaintiff in their brief contend: "(1) That the reconstruction of a bridge which was partly, substantially or wholly destroyed by fire, flood or other casualty is repairs within the meaning of the law imposing upon adjoining counties the duty to repair bridges over streams dividing such counties; (2) that notice by one county to another to join with it in repairing a bridge over a stream between the two counties is sufficient to make the county receiving such notice liable for one-half the expense necessarily incurred in making the bridge safe and passable, even though the work done amounts substantially or wholly to new construction." They concede in their argument the structure in question is practically a new bridge, but contend the work performed by Colfax county was "repairs" within the meaning of the statute.

Counsel for defendant contend that the notice served on the defendant county was so unreasonable as to time of service and so essentially defective in substance as to relieve the defendant of liability. The proof shows the original bridge was built in 1883 by a railroad company without expense to plaintiff or defendant, and that in March, 1903, a large part of it was taken out by a flood, leaving about 800 feet standing in the center of the stream, which was afterwards discovered to be practically

valueless. It also shows that certified copies of the resolutions of June 6 and of August 15, 1904, substantially in form and substance the same as those hereinbefore referred to, "and also a copy of a proposition or contract" between Sheeley and Colfax county, were served on the defendant on August 16, 1904, by the then county attorney of Colfax county; that on August 29, 1904, the contract between plaintiff and Sheeley was entered into in pursuance of said resolutions, and on September 3 the work was commenced on the bridge and completed November 10, 1904. The record does not disclose that the county board of the plaintiff heard officially from, or had any official communication with, the county board of the defendant between the date of the service of the said instruments and the date of entering into said contract, a period of 12 days, at the expiration whereof the plaintiff entered into said above contract involving an expenditure of about $22,000, one-half of which it was their intention to induce or compel the defendant to assume and pay. "'Reasonable time' is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. * * * In determining what is a reasonable time or an unreasonable time, regard is to be had to the * * * facts of the particular case. * * * A reasonable time, when no time is specified, is a question of law, and depends on the subject matter and the situation of the parties." 7 Words & Phrases, 5977.

The plaintiff attempts to prove that a certified copy of the resolution of June 6, 1904, was served on the defendant in the same month by F. C. Egerton, a member of the county board of Colfax county, who went to David City evidently for that purpose, but, to the mind of the court, in this the plaintiff has utterly failed. Had the June 6 resolution been properly served upon defendant by Egerton, it is not probable plaintiff would have again served it on August 16, 1904, which the record clearly discloses was done at the same time that a copy of the

"emergency" resolution was served on defendant that was passed by the plaintiff's board. Ordinarily county boards, and political corporations generally, speak by the written record, and not by the individuals composing such bodies. The subject matter of the notice and of the contract must be considered in connection with the facts surrounding the case. A notice served upon a party sought to be charged thereby should fairly state the intention of its author and the scope of the enterprise contemplated by him. There should be no room left for doubt or conjecture. In *Dodge County v. Saunders County*, 77 Neb. 787, this court, in a well-considered opinion, speaking by LETTON, J., says: "The notice served upon Saunders county contained no indication that any new ice breaks were to be constructed, but only provided for 'the needful repair of said bridge to make the same safe for passage.' * * * It is contended that these ice breaks are not repairs, and that they are not necessary for the purpose of repairing the bridge and making it safe for public travel. Whether this be so or not, it is very clear that their construction is not within the terms of the notice served upon Saunders county. It may well be that the county board of Saunders county was willing to entrust the expenditure of the amount of money necessary for 'the repairing of the bridge and making it safe for passage' to the discretion of the county board of Dodge county, and therefore took no action, but that, if it had been notified that the expenditure of nearly $800 was contemplated in the building of new ice breaks, it would have appeared at the time and place mentioned in the notice for the purpose of participating in the discussion as to the propriety and advisability of letting a contract for such purpose."

It is shown by the proof that less than $300 worth of material of the old bridge was used by Colfax county in the construction of the new bridge, and it is fairly inferable from the record that such old material was so used for the purpose of making the work appear to be "a repair

job," rather than new work. On cross-examination upon this point the following appears from the testimony of F. C. Egerton, county commissioner of plaintiff in 1904: "Q. Didn't the county attorney advise you that he wanted you to leave something out of the old bridge in the new bridge so that you make it appear a repair job? A. Yes, sir; he told us that we should use that (what) we could. Q. For the purpose of making it a repair job? A. Yes, sir; we would have to use it to make it a repair job." Robert Z. Drake, called by the plaintiff as an expert witness and experienced bridge builder, on cross-examination testified: "A. Well, I think it would be rather a misuse of the word repair if $22,800 was new work on a $23,000 job." He also testifies the ice breaks in suit cost from $5,500 to $6,000, and that he would not designate an ice break as part of a bridge. John H. Sparks, a bridge builder of 24 years' experience, called on the part of plaintiff, on cross-examination testified, in substance, that a $22,000 bridge in which there was used $279.36 worth of old material was new construction, and that the term "bridge repairing" did not contemplate nor include "ice breaks."

Plaintiff contends for what we believe to be a strained construction of the word "repairs" as used in the statutes under consideration and as related to the facts of the case at bar. The resolution and the contract by their terms use the word "repairs" in the ordinary sense. The contract with Sheeley expressly provides that "whatever portion of said bridge is still standing and in a condition safe for public travel shall be left as it now is, and the portion repaired and built by said first party shall be joined upon and added thereto." It has been shown that plaintiff's board of commissioners deemed it advisable to adopt a resolution reciting that an emergency existed, and that the public good required immediate action on its part looking toward the repair of the bridge. The emergency to which the resolution refers, it seems from the record, was carefully nurtured from March, 1903, when

a considerable portion of the bridge was taken out by the flood, until midsummer, 1904, when the "emergency" as shown by the resolution was first given official recognition by the county board of plaintiff. An emergency is defined in 15 Cyc. 542, as: "Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition." The Century dictionary thus defines emergency: "A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a preplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity."

We have carefully examined the entire record and find no error therein. The judgment of the district court is right, and is in all things

AFFIRMED.

REESE, C. J., not sitting.

GERTRUDE M. CARTER, APPELLEE, V. BANKERS LIFE INSURANCE COMPANY, APPELLANT.

FILED MARCH 20, 1909. No. 15,467.

1. Insurance: ACTION: VENUE. An action against a domestic insurance company may be brought in any county of this state where the cause of action or any part thereof arose, and summons therein may be issued to and served in any other county, although there is but a single defendant to the suit.

2. ———: ———: PARTIES. Where a husband enters into a contract of insurance on his life for the benefit of his wife and dies before the policy of insurance issues, the cause of action on the contract of insurance, or for breach of contract for refusal to issue the policy, if such be the case, vests in the wife for whose benefit the contract was made, and not in the administrator of the deceased husband's estate.

3. ———: CONTRACT. Where written application for a twenty-payment life insurance policy is made to a company, one of its provisions being that the application, together with the applicant's statement made to the examining physician and the policy that may be issued, shall be the contract between the applicant and the company, and said application is rejected by the company, which makes a counter proposition to insure the applicant and to issue him a ten-payment policy upon the payment of an additional premium, which proposition is accepted and the additional premium paid, a contract of insurance comes immediately into existence, even though no policy of insurance was then or afterwards issued.

4. ———: REFUSAL TO ISSUE POLICY: ACTION FOR DAMAGES. Where an oral contract of insurance has been made and the premium paid, and the company refuses to issue a policy as required by the terms of the contract, an action for damages for such breach of contract may be maintained by the party in whose favor the insurance was effected.

5. ———: POLICIES: EXECUTION. Section 15, ch. 52, laws 1903, requiring "all policies and contracts of whatever kind for life insurance" to be signed by the president or vice-president and by the secretary or assistant secretary of such company, applies only to companies formed under the provisions of that act.

6. **Statute of Frauds:** CONTRACT OF INSURANCE. The contract of insurance set out in the plaintiff's petition is not obnoxious to our statute of frauds.

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

Charles O. Whedon, for appellant.

Clements Bros. and *E. J. Clements, contra.*

DUFFIE, C.

This action was brought for damages for failure of the defendant to issue a policy of insurance on the life of plaintiff's husband. The plaintiff's amended petition alleges that on May 5, 1905, the plaintiff's husband, Harry E. Carter, made a written application to the defendant for a life insurance policy in the sum of $1,000 for her benefit, the policy to be a twenty-payment policy; that at said

time he executed to the defendant's agent his promissory note for $31.10, being the first year's premium, and passed a medical examination which was reduced to writing, and this, together with his application, was submitted to defendant for its consideration; that after due examination and consideration of his application and medical examination, and on May 31, 1905, the defendant informed Carter that it had accepted his application for insurance, and would issue a policy for the benefit of the plaintiff on condition that he would consent to accept a ten instead of a twenty-payment contract, and that the annual premium be increased from $31.10 to $48.10; that Carter thereupon consented to said change, and gave the defendant's agent his check for $17, the additional premium required; that defendant sold the note first given and cashed the check for $17 and applied the proceeds to its own use. It is further alleged that Carter and the plaintiff at the time of making said contract resided in Valley county; that defendant agreed to deliver its policy in said county; and that the contract was made and to be performed therein; that Carter died July 23, 1905, and defendant failed and refused to deliver to Carter or to the plaintiff said insurance policy to the plaintiff's damage in the sum of $1,000.

A special appearance was made by the defendant, who moved to quash the summons, which motion was overruled.

The answer to the amended petition contains two grounds of defense: First, that the court had not legally acquired jurisdiction over the defendant company, for the reason that at no time did it maintain in Valley county an office or place of business, nor have therein servants, employees or agents who were engaged in carrying out the business of life insurance for it in said county; that the summons was directed to the sheriff of Lancaster county, Nebraska, and was there served upon the defendant; that no summons in the case was issued to the sheriff of Valley county, and no summons served upon

defendant by the sheriff of Valley county; that the court did not and could not obtain jurisdiction of the defendant by virtue of a summons issued in Valley county to the sheriff of Lancaster county. The second defense admits that the defendant is a domestic life insurance company, and that S. J. and M. G. Medlin were its agents, and admits, also, that Harry E. Carter was plaintiff's husband and made application to the defendant for a policy of insurance for $1,000, payable on his death to the plaintiff, that he passed a medical examination and submitted the same with his application to the defendant, and further admits that Carter about June 1 offered to accept another form of policy and pay defendant's agent $17 additional premium therefor, and admits that it never issued or delivered to Carter or to the plaintiff any policy, and that Carter died July 23, 1905. It is further alleged that at the time of making his application, and when he paid the $17 additional premium; Carter was not in good health, which fact he concealed from the defendant, that his application was not accepted, but was refused July 13, 1905, and that on August 16, 1905, defendant tendered to plaintiff $48, the amount paid as premium, which the plaintiff refused to accept.

A demurrer to the first defense set out in the answer was sustained by the court, and an exception saved by the defendant. A trial resulted in a verdict and judgment for the plaintiff, and defendant has appealed.

The undisputed facts are that Carter applied for insurance in the sum of $1,000 for the benefit of his wife, and that his written application and written medical examination were submitted to the proper officers of the defendant company at Lincoln, Nebraska; that in the latter part of May or the first of June an agent of the defendant company informed Carter that his application, which was for a twenty-payment policy, would not be accepted by the company, but, if he would consent to take a ten-payment policy and pay an additional annual premium of $17 a year, then a policy for $1,000 would

be issued to him; that Carter accepted this proposition and paid the agent, in addition to his note of $31.10 which he executed for the company when his application was made, his check for $17, the required additional premium for a ten-payment policy; that Carter died July 23, 1905, and the defendant has refused to issue any policy. If defendant's agent had authority to close a contract with Carter for insurance on his life and to agree that a ten-payment policy would be issued, then it is quite apparent that an oral contract of insurance was completed when Carter accepted the proposed change and gave his check for the additional premium. The evidence relating to the authority of the agent is amply sufficient to support the finding of the jury that the agent was authorized to make the contract.

Dr. Mitchell, the medical director of the company, testified that Carter's application was turned over to him about May 9, 1905. Either on the 10th or 19th of May the doctor filled out the blank indorsed on the back of said application approving the same. This indorsement of approval and the date thereof are partially erased, so that it is hard to say whether the date of approval is the 10th or 19th of May, and the doctor himself cannot tell which is the proper date. After such approval the president of the company informed S. J. Medlin, the agent who took Carter's application, that the application had been rejected for a twenty-payment policy, but recommended for a ten-payment policy, and asked him if he could secure the change. Medlin told the president that his brother, M. C. Medlin, also an agent of the company, was going to North Loup, and that he would consult with and have him see Carter. This he did, after which M. G. Medlin saw and talked with the secretary of the company, and the secretary told M. G. Medlin that Carter's application for a twenty-payment policy had been rejected, but had been passed for a ten-payment policy, and the secretary instructed Medlin to take the matter up with Carter and induce him to accept of the proposed change. It was

after this, and about the 31st of May, that Medlin saw Carter, who at first refused, but afterwards consented to take a ten-payment policy, which it was agreed should be delivered to him at North Loup, in Valley county. Medlin further testified that, after securing the change, he informed Mr. Harley, the secretary, of what he had done. Mr. Harley denies these conversations, but the question was one for the jury, who accepted the testimony of Mr. Medlin.

The defendant claims that it rejected Carter's application July 12, 1905, and notified him by letter on July 13. The proof offered to show that Carter was notified of the rejection of his application was a letterpress copy-book containing a copy of a letter to Carter of that date. The only witness who testified as to the date of this letter was Mr. Harley, the secretary. The copy-book contained no letters written by Harley, nor does he claim to have written the letter in question. He had no personal knowledge that any such letter was written. The letter was as follows: "Lincoln, Neb., 7-13-05. Harry E. Carter, North Loup, Neb. Dear Sir: We are sorry to inform you that your application has been declined by the medical department. Very truly yours, Bankers Life Insurance Co. M. L." Who wrote the letter or whom the initials "M. L." stood for Mr. Harley could not tell, and no further evidence regarding it was offered. It is also quite significant that the money received on account of his application was not returned in this letter, and no mention made of it, and the evidence is conclusive that no such letter was ever received by Carter or his wife. There can be no question that the evidence amply supports the finding of the jury that Medlin was authorized to insure Carter, and that he did so.

Recurring now to the legal questions involved: First. Did the district court acquire jurisdiction of the defendant? Section 55 of the code provides that an action against a domestic 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. And section 65 provides that, where the action is rightly brought in any county, a summons shall be issued to any other county against any one or more of the defendants. The evidence is uncontradicted that the agent agreed with Carter that he would deliver the policy to him or it would be sent to him by mail at North Loup. It was part of the contract, therefore, that delivery should be made in Valley county, and the failure to deliver is the breach for which this action is brought. We have no doubt that under sections 55 and 65 of the code the action was properly brought in Valley county. The fact that Carter died in Buffalo county, while absent from his home, is not material in determining the proper venue of action. That the summons was properly issued and served upon the defendant in Lancaster county is, we think, established by this court in the following cases: *Grand Lodge, A. O. U. W., v. Bartes*, 64 Neb. 800; *Nebraska Mutual Hail Ins. Co. v. Meyers*, 66 Neb. 657.

Defendant contends that, if any contract of insurance was made with Carter, an action against the defendants for a breach thereof went to his personal representative, and not to the plaintiff. As we understand the case, the plaintiff does not claim the right to recover in this action upon any cause of action which her husband may have had against the defendant company. Her position is that the contract entered into between Carter and the company was made for her express benefit, that she was the real party in interest, and that any breach of such contract gave her a personal cause of action against the defendant, the same as though the contract had been made personally. This to us seems the correct view of the case, and under the code she may maintain an action on a contract made for her benefit.

One paragraph of Carter's application for insurance upon which much stress is placed by the defendant is in

the following words: "It is hereby expressly stipulated and agreed that the above application, together with the statement made to the examining physician and the report of the examining physician, and this declaration and the policy that may be issued to me shall be the contract between me and the Bankers Life Insurance Company of Nebraska, and I hereby warrant the same to be full, complete and true, whether written by my own hand or not; this warranty being a condition precedent to and a consideration for the policy which may be issued hereon." As we understand the contention of the defendant, it is this: The application providing that the policy, among other matters, shall constitute the contract of insurance, then no contract for insurance could be completed until the policy itself was issued. The form of the application was prepared by or upon the approval of the general officers of the company. Conditions which these officers could exact they could also waive. It is quite clear from the evidence, and the jury have so found, that both the president and secretary of the defendant company authorized Medlin to contract with Carter for a ten-payment policy and that such contract was made. There is no doubt that under the terms of Carter's application no agent could bind it by a complete agreement of insurance until the application was approved at the home office; but, when the home office rejected that application and made a counter proposition to Carter, then when the counter proposition was accepted by him, a valid contract of insurance came immediately into existence, regardless of whether the policy was then issued or not. In *Born v. Home Ins. Co.*, 120 Ia. 299, it is said: "The agreement that no liability should attach until there was an approval of the application by the defendant cannot, alone, change the situs of the contract, for that meant simply that the company should not be liable until it had approved the contract made by its local agent; and when it disapproved it in part, and made a counter proposi-

tion, which was accepted by the plaintiff, it would be idle to contend that it must reaffirm its own act." In this case the company said to its agent: We cannot accept Carter's application for a twenty-payment policy. We will accept his application and insure him for $1,000 on a ten-payment policy, and we authorize you to see Carter to make him this proposition and to close with him if he accepts it. Making the proposition and its acceptance by the other party, under all authorities, constitutes a valid contract of insurance, unless there be a further stipulation that no contract of insurance shall come into effect until the policy is issued and delivered to the insured.

In *Kimbro v. New York Life Ins. Co.*, 134 Ia. 84, Kimbro made application through a local agent of the company for a policy on his life of $2,000 for the benefit of his wife. This application and the medical examination were sent to the New York office. As the result of some inquiry made, the company declined the policy applied for, but filled out and sent to the local agent at Cedar Rapids, Iowa, a policy differing materially in its terms, and providing that, if the applicant died within 16 years, the liability of the company should be $1,228 only. The agent was directed to deliver this policy, if satisfactory to Kimbro, and he did inform Kimbro that his policy had arrived, and that he would deliver it the next day, but said nothing about the change made. Kimbro died before the policy was delivered. The wife of Kimbro recovered judgment against the company, and the supreme court upon appeal said: "It is true, as already said, that a mere application for insurance cannot be given the effect of a contract; but is a proposal or offer to take insurance, and, if there is any evidence on which the trial court could find as a fact or as conclusion of law that such offer was accepted, then we must treat the applicant as insured upon the terms and conditions of the application. The issuance and manual delivery of a written policy is not ordinarily essential to a contract of insurance." To the same effect is *Preferred Accident Ins. Co.*

v. Stone, 61 Kan. 48, and *Moulton v. Masonic Mutual Benefit Society,* 64 Kan. 56.

In *Fried v. Royal Ins. Co.,* 50 N. Y. 243, an agent of the company took an application on the life of plaintiff's husband. The first premium was paid, and it was agreed that the application should be forwarded to the company's head office in London, and, if accepted, a policy would issue, and, if declined, the premium should be returned. In case the husband died before the decision was received, the sum insured was to be paid. The application was accepted by the London office, and a policy returned to be countersigned by the agent and delivered. The agent refused to deliver, upon the ground of an unfavorable change in the health of the husband, who died soon after. In an action by the wife, it was held: "That the contract and acceptance were unqualified and could not be limited or modified by the private instructions to the agent. That the facts being stated in the complaint, it was immaterial whether the action was to be regarded as one upon the policy, or for damages upon the contract to issue a policy. In either view, plaintiff was entitled to recover the amount insured or agreed to be insured."

In the instant case the facts are all stated in the petition. They are supported by the evidence and constitute an agreement to insure. The failure to issue the policy gave the plaintiff an action for damages to the same extent as though a policy had been issued and action brought thereon. In 1 Wood, Insurance (2d ed.), sec. 11, it is said: "The distinction between a contract of insurance and a contract *to* insure is that the one is executed, and the other executory, and in the one case the action is upon the contract for the loss or damage sustained under the risk, while, in the other, the action is for a breach of the contract, for not insuring, and the measure of recovery is the loss sustained, so that the effect is the same in either case."

The contention that the trial court erred in admitting the testimony of agent Medlin, and that by so doing the

terms of a written contract were attempted to be changed and varied by parol testimony, is not well taken. In *Firemen's Ins. Co. v. Kuessner,* 164 Ill. 280, it is said: "Where an application for insurance is presented to a company, stating what is wanted and the terms, and its officer or any agent having authority to issue a policy says one will be issued on that application, the minds of the parties have met in the execution of a contract and a contract for insurance has been consummated. It is an oral contract. Though proposed in writing, the acceptance by parol and a promise to issue a policy thereon constitute an oral contract." And in *Arbuckle v. Smith,* 74 Mich. 568, the court said: "A verbal contract, made on a verbal understanding that it should conform to the terms of a written paper, does not differ from any other verbal contract, and may be shown to have agreed with the writing or differed from it, according to the facts."

So, also, the objection that the contract is obnoxious to our statute of frauds is not tenable, as the contract might, and in this case did, actually terminate within one year.

The claim made by the defendant company that our statute requires all contracts to be evidenced by a written policy must also be denied. Chapter 52, laws 1903, applies only to life insurance companies on the mutual, level premium, legal reserve plan.

Our conclusion is that a contract for insurance was legally made between the parties, that this contract was for the express benefit of the plaintiff herein, and that she may maintain an action for damages for failure to issue the policy. We recommend an affirmance of the judgment.

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.

ELIZABETH P. SHANNON ET AL., APPELLANTS, V. WILLIAM O. BARTHOLOMEW ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 15,485.

1. **Eminent Domain: APPRAISEMENT: NOTICE.** A notice to the owners of land sought to be condemned for park purposes stated that the appraisers apointed to view the land and assess the damages would meet at 2 o'clock P. M. on a certain day and commence their view across Nineteenth street from Kountze park, within the corporate limits of the city, and after viewing the property and hearing interested parties would adjourn to room 200, Omaha National Bank building, where the business would be proceeded with until completed. *Held*, That the notice was sufficiently definite and certain as to the time and place of meeting.

2. ———: ———. The Omaha city charter of 1905 provided that, in appropriating lands for park and other purposes, three appraisers should be appointed by the city council, except that, in cases where land of the value of $50,000 or more was to be taken, five appraisers should be appointed. *Held*, That, as a preliminary step in the appointment of appraisers, the council must exercise its own judgment as to the value of the land to be taken, and, if but three appraisers were appointed and their report showed the land to be of the value of $50,000 or more, a second appraisement by five appraisers must be had, but that the appraisement made by the five appraisers would be valid regardless of the value found by them.

3. **Cities: PARK COMMISSIONERS: APPOINTMENT: VALIDITY OF ACTS.** One section of a city charter provides for the appointment of the members of the park board by the judges of the district court of the judicial district in which the city is located. In a case determined by this court it was held that the statute directing the appointment to be made by the district judges was unconstitutional, and that the park board should be appointed by the mayor and city council under another section of the charter. *Held*, That a park board whose members were appointed by the mayor and city council were invested with all powers vested in park boards by the charter, and that it had authority to designate the real estate deemed desirable for park purposes.

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

Richard S. Horton, for appellants.

H. E. Burnam and *I. J. Dunn, contra.*

DUFFIE, C.

Chapter 12*a*, Comp. St. 1905, contains the charter of metropolitan cities, and section 57 embraces, among others, the following provisions: "It shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or grounds designated by said park board, the power to appropriate lands, lots or grounds for such purpose being hereby conferred on the mayor and council." Some time previous to the commencement of this action the park board designated certain real estate in the city of Omaha as desirable for park purposes, and the mayor and council, after passing a proper ordinance, appointed William O. Bartholomew, Frank B. Kennard and Martin Dunham as appraisers to view and appraise the value of said real estate. Thereupon the appraisers served written notice upon the plaintiffs herein, as the owners and parties interested in said land, that said appraisers "will, on the 16th day of February, 1906, at the hour of two o'clock in the afternoon, upon the property described in said ordinance to begin across Nineteenth street from Kountze park, within the corporate limits of said city, meet for the purpose of considering and making the assessment of damages to the owners of the property, and parties interested in the property, respectively, by reason of such taking and appropriation, as declared necessary by said ordinance, which meeting, after viewing the property affected by said appropriation and hearing the parties interested, who may desire to be heard, will be adjourned to room 200, Omaha National Bank building, in said city of Omaha, where the business of the board of appraisers and freeholders will be proceeded with until completed, and for this purpose may adjourn from day to day." The notice

also contained a description of the property to be appraised and appropriated for park purposes. Prior to the meeting of the appraisers the plaintiffs secured a temporary writ enjoining the appraisers, the city of Omaha and its officers from appropriating or taking any steps toward the appropriation of the property; and this injunction upon the final hearing was dissolved and the plaintiffs' bill dismissed. From this judgment the plaintiffs have appealed.

Section 142 of the charter of metropolitan cities makes it the duty of the mayor and council to appoint three disinterested freeholders to assess the damages to the owners of property appropriated by the city for park purposes, and, in case the property sought to be taken is of the value of $50,000 or more, then five appraisers are to be appointed. The appraisement is to be reported to the city council, and, if the same is confirmed, the damages assessed, if less than $50,000, shall be paid to the owners of the property. If the assessment is not confirmed by the council, further proceedings may be taken and a new assessment had. Where the property is valued at $50,000 or more, and the report of the five appraisers is confirmed by the council, the proposition to appropriate the land and pay the damages must be submitted to a vote of the electors of the city at a general or special election.

It is first contended that the property sought to be appropriated is of value of $80,000, and that three appraisers have no jurisdiction to assess the damages. It is evident that the city council must, in the first instance, as a preliminary step to the appointment of the appraisers, determine the value of the property sought to be taken. If in the judgment of the council the property is of the value of $50,000 or more, then five appraisers must be appointed. If but three are appointed, and they report the value of the property at $50,000 or more, it is evident that a second appraisement by five appraisers must be had, and their report upon the value of the prop-

erty, whether they place it at $50,000 or less, would seem to be valid so far as the appraisement is concerned, as there is no prohibition in the charter againstt accepting the report of five appraisers, even though they fix the value of the property at less than $50,000. We discover no error in the proceedings of the council in the appointment of but three appraisers; the question of the value of the property being left with the city council in the first instance. That the owners of the property sought to be taken for a public use are entitled to notice and to a hearing by the persons or board appointed to assess their damages is fundamental law.

The second complaint urged by the plaintiffs is that they were denied this right, in that the notice given them was not sufficiently definite as to the place of meeting. The objection is, we think, without merit. The appraisers were to meet at 2 o'clock P. M. on the 16th day of February, 1906, and the meeting was to be on the property and to begin across Nineteenth street from Kountze park. The time of the meeting was definitely fixed, and the place of meeting described with reasonable certainty. Section 55 of the charter provides for the appointment of the park commissioners by the judges of the district court of the judicial district in which the city is situated. A recent decision of this court holds this section of the charter unconstitutional, and that the appointing power rests in the mayor and council under another section of the charter. *State v. Neble,* 82 Neb. 267. The designation of lands in question as desirable for park purposes came from a park board appointed by the mayor and council of the city, and the plaintiffs contend that the charter contemplates that the initial steps to be taken in the appropriation of land for park purposes shall be taken only by a park board appointed by the judges, and that a park board appointed by the mayor and council has no authority in that regard. In other words, it is argued that as the designation of lands desirable for park purposes must come from the park board, and as section 55 provides that

the park board shall be appointed by the judges of the district court, a park board appointed by the mayor and council has no power to select and designate such lands, and the city no power to initiate steps for their condemnation. We do not think that the charter should receive so narrow a construction. In the case of *State v. Neble, supra,* we held that under another provision of the charter the mayor and council were authorized to appoint the members of the park board. It was the undoubted intention of the legislature that the members of that board should be selected and appointed by legal authority, and that, when so appointed, it should exercise every duty devolving on it by the charter. If, as seems to be the case, the legislature endeavored to place the appointing power in the judges of the district court and exceeded its constitutional power in so doing, but by another section of the charter granted full power, as it might, to the mayor and council to make such appointments, the park board appointed by the mayor and council is the legal board, and its proceedings, when acting within the power conferred by the charter, cannot be questioned.

We recommend an affirmance of the judgment.

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.

WALTER A. GEORGE, APPELLANT, V. EMMA DILL ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 15,568.

1. Judgment: VALIDITY: QUÆRE. In an action pending in the Twelfth judicial district the parties stipulated to try the case before the judge of the Thirteenth judicial district, and to take the evidence before said judge, at Grand Island, in the Eleventh judicial district, during the vacation of the court in which the action

was pending. Whether a judgment based on the evidence so taken rendered by the judge hearing it at a regular term of the court of the Twelfth judicial district is erroneous and subject to reversal on appeal, *quære.*

2. ———: COLLATERAL ATTACK. After acquiring jurisdiction of the parties and the subject matter of the action, irregularities on the part of the court in entering judgment in the case can be taken advantage of only by appeal; such judgment not being absolutely void and subject to collateral attack.

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

Sullivan & Squires and *R. A. Moore,* for appellant.

John N. Dryden, contra.

DUFFIE, C.

In January, 1902, the plaintiff, Emma Dill, commenced an action in the district court for Custer county against the defendant, Walter A. George. After issue joined, the parties stipulated that the case should be tried before Judge Grimes, judge of the Thirteenth judicial district, at Grand Island. Custer county is in the Twelfth judicial district, and Grand Island is in the Eleventh judicial district. The parties appeared before Judge Grimes at Grand Island, and during a vacation of the district court for Custer county the evidence was heard, arguments made, and the case taken under advisement by the judge. In November, 1904, Judge Grimes made his findings in the case, and drew up a journal entry which he sent to the clerk of the district court for Custer county to be entered of record. His findings and judgment were in favor of the plaintiff, who thereafter caused an execution to issue, whereupon Dill commenced proceedings in the district court for Custer county to enjoin the plaintiff and the sheriff having the execution in charge from enforcing said judgment upon the ground that the same was absolutely void. The injunction proceedings so brought were heard at a regular term of the court for Custer county, Judge

Grimes presiding at the trial upon the request of the judge of the Twelfth judicial district. A finding was made in said cause as follows: "Said judgment having been actually written outside of the judicial district in which said cause was pending, that the court had no jurisdiction by virtue of the stipulation as aforesaid to render judgment in said cause, and that the same is null and void; * * * that the injunction heretofore granted be and the same is hereby made perpetual." After entering a decree and vacating the judgment and enjoining its execution, the court, Judge Grimes still presiding, entered judgment in favor of the plaintiff in the case of *Dill v. George*. The journal entry recited that defendant filed a motion for a new trial, which was overruled, and to which defendant excepted. This occurred on the 17th of November, 1905. On the 19th of August, 1907, the district court for Custer county modified the judgment entry made by Judge Grimes in the case of *Dill v. George* to show that the defendant took no exceptions to the judgment entered, and that no motion was filed by the defendant for a new trial in said cause, and that a statement made in the judgment entry that the case came on for hearing upon the "evidence heretofore taken" referred to the evidence taken before Judge Grimes at Grand Island, in Hall county, in January, 1904.

In May, 1906, this action was commenced to enjoin the levy and collection of another execution procured by Mrs. Dill upon the judgment rendered November 17, 1905, and to have said judgment declared null and void upon the grounds that it was based upon the evidence taken in vacation and outside the judicial district in Hall county; that the case had not been called for trial, evidence taken, or parties heard at the time said judgment was entered; that neither defendant nor his attorneys had any knowledge that said case was to be tried or any steps taken therein; and that they had no knowledge of the entry of said judgment until after Judge Grimes left the bench. Upon the hearing the plaintiff's petition was dismissed,

and judgment entered against him for costs of the action, and he has appealed to this court.

That the trial of a case cannot be had outside the county or at any place in the county except at the place designated by law was settled by the opinion in *Shold v. Van Treeck,* 82 Neb. 99. That judgment in a case cannot be entered in vacation has been settled by numerous decisions in this and other courts. Such judgments are absolutely void. In the instant case the right of the plaintiff to an injunction against the enforcement of the judgment depends upon whether the judgment is voidable or absolutely void. If erroneous and voidable only, the remedy of the defendant to have the error corrected was by appeal to this court. If void and of no force or effect, he had no need to proceed against it until some of his rights were threatened in an attempt to enforce it. The testimony of Judge Grimes relating to his action in the matter is as follows: "At some time previous to November, 1905, I had heard a case, *Emma Dill v. Walter A. George,* and there was some question as to the legality of the judgment rendered because the same was prepared elsewhere than in Broken Bow, and in open court and at the request of Judge B. O. Hostettler, the judge of the district court in and for Custer county, I went to Broken Bow during the month of November, 1905, and handed down my decision and rendered the judgment in said case of *Dill v. George.* If I remember correctly, there was also pending at that time an action entitled *George v. Dill,* which action I heard and disposed of at that term of court, Judge Hostettler then being present and holding a regular term of the district court in and for Custer county, at Broken Bow, Nebraska. Q. You may state who was present in the court room at Broken Bow of counsel for the parties plaintiff and defendant when the cases of *George v. Dill* and *Dill v. George* were tried by you as you have narrated? A. John M. Dryden was present representing Emma Dill as her attorney. Homer M. Sullivan, who represented Mr. George in the trial of the case, was

present, and when the two cases, *George v. Dill* and *Dill v. George,* came on for hearing, I remember distinctly asking Mr. Sullivan what action, if any, he desired to take further in said two causes, and his reply, as I now remember it, was that he did not desire to take any action or further steps than had already been taken." It conclusively appears that no evidence in the case of *Dill v. George* was heard by the court at Broken Bow at the time the judgment in question was rendered, and the amended journal entry shows that the evidence referred to in the journal entry was that taken at Grand Island, in the Eleventh judicial district.

Whether a court may pronounce a valid judgment based upon the evidence taken before the judge in the vacation of the court and in another judicial district by agreement of the parties is a question which we do not think it necessary to decide. That such a proceeding taken under objections made by one of the parties would render the judgment erroneous has been held by the supreme court of Iowa. *Funk v. Carroll County,* 96 Ia. 158. The difference between a judgment which is absolutely void and a judgment which is voidable because of some erroneous proceeding leading up to its entry is radical and far reaching. A void judgment may be disregarded until it interferes with the rights of the parties against whom entered, while an erroneous or voidable judgment must be attacked and reversed in the manner provided by law, and, if this be not done, its validity cannot be otherwise questioned. The court having jurisdiction of the subject matter and of the parties has jurisdiction to enter a judgment in the case. That the judgment is not warranted by the evidence does not affect its validity, except upon proper steps taken to have it set aside. Indeed, the courts have gone so far as to say that a judgment entered in the absence of any evidence is valid and binding until set aside by some regular proceeding. In *Clark v. Superior Court,* 55 Cal. 199, it is said: "If, after acquiring jurisdiction of the parties and the subject matter, a superior court should

order judgment for one of the parties without a trial, such judgment would not be 'without or in excess of the jurisdiction' of the court, although it might be erroneous; and in such case the only remedy would be by appeal." The facts in that case are somewhat akin to the case at bar. One Murdock had sued Clark in the district court for Lassen county, California. The case was tried before the court without a jury. The court took the case under advisement, and on the 24th of November the term was adjourned. Afterwards the judge made and signed written findings and a judgment in favor of the plaintiff in the action, and forwarded the judgment and findings to the clerk of the court, with private instructions not to file the judgment until the reporter's fees were paid. The findings and judgment remained in the hands of the clerk without being formally filed until a new constitution went into effect. The new constitution apparently created a new system of courts known as the superior courts, and the judge of that court on the 13th of April, 1880, ordered the clerk "to place said judgment and findings and conclusions of law upon the files and records of said court." In the body of the opinion it is said: "Whatever else may be doubted, there is no room for any doubt as to the fact that the action was one of which the superior court had jurisdiction, and could proceed to try and determine it precisely as it might have done if said action had been originally commenced in that court. The case was transferred to that court, and was at issue. No question is raised as to the court having had jurisdiction of the parties or of the subject of the action. Now, conceding for the purpose of this argument, that the court should have proceeded to try said cause *de novo,* instead of adopting the findings, conclusions, and judgment of the late district court, it must be obvious that the only remedy for that error is an appeal. If, after acquiring jurisdiction of the parties and subject matter of an action, a superior court should order judgment in favor of one of the parties without a trial, that judgment would neither be 'without

nor in excess of the jurisdiction of such tribunal,' although it might be erroneous, as any judgment might be if rendered upon the naked pleadings in a case where the pleadings raised a material issue."

In *Ex parte Bennett,* 44 Cal. 84, the court said: "The hearing of proofs, the argument of counsel—in other words, the trial had, or the absence of any or all of these —neither confer jurisdiction in the first instance, nor take it away after it has once fully attached. Jurisdiction has often been said to be 'the power to hear and determine.' It is in truth the power to do both or either—to hear without determining, or to determine without hearing." In *Garner v. State,* 28 Kan. 790, the second paragraph of the syllabus is in the following words: "Where a court of record, having jurisdiction, renders a judgment upon a petition filed before it against a defendant upon default of answer, and the statute requires the court in the particular proceeding to take evidence, and make special findings, and the court fails to comply with the statutory requirements, the judgment at most is erroneous, not void." Many cases of like import are cited in Van Fleet, Collateral Attack, secs. 696, 697.

It is true that in *First Nat. Bank v. Sutton Mercantile Co.,* 77 Neb. 596, we held that, "where there is an answer on file setting up a valid defense, the fact that the defendant fails to appear either in person or by attorney when a cause is reached for trial does not entitle the plaintiff to a judgment without proof of the facts constituting his cause of action, unless the facts admitted by the answer make out a *prima facie* case in his favor." This is undoubted law, and its application to the facts in this case would entitle the plaintiff herein to have the judgment against him reversed, had he taken proper steps to that end. While a judgment rendered under such circumstances is erroneous, we have never yet held that it was absolutely void, nor do we know of any rule of law making it so. As long as the court has jurisdiction of the parties and the subject matter of the action, it has

jurisdiction to pronounce an erroneous judgment equally with one that is free from fault. Another matter which must be taken into consideration is that the record in this case does not contain the pleadings in the case of *Dill v. George,* in which the judgment sought to be enjoined was entered. It may be that the court was justified in entering a judgment upon the pleadings alone, in the absence of evidence, or that he construed the pleadings as requiring such action to be taken. If such were the case, it would be entirely immaterial where the evidence taken in the case was heard, and, if an error of the court in construing the pleadings gives the plaintiff in this action greater relief than they justified, this would not invalidate the judgment entered, nor render it subject to an attack in the manner attempted. A careful consideration of the case brings us to the conclusion that, in any aspect in which it may be viewed, the judgment sought to be enjoined is not absolutely void, but erroneous only, and not subject to collateral attack.

We 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.

COOPER WAGON AND BUGGY COMPANY, APPELLANT, V. JOHN W. IRVIN ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 15,584.

Mortgages: FORECLOSURE: MARSHALING SECURITIES. The husband and wife mortgaged their homestead owned by the wife, together with other lots owned by the husband, to C. Afterwards they executed a second mortgage to the appellant on the lots owned by the husband. *Held,* That on a foreclosure of these mortgages a decree requiring C. to exhaust the property not embraced in

the homestead before selling the homestead estate was proper, and that the appellant had no cause of complaint, as a marshaling of securities is allowable only where the common debtor of two or more creditors is the owner of the several funds out of which payment is to be made.

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

Dorsey & McGrew, for appellant.

Albert R. Peck and *H. W. Short, contra.*

DUFFIE, C.

John W. Irvin and his wife, Ida, made a mortgage to the defendant Cummings covering their homestead, to which the wife held the legal title, and certain other lots in the village of Franklin, the fee title to which was owned by the husband. Afterwards Irvin and wife made to the Cooper Wagon & Buggy Company a second mortgage which covered only the lots owned by the husband. It will thus be seen that the first mortgage to Cummings covered the homestead of the Irvins, together with other real estate, while the second mortgage covered the real estate not included in the homestead. On foreclosure of these mortgages, the district court entered a decree giving Cummings the first lien upon the property covered by his mortgage, but directing that the lots other than the homestead property be first sold, and the surplus, if any, paid to the appellant on its lien. The Cooper Wagon & Buggy Company appeals from this decree, and insists that it is erroneous in not providing for a sale of all the property covered by Cummings' mortgage, which would, of course, leave a greater surplus to be applied in discharge of its lien. The appellees insist that the homestead right of the defendants Irvin is superior to the claim of the appellant, and that their homestead should not be sold unless necessary to satisfy the mortgage lien of Cummings.

The question presented was before this court in a slightly different form in *McCreery v. Schaffer,* 26 Neb. 173. The facts in that case and the law applicable are fully stated in the second paragraph of the syllabus, which is as follows: "If the husband and wife own a tract of land, a part of which is claimed as a homestead, and both execute a mortgage on the whole tract to secure a debt, and the husband afterwards executes a mortgage upon the part not covered by the homestead, to secure his debt, and judgments are rendered or filed in the district court against the husband, and the first mortgagee forecloses, making the other mortgagees and judgment creditors parties, the second mortgagees and judgment creditors cannot insist that the homestead be sold; and the decree will direct the part not covered by the homestead to be first sold, and, if the proceeds satisfy the first mortgage, that the homestead be reserved from sale. The second mortgagees and judgment creditors must rely on the surplus, if any, arising from the sale of the part not exempt from execution as a homestead."

If, where the title to all the mortgaged estate stands in the name of the husband, who is the sole debtor, a marshaling of securities will not be ordered in favor of a creditor who has a lien only upon that part of the mortgaged land not embraced in the homestead, the equities of the homestead claimant are much stronger where the title to the homestead stands in the wife, against whom the second mortgagee has no claim. In such a case it is probable that no marshaling of securities would be ordered or allowed by the court, regardless of the homestead character of part of the security, as it is a well-understood rule that a marshaling of securities cannot be claimed, except where both funds are in the hands of the common debtor of both creditors *Lee v. Gregory & Perry,* 12 Neb. 282; *Citizens State Bank v. Iddings,* 60 Neb. 709. In the case we are considering the property which the appellant insists shall be sold is owned by the wife, while the debt secured by his mortgage is the debt of the

husband. The husband is not the owner of both tracts, and under the rule most favorable to the appellant a marshaling of securities could not be ordered.

The decree of the district court was the proper one to enter in the case, and we recommend its affirmance.

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.

LYDIA E. HINTON, ADMINISTRATRIX, APPELLEE, V. ATCHISON & NEBRASKA RAILROAD COMPANY ET AL., APPELLANTS.

FILED MARCH 20, 1909. No. 15,405.

1. **Appeal:** CHANGE OF VENUE: REVIEW. Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a motion for a change of venue.

2. ———: CHALLENGE OF JUROR: REVIEW. Error will not be attributed to the trial court in overruling the challenge of a juror for cause unless an abuse of discretion is shown.

3. **Waters:** OBSTRUCTIONS: ACTION FOR DAMAGES: EVIDENCE. In an action to recover damages for the negligent damming back of flood waters, evidence is admissible tending to show that the floods were not unprecedented, and that former excessive rainfalls did not deluge the land in controversy except when the waters were interfered with by an embankment similar to that complained of.

4. ———: ———: ———: ———. Evidence that in another part of the valley in which plaintiff's property was destroyed, but at a place where no embankment interfered, property similar to plaintiff's was destroyed by flood waters was properly excluded, in the absence of evidence or an offer to prove that the rainfall was substantially equal in both places and other natural influences were the same.

5. **Trial:** INSTRUCTIONS. An instruction which assumes to determine the issues of the case is held not to be erroneous because it excluded certain defenses which were not supported by the evidence, or which have been covered by other instructions given.

6. Waters: RAILROAD EMBANKMENT: NEGLIGENCE: EVIDENCE. In the construction of an embankment or roadbed across the valley of a watercourse, a railway company is required to build sufficient bridges or culverts to permit the passage of such flood waters as might reasonably be expected, and proof of its failure in this regard is proof of negligence in the construction of the roadbed of which an upper landowner may complain.

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

J. E. Kelby, Byron Clark and *Frank E. Bishop,* for appellants.

Reavis & Reavis, contra.

EPPERSON, C.

The plaintiff, as administratrix, sues to recover for damages to her decedent's crops, icehouses and ice in the years 1902 and 1903, alleged to have been caused by the illegal act of the defendants in the construction of their roadbed or embankment across the valley of the Nemaha river, whereby flood waters were held back upon the premises in controversy.

The defendants filed a motion for a change of venue, alleging that a fair and impartial trial could not be had in Richardson county because of the prejudice of the citizens, and a desire to have defendants defeated in damage suits that they might be induced thereby to assist in forming drainage districts. This motion was supported by the affidavits of the defendants' attorneys, who stated substantially that all the citizens of said county are more or less interested either through ownership of land or that of their friends and relatives, and that their social, geographical and political associations and interests all combined against the railroad companies in said county; that affiants have often heard and have become familiar with the prevalent argument of the people advanced for the purpose of inducing the railroad com-

panies to consent to be included in the drainage districts, and it has been constantly urged that the company would thereby escape the numerous actions at law for the recovery of damages on account of flood waters; that, in furtherance of said purpose, the people of the county seem to be interested in having large verdicts for damage in the trial of causes against the railroad companies. Counter affidavits were filed, in substance, that affiants believed defendants could receive a fair and impartial trial, and that the question of establishing drainage districts did not affect the defendant's chance for a fair trial. We do not believe that the trial court abused his discretion in overruling the defendants' motion. The statement that all the people of the county were prejudiced was probably the conclusion of affiants. In a general statement as broad as this the sources of information should be stated, showing that the conclusion is well founded.

The defendants challenged three jurors for cause, two of whom, as shown by their *voir dire,* knew nothing about the premises in controversy, nor the cause of the damages done to the property, but who testified substantially that they had an opinion that an embankment placed across the valley would operate to stop the usual course of flood waters. The statements of another juror, Mr. Sullivan, were somewhat contradictory. He knew the premises in controversy and knew the location of the railroad embankment. He was asked if he had any opinion concerning defendants' liability, or whether they in any way caused the damage, to which he answered: "I have no information whether they caused it or not. I have an opinion that way. Q. You have an opinion on whether they caused it or not? A. Yes, sir. Q. And whether they are liable for it or not will depend on what the court told you the law is? A. Certainly." He said, moreover, that his opinion would not affect his judgment in weighing the evidence in the case. It has been decided that the retention or rejection of a juror is a matter of discretion

for the trial court. *Omaha S. R. Co. v. Beeson,* 36 Neb. 361; *Foley v. State,* 42 Neb. 233; *State v. Bartley,* 56 Neb. 810. The *voir dire* examination of this juror does not clearly indicate that he was incompetent, and we cannot say that the trial court abused his discretion.

The plaintiff's decedent's land was on the north bank of the Nemaha river. Below this the defendants' grade or embankment of earth runs through the valley, crossing the river at a point about 2½ miles east over a bridge 61 feet long. West of the bridge there is a culvert of 18 feet, and there are smaller openings of only a few feet. In each of the years in controversy there were heavy rains, and water stood upon the premises in controversy, destroying certain crops, icehouses and ice belonging to the plaintiff's decedent. Plaintiff recovered a judgment in the district court, from which the defendants have appealed.

Plaintiff's principal witness was permitted to testify, over objection, of former floods and the effect they had upon the land in controversy, and the influence upon flood waters and upon the land of the Missouri Pacific Railway embankment which formerly traversed the valley, and which was similar to the defendants' embankment. This evidence we consider proper. Its tendency was to show that the high waters in the years in controversy were not unprecedented, and, moreover, showed that former rainfalls did not deluge the land in controversy except at times when there was an embankment across the valley similar to that now maintained by the defendants. This witness was also permitted to state that a certain public roadway and dike had no tendency to cause the flood waters to stand upon the plaintiff's land. This may have been the conclusion of the witness, and, technically, was incompetent. We are unable, however, to see wherein it was prejudicial. The same may be said of other evidence wherein the witness gave his estimate as to the height of the defendants' embankment. This was not prejudicial, as his guess did not differ materially from

the testimony of one of defendants' witnesses given with apparent accuracy.

A witness called by the defendant was not permitted to testify that up the valley of the Nemaha, along the south fork wherein no railway had been constructed, the flood waters of 1902 and 1903 destroyed property similar to plaintiff's. We believe that such evidence would have been competent, and would probably have been admitted by the trial court had a sufficient foundation therefor been laid, by showing that the rainfall up the valley was substantially equal to the rainfall upon or affecting the plaintiff's land and that the natural influences were the same. For aught that appears in the record, the plaintiff's property might have been immune from the ravages of the flood, but for defendants' embankment, while that of the witness would have been destroyed.

The court, at plaintiff's request, gave a certain instruction objected to by the defendants. In effect this instruction told the jury that if they believed from the evidence that the flood waters of the river were obstructed by the defendants' embankment, and thereby backed upon the lands of the plaintiff and held there for a longer period than they otherwise would have been held, and plaintiff's decedent suffered damages because thereof, then the verdict should be for the plaintiff for such damage as they may believe from the evidence she has suffered, not exceeding the amount claimed in the petition. Complaint is made that by this instruction the court assumed to determine all the issues of the case, but that certain material issues were omitted. It is argued that there was error in omitting to present one defense pleaded by the defendants, that the rains which produced the flood waters were so unprecedented as to amount to an act of God. The only evidence in the record which tends to support this defense is the testimony of one of plaintiff's witnesses, who testified that the water was higher in 1903 than in any previous year since 1883. The other evidence regarding excessive rainfall indicates that the damages might

have been caused by the rain had not defendants' embankment been constructed. But this feature of the case was properly submitted to the jury by instructions which defendants requested.

Defendants also argue that the court should have submitted to the jury the question of defendants' negligence or right to construct and maintain the grade as it did. We find it somewhat difficult to comprehend defendants' reason in presenting this argument. That question was the very one to be determined by the jury, it is true; but the ascertainment of the defendants' right to maintain the grade as it was must be arrived at by a consideration of the evidence and by certain rules which govern. The law required the defendants in the construction of their railway embankment to build bridges or culverts sufficient to permit the passage of such flood waters as might reasonably be expected, and proof of their failure in this respect is proof of the negligent construction of their embankment so far as it affects the rights of upper landowners.

Complaint is further made that the instructions failed to submit the questions of the statute of limitations, of estoppel, the rule regarding the measure of damages, and that it failed to give the essential doctrine of proximate cause. We will not discuss these questions in detail. They were either sufficiently covered by other instructions given by the court or the defendants' theory relative thereto had no support in the evidence. It is very apparent that the damages here in controversy were either caused alone by the flood waters or by the combined influence of the flood waters and the defendants' embankment. These questions were submitted to the jury.

This case is rendered unusually difficult by the admission of scientific evidence reflected in part by an exhibit in the form of a blue print, in which it is represented that the plaintiff's land is at a greater elevation than the defendants' embankment, thereby making it appear impossible for the grade to hold the water back upon the land.

We have endeavored to reconcile this evidence with the verdict, but, not being able to overrule or modify the laws of nature, we have reached the conclusion that the jury considered that the scientist who prepared the map, but who did not testify, was probably mistaken in marking the elevations, numerous witnesses having testified that the water did in fact stand three feet in depth upon the plaintiff's land.

We find no reversible error, and 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.

ROOT, J., not sitting.

IN RE ESTATE OF SAPHRONIA JONES.
IDA M. LIVINGSTON, APPELLANT, V. A. G. ELLICK, ADMINISTRATOR, APPELLEE.

FILED MARCH 20, 1909. No. 15,442.

1. Appeal: SUPERSEDEAS. In an appeal from the judgment of a county court in a matter of probate jurisdiction, a bond which is not conditioned as required by the statute is insufficient to supersede the judgment appealed from.
2. ———: TRIAL DE NOVO. In the trial of a case in the district court on appeal from the county court, a party may plead and prove any facts arising since the trial in the county court which shows that the adverse party is not entitled to the relief sought.
3. ———: REVERSAL: RELIEF. Although appellant may fail to supersede an erroneous judgment, which is later executed, the appellate court should reverse it, and, if it appears equitable and just, the appellant should be permitted to seek restoration.

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

B. N. Robertson, for appellant.

J. A. C. Kennedy and *A. G. Ellick, contra.*

EPPERSON, C.

The appellee was administrator with the will annexed of the estate of Sophronia Jones, deceased, and made his final report to the county court, showing the full administration of the estate, and asked a decree for the distribution of the residue, and for his discharge as administrator. Notice was duly given of the hearing, and at the time therein fixed the court entered an order of distribution. The appellant was a beneficiary under the will to the extent of $205.98, but in the order of distribution the county court found that there was due the estate from the appellant the sum of $1,294 on certain notes, which sum it was ordered should be deducted from her distributive share. One of the notes referred to was given to a bank for $200, signed by R. L. Livingston and Alfred D. Jones. Jones was surety only, and had paid the note. The other note referred to was for $340, and was given by R. L. Livingston and Mrs. R. L. Livingston, the appellant herein, to Alfred D. Jones on May 4, 1892. Alfred D. Jones was the husband of Sophronia Jones, who survived him. The notes in controversy came into the possession of the appellee as administrator, and presumably belonged to the estate. In his inventory and in his petition for discharge the notes were referred to as of no value. R. L. Livingston was the husband of the appellant, and is deceased. The administrator made no request that the amount represented by these notes be deducted from the distributive share of the appellant, nor did any of the interested parties make such a request. One of the heirs suggested such an order to the county court, upon which he acted without notice to appellant. The administrator, acting, perhaps, with too much haste, distributed the money as directed by the court, and procured a final or-

der of discharge. A few days later the appellant filed an application with the county court, asking that the order of distribution and of the discharge of the administrator be set aside. She also appealed to the district court from such orders. Upon trial in the district court the appellant introduced evidence showing that the $340 note was given to Alfred D. Jones in consideration of his having paid as surety the $200 note, the debt of appellant's husband, and, moreover, was permitted to prove that no consideration passed to her for her signature upon the $340 note, and that it was not signed with reference to her property, trade or business. It appears, therefore, that the county court erred in requiring the deduction of this indebtedness from the distributive share of the appellant.

But the disposition of this case depends upon another question which demands consideration here. The administrator filed an answer, alleging distribution according to the provisions of the order appealed from, and further alleging that the appeal bond given by the appellant to the county court in the prosecution of her appeal therefrom was insufficient to supersede the judgment. The bond was deficient, in that it was signed by one surety instead of two, and was not conditioned as required by law, in that it provided only for the payment of costs instead of debts, damages and costs as provided by section 4825, Ann. St. 1907. This bond did not supersede the judgment of the county court. *Gillespie v. Morsman*, 2 Neb. (Unof.) 162; *O'Chander v. State*, 46 Neb. 10; *State v. Ramsey*, 50 Neb. 166. For this reason, we are convinced that the appellant cannot now complain that the administrator has distributed the funds under the erroneous order of the county court. This, of course, introduced in the trial an issue which was not before the county court. But it was alleged by way of supplemental pleadings, and set forth conditions or facts arising since the trial in the county court which were sufficient to show that it was impossible now to give the relief to appellant which she seeks. As the order of distribution was not superseded, the administra-

tor was justified in paying out the funds to the distributees, and could have been compelled to do so had he refused. For these reasons, the appellant was not entitled to a personal judgment against the administrator, nor its equivalent in the form of an order of distribution requiring him to pay her the amount she claims.

It is apparent from the record before us that the order of distribution was erroneous, and that appellant was entitled to relief. The other legatees have received the amount which should have been paid to appellant. They were parties to the proceeding in which the estate was settled, and in which the order of distribution complained of was made. They made no appearance in the district court, probably thinking that the administrator would represent them. Notwithstanding the fact that appellant failed to supersede the order of distribution, she was entitled to a reversal and modification of that order. In procuring a reversal she would be entitled to proceed against her colegatees for a restoration of the amount each received, which should have been awarded to her, unless they have a defense, which is not indicated in the case before us. In *State v. Horton,* 70 Neb. 334, it was held: "It is a general rule that, 'upon the reversal of a judgment which has been executed, it is the duty of the court to compel restitution,' but restitution is not, in all cases, a matter of absolute right; it rests in the sound discretion of the court." We think this case is one in which appellant should be permitted to enforce a restoration of her money.

We recommend that the judgment of the district court, so far as it releases the administrator from liability, be affirmed, but otherwise reversed and remanded, with instructions to the court below to enter judgment reversing and modifying the county court's order of distribution, and permitting the appellant, if she so desires, to seek restoration of her money from the other legatees.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: The judgment of the lower court releasing the administrator is affirmed, but remanded, with instructions to the lower court to reverse and modify the county court's order of distribution, and permit the appellant, if she so desires, to seek restoration of her money from the other legatees.

JUDGMENT ACCORDINGLY.

WILLIE Z. LEACH, APPELLEE, V. JAMES H. BIXBY, APPELLEE; JESSE C. MCNISH, APPELLANT.

FILED MARCH 20, 1909. No. 15,455.

1. Appeal: PARTIES. No one but an interested party may appeal, and one bringing a case to this court for review must show by the record that he is an interested party, and that he has been prejudiced by the judgment appealed from.
2. ———: ———. In order to obtain relief on appeal, an intervener may not assail the sufficiency of plaintiff's petition alleging a cause of action only against the defendant, unless he further shows that the judgment dismissing the intervener's petition was erroneous and prejudicial.

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

Starr & Reeder, for appellant.

R. D. Brown, C. A. Ready, Venrick & Green and *J. L. White, contra.*

EPPERSON, C.

Plaintiff filed a petition in the district court to require the specific performance of a contract for the sale of real estate. The defendant filed an answer, with which we are not concerned. The appellant herein obtained leave of court to intervene, and filed an answer and cross-petition, claiming title by virtue of a deed of conveyance made by

the defendant subsequent to the time that plaintiff claims to have purchased. A trial was had upon the issues presented by all the pleadings, which resulted in the relief prayed for by the plaintiff and a dismissal of the intervener's cross-petition. The intervener alone appealed from the judgment of the district court, alleging that the judgment is not supported by the evidence, and assigning as errors the court's failure to sustain intervener's demurrer to the petition, and the admission of evidence on the part of the plaintiff.

No bill of exceptions has been filed, but the intervener contends that he is entitled to a review of the pleadings, and a reversal of the judgment of the court below in the event it is found that the petition did not state a cause of action against the defendant. We do not believe, under the circumstances of this case, that it would be right for us to determine the sufficiency of the petition. No one but an interested party may appeal, and one bringing the case to this court for review must show by the record that he is an interested party and that he has been prejudiced by the judgment appealed from. Where a petition is assailed by a party thereto, who is sued as a defendant and against whom affirmative relief is asked, he may question its sufficiency at any time before final judgment. He is *prima facie* an interested party, and, on appeal by such a one, this court would be required to look into the petition for the purpose of ascertaining whether or not it stated a cause of action. But in the case at bar the intervener does not appear from the record to be an interested party. At most, the record only discloses that he claims to be such by reason of some interest or title which he asserted in his answer and cross-petition. That issue was tried in the court below, and, in the absence of the bill of exceptions, we presume that the judgment of the district court dismissing the intervener's cross-petition is right. He therefore comes into this court without putting himself in a position to question that part of the judgment dismissing his cause of action. In other

words, he has not brought enough of the record here to show that he was prejudiced by the judgment rendered in favor of plaintiff, which he seeks to reverse. He is not entitled to a reversal of the judgment dismissing his cross-petition simply because plaintiff failed to allege a cause of action against defendant.

It is claimed that the intervener was virtually substituted as a party defendant. The record does not support this contention. The intervener asked leave of court to intervene. It seems that this was an oral request, which was granted. Thereupon he filed a pleading in the form of an answer and cross-petition, in which he asked affirmative relief against the plaintiff and against the defendant. Upon trial on the merits the district court found against the intervener and dismissed the cross-petition. Without doubt intervener had the right in the court below to question the sufficiency of plaintiff's petition by showing that he was interested in the subject matter. Although the record discloses that a demurrer was filed, it does not show that it was ever called to the court's attention and a ruling requested thereon. In order to obtain relief on appeal, an intervener must show, not only that the judgment obtained by plaintiff was wrong, but that it was prejudicial to him.

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

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

REMINGTON TYPEWRITER COMPANY, APPELLEE, V. E. D. SIMPSON, APPELLANT.

FILED MARCH 20, 1909. No. 15,492.

New Trial: SURPRISE. A party will not be entitled to a new trial for surprise occasioned by his adversary's evidence when he could have procured all available evidence to refute it by procuring a short continuance of the trial, but fails to ask for such continuance.

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

Richard S. Horton, for appellant.

W. W. Dodge and *J. W. Battin, contra.*

EPPERSON, C.

The plaintiff, claiming to be the owner of a typewriter, brought an action in replevin against the defendant, a constable, who had seized the same upon an execution against the Omaha Umbrella Manufacturing Company. From a judgment rendered in the justice of the peace court an appeal was taken to the district court, where a trial was had resulting in a directed verdict and judgment for the plaintiff. In both courts the plaintiff's ownership and right to possession were alleged in general terms. The typewriter was found by the defendant in the possession of the judgment debtor. In the justice of the peace court plaintiff introduced evidence for the purpose of proving that the judgment debtor was, prior to seizure, in possession of the property under a written contract for the purchase thereof, which said contract upon its face purported to be a sale by the plaintiff to the judgment debtor conditioned for the return of the property to the plaintiff upon default in the payment of the purchase price. In the district court the plaintiff claimed and introduced evidence to prove that the judg-

ment debtor was in possession of the property under a verbal contract permitting him to examine and use the same with a view of purchasing, if satisfactory; that the judgment debtor never did purchase the property, and that the written instrument above described was a forgery.

In a replevin case the only issue to be determined is the right to the possession of the property, and all that a plaintiff need to allege in setting forth his cause of action is that he is the owner of, or has a special interest in, the property, with the right of possession, and that the property is wrongfully detained by the defendant. He need not set forth the facts upon which he relies, and, for this reason, the plaintiff may on a second trial introduce evidence inconsistent with that relied upon in a former trial, and thereby will not introduce a new or different issue. Therefore the evidence adduced in the district court was competent, as it tended to prove plaintiff's ownership.

Defendant asked for a new trial on the ground of surprise, in that the evidence introduced was in support of a theory contrary to, or at least inconsistent with, that upon which it relied in the justice of the peace court. The defendant's affidavits in support of the motion for a new trial show his surprise; but, as we view it, the showing came too late to be available. The record shows that, after the plaintiff introduced the surprising evidence, defendant moved for a directed verdict, thereby expressing his satisfaction with his defense as made. It appears from the showing later made that defendant could have produced evidence to refute that of the plaintiff had a certain witness, a resident of the place of trial, been present; that such witness was absent, but was expected to return on the afternoon of the day of trial. The record does not disclose that any adjournment of the trial was requested for the purpose of procuring such evidence. This should have been done. Defendant was

not justified in suffering the action to proceed to judgment when, as in this case, he knew that the only available evidence could be, or with reasonable certainty would be, available within a short time.

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

DUFFIE, GOOD and CALKINS, CC., concur.

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

AFFIRMED.

GEORGE WILLARD ET AL., APPELLEES, V. GEORGE KEY, APPELLANT.

FILED MARCH 20, 1909. No. 15,566.

Principal and Agent: MISREPRESENTATIONS: LIABILITY. If an agent, in the prosecution of his principal's business, misrepresents a material fact, and the person to whom such representation is made, in ignorance of the truth, relies and acts on such statement to his damage, the agent and principal are jointly liable in tort therefor.

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

Martin & Ayres, for appellant.

John J. Sullivan, A. M. Post and *Louis Lightner, contra.*

EPPERSON, C.

Plaintiff bought a tract of land of defendant Key, the sale of which was negotiated in part by defendant Carrig as Key's agent. Plaintiff alleged, in substance, that he was induced to purchase by the false and fraudulent statements of defendants that there were 352 acres in the tract, when, in fact, there were but 325 acres; that the

agreed price was $30 an acre, at which rate plaintiff paid for 352 acres. Plaintiff seeks to recover for the difference in the number of acres received and the 352 acres which the defendants represented he would receive, and which his contract called for. The trial court found that there were 335 acres, and rendered judgment against both defendants for $510 and interest. Key appeals.

Carrig was served with summons in Platte county, where he resided, and wherein the action was instituted and prosecuted. Key was served with summons in Merrick county, where he resided, and, as one defense, pleaded to the jurisdiction of the court. It appears from the evidence that Carrig did not know how many acres there were, but that he relied upon the information given him by his codefendant, in his negotiation of the sale, when he told plaintiff that there were 352 acres. Appellant contends that Carrig had a right to rely upon the information thus received, and that he is not liable to the plaintiff in any event, and should not have been made a party to this suit, and that the appellant should not be required to litigate this case in Platte county, there being no proper party defendant resident thereof whereby jurisdiction might be obtained over the appellant under the provisions of section 65 of the code. Carrig was made a party and properly served in Platte County, and, if plaintiff was not entitled to recover against him, the judgment against the appellant must be set aside for the want of jurisdiction, without regard to the merits of the case. The question therefore is: Did the ignorance of Carrig as to the number of acres in the tract of land, which he was selling for his codefendant, excuse him from liability to the plaintiff? The evidence shows that he told the plaintiff that there were 352 acres, by a positive statement of the fact, and without communicating to the plaintiff that his only source of information was the appellant. Relying upon this and like statements of the appellant, the plaintiff purchased the land in controversy.

We are of the opinion that Carrig's ignorance of the untruthfulness of his representations does not excuse him from liability. In *Phillips v. Jones,* 12 Neb. 213, it is said: "And if a party, without knowing whether his statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded in a proper case will be entitled to relief." The principle there announced has been adhered to by this court in every case where that question has been before it. It is true that it was held in *Runge v. Brown,* 23 Neb. 817, that, in order to permit a recovery for deceit, there must be established, among other things, "The telling of an untruth, knowing it to be such." This case only partially stated the rule. It was modified in *Foley v. Holtry,* 43 Neb. 133, wherein it is said: "A more accurate statement, in view of the later decisions, would be that the defendant must either know that the representations were false, or else they must be made without knowledge as positive statements of known facts." In *Moore v. Scott,* 47 Neb. 346, it was said: "This court has repudiated the doctrine that, in order to make out a case of deceit, it must be shown that the defendant knew his representations to be false. * * * But in all of these cases it is either expressly stated or necessarily implied that in order to be actionable the representations must have been made as a positive statement of existing facts." It has also been held that, although *scienter* is pleaded, it need not be proved, the allegation being considered as surplusage. *Johnson v. Gulick,* 46 Neb. 817. Appellant seeks to distinguish our former decisions above cited, and points out wherein the nature of each action was different from the case at bar. It appears that in *Johnson v. Gulick, supra,* misrepresentation was pleaded in defense, and that *Foley v. Holtry, supra,* was an action in equity to rescind a contract obtained by deceit; otherwise we fail to see any distinction between the adjudicated cases cited and this one. They are governed by the same principles. The liability of the parties was created at

the time the contract was entered into, and that liability can be enforced in equity or in law, according to the circumstances of each case. The decisions cited are in point, and we see no reason for deviating from the rule so firmly established. If the deceit was discovered before the performance of the contract, the wronged party could, of course, maintain an action to rescind.

The evidence relied upon by the plaintiff regarding the number of acres establishes that in 1899 there were 335 acres only in the tract. The land is bounded on the west and south by the Loup river. On cross-examination the plaintiff testified that the river at times makes changes by accretion and washing out the land through which it crosses; that it changed its course at times in high water. With reference to this testimony, the appellant contends that the acreage in 1899 cannot be taken as a basis to determine his liability in 1904, the time of the sale. This evidence is hardly sufficient to justify the court in a conclusion that there was a change in the bank of the river along the boundary line of the land in controversy at any time. The surveyor who measured the land in 1899 visited it again in 1906, and testified that then there was less acreage. He did not survey the land in 1906, nor did he examine the entire tract, nor did he testify that there had been any change between 1899 and 1904.

The evidence supported the findings and the judgment of the lower court, and we recommend that it be affirmed.

DUFFIE and GOOD, CC., concur.

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2. The examining magistrate does not lose jurisdiction of a bastardy case by granting a continuance on the request of defendant. *Heidemann v. Noxon*..... 175
3. Where evidence as to his chastity in a bastardy case was improperly introduced by defendant, he cannot predicate error on a proper instruction to disregard it. *Collister v. Ritzhaupt* 794
4. Where the evidence in a bastardy case has been fully submitted, *held* not error to refuse a requested instruction making prominent certain evidence. *Collister v. Ritzhaupt*.... 794
5. In bastardy case, defendant by appearing before a justice and entering into a recognizance to appear before the district court, *held* to waive objection to complaint that it fails to state the child, "if born alive, may be a bastard." *Collister v. Ritzhaupt* 794
6. In bastardy case, defendant by plea of not guilty, without objecting to the complaint, *held* to waive objection. *Collister v. Ritzhaupt* 794

Bills and Notes.

1. Whether defendant, who, being unable to read, was induced to sign a note on the false representation that it was an agreement for the use of a farm gate, was negligent, *held* question for jury. *First State Bank v. Borchers*..... 530
2. That circumstances surrounding the purchase of a note before maturity were sufficient to excite the suspicion of a prudent man will not defeat a recovery. *First State Bank v. Borchers* 530
3. Note of corporation *held* valid in the hands of *bona fide* purchaser. *Second Nat. Bank v. Snoqualmie Trust Co*..... 645
4. An indorsee who took a note before maturity in part payment of a preexisting debt, *held* a purchaser for value. *Second Nat. Bank v. Snoqualmie Trust Co*..... 645
5. Where evidence is conflicting as to whether an indorsee took a note without notice of infirmities, *held* error to direct a verdict. *Gibson v. Gutru* 718

Bills and Notes—*Concluded.*

6. Certain notes *held* given for accommodation. *Citizens Bank v. Fredrickson* 755
7. It is no defense to an accommodation note, as against an indorsee, that it was without consideration, or that it was understood the payee was to take care of it. *Citizens Bank v. Fredrickson* 755

Bridges. See COUNTIES AND COUNTY OFFICERS.

Brokers.

1. Where a contract for the sale of real estate between the owner and a broker is void because not in writing, as required by sec. 10856, Ann. St. 1907, the broker cannot recover on a *quantum meruit*. *Nelson v. Webster*..... 169
2. As between brokers, *held* that the one whose efforts were the effective cause of the sale is entitled to the commission. *Lewis v. McDonald* 694
3. As between brokers, the efforts of one *held* the effective cause of the sale, entitling him to the commission. *Lewis v. McDonald* 694

Cancelation of Instruments.

Evidence in suit to cancel deed, *held* to sustain judgment for plaintiff. *Jesse v. Brown* 311

Carriers.

1. Conduct of carrier, *held* an unlawful discrimination against shippers of hay. *State v. Chicago & N. W. R. Co*..... 518
2. Shipper *held* only entitled to a just division of empty cars that should have been apportioned to the station where he transacted business. *State v. Chicago & N. W. R. Co*..... 518
3. Ch. 90, laws 1907, *held* not in every instance to afford a shipper an adequate remedy against a carrier's refusal to furnish cars. *State v. Chicago & N. W. R. Co*..... 524
4. Carrier *held* not liable to shipper for loss of horses. *Quinby v. Union P. R. Co*..... 777

Chattel Mortgages.

1. Where successive chattel mortgages on a specified number of cattle out of a greater number are given to the same mortgagee and assigned, *held* the second assignee takes subject to a right of selection in the first assignee. *South Omaha Nat. Bank v. McGillin*..... 439
2. Right of selection *held* not affected by the fact that second mortgages were renewals of prior mortgages satisfied of record, or that there was an oral agreement that releases of record should not take effect according to their terms. *South Omaha Nat. Bank v. McGillin*..... 439

Constitutional Law.

1. Only tax proceedings which are arbitrary, oppressive or unjust are not due process of law. *State v. Several Parcels of Land* 13
2. To constitute due process of law it is not necessary that notice be given of each step in the process of taxation, but it is sufficient if the taxpayer has an opportunity to appear at some time. *State v. Several Parcels of Land*..... 13
3. Sec. 3 of the act of March 30, 1901 (laws 1901, ch. 93), relating to extortion, contravenes sec. 15, art III of the constitution, forbidding special legislation, because the acts prohibited are made criminal only when committed against citizens or residents of Nebraska. *Greene v. State*..... 84
4. Courts will listen to an objection to the constitutionality of a law by a party whose rights it does not affect where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed. *Greene v. State*..... 84
5. A statute limiting the dower right of a nonresident widow to lands of which her husband died seized, *held* not inhibited by constitutional provisions relating to due process of law and to distinctions between resident aliens and citizens in the possession, enjoyment or descent of property. *Miner v. Morgan* 400
6. The language of the constitution is to be interpreted with reference to the established laws, usages and customs at the time of its adoption, and the course of ordinary and long-settled proceedings according to law. *In re Hammond*..... 636
7. A party will not ordinarily be permitted to attack the constitutionality of a statute where his rights are not invaded. *State v. Brandt* 656
8. Sec. 5514, Ann. St. 1907, in so far as it assumes to authorize an appeal from the decision of the county board on the question of public utility of a drain, *held* void. *Johannes v. Thayer County* 689

Contempt. See DEPOSITIONS, 2.

Contracts.

1. The meaning of a sentence or part of a written instrument should be ascertained by considering all of the parts of the instrument together. *Teske v. Dittberner*..... 701
2. Instruction in an action for balance due on verbal contract to exchange work, *held* erroneously refused. *Adams v. Fisher* 686
3. Where both parties to a contract fail to perform on the day

Contracts—*Concluded.*

named, they will be held to have waived performance as to time. *Cadwell v. Smith* 567

4. One party to a contract cannot declare a forfeiture, unless he is in position to perform. *Cadwell v. Smith*..... 567

5. Where parties have adopted a reasonable construction of their contract, courts will adopt such construction. *Ord Hardware Co. v. Case Threshing Machine Co*..... 353

Costs. See WILLS, 5.

1. In a suit to enjoin the construction of a street railway for failure of defendant to comply with a certain ordinance, *held* that costs of suit were properly taxed to defendant. *Woods v. Lincoln Traction Co*..... 23

2. Where separate appeals in an administrator's accounts are filed in the district court, the costs of the several transcripts are properly taxed against the losing party. *Etmund v. Etmund*..... 151

3. Though mandamus to compel carrier to furnish cars was reversed on appeal, costs taxed to carrier. *State v. Chicago & N. W. R. Co.* 518

Counties and County Officers.

1. The words "recovery by suit," in the proviso of sec. 6147, Ann. St. 1907, include a suit instituted by appeal from the disallowance of a claim by a county board. *Cass County v. Sarpy County* 435

2. County surveyor *held* not within the inhibition of sec. 4469, Ann. St. 1907, and entitled to recover for services to the county. *Pethoud v. Gage County*..... 497

3. A county which refuses to enter into a contract with an adjoining county to repair a bridge across a stream dividing the counties is liable to the county making the repairs. *Buffalo County v. Kearney County*..... 550

4. Where proper steps have been taken to render an adjoining county liable for repair of a bridge, and an issue is raised as to the necessity of the repairs or the amount paid therefor, the amount the defaulting county ought to pay is a question for the jury. *Buffalo County v. Kearney County*.. 550

5. Where traction engine is injured by reason of defective bridge, plaintiff can recover only actual cost of necessary repairs. *Layton v. Sarpy County*..... 628

6. Notice by a county to an adjoining county to join in the repair of a bridge, *held* not to make the adjoining county liable for any part of the costs of a new bridge. *Colfax County v. Butler County* 803

7. Requisites of notice stated. *Colfax County v. Butler County*. 803

Courts.

Sec. 16, art. VI of the constitution, barring the county court of jurisdiction of actions involving title to real estate, does not apply where title is involved as an incident to a question of which that court has exclusive original jurisdiction. *In re Estate of Buerstetta* 287

Criminal Law. See INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 14, 15, 17, 18. LARCENY. MONOPOLIES. RAPE. ROBBERY.

1. In a prosecution for homicide while committing a robbery, evidence that decedent had considerable money in his possession, *held* admissible. *Fouse v. State* 258
2. An answer responsive to a question should not be stricken. *Fouse v. State* 258
3. It is within the court's discretion to permit a witness to testify, though he had disobeyed an order excluding witnesses from the court room. *Fouse v. State* 258
4. An order refusing defendant permission to amend his motion for a new trial will not be reviewed, where application was made more than three days after verdict. *Fouse v. State* 258
5. A voluntary statement by defendant *held* properly referred to by the court as a confession. *Fouse v. State* 258
6. Where the evidence does not tend to prove that defendant was intoxicated, and defendant claimed he acted in self-defense, the supreme court will not examine an instruction submitting the defense of intoxication. *Fouse v. State*, 258
7. A police officer may testify to statements by defendant while in his custody, where the statements were voluntary. *Fouse v. State* 258
8. It is within the court's discretion to order or refuse to permit the jury to inspect the scene of the crime. *Fouse v. State* 258
9. Exceptions to instructions will not be considered unless specifically assigned in the motion for a new trial. *Poston v. State* 240
10. Defendant will not be permitted to prove matters of defense on cross-examination of state's witness not brought out on direct examination. *Poston v. State* 240
11. On a prosecution under sec. 7170, Ann. St. 1907, making it a crime to keep intoxicating liquor for unlawful sale, certain evidence of state chemist *held* competent. *Poston v. v. State* 240
12. Defendant testifying in his own behalf is subject to the

Criminal Law—*Continued.*

same rules of cross-examination as any other witness. *Poston v. State* 240

13. It is competent to show the intoxicated condition of persons in defendant's place of business as tending to show that liquor sold was intoxicating. *Poston v. State*..... 240

14. Evidence, in a prosecution for assisting and procuring another to disinter human remains, *held* insufficient to support a conviction. *Callahan v. State*..... 246

15. Evidence *held* not to constitute such instructions to a laborer as to warrant a conviction for procuring another to disinter human remains. *Callahan v. State*..... 246

16. Submitting an issue to the jury, unsupported by evidence, *held* error. *Callahan v. State* 246

17. Failure to appoint an attorney for accused until after plea *held* not error. *Foster v. State*..... 264

18. That a part of the jury were taken by the baliff to a toilet room, *held* not to justify a new trial. *Foster v. State*..... 264

19. Accused *held* to have waived his right to a copy of the information. *Foster v. State* 264

20. Under the evidence, *held* that conviction for robbery would not be set aside because of defendant's denial corroborated by an alibi sought to be established by relatives. *Lillie v. State* 268

21. Refusal to grant a new trial for reasons set out in an amendment to the motion for a new trial filed more than three days after verdict will not be reviewed. *Lillie v. State*..... 268

22. A new trial for newly discovered evidence *held* properly denied. *Lillie v. State*..... 268

23. The police judge of the city of Lincoln has jurisdiction of violations of rules of the excise board of that city. *State v. Dudgeon* 371

24. The jurisdiction of a police judge under sec. 18, art. VI of the constitution, sec. 260 of the criminal code, and sec. 7943, Ann. St. 1907, in relation to misdemeanors, is concurrent with that of a justice of the peace, and, where the punishment may be a fine over $100, he can only sit as an examining magistrate. *State v. Dudgeon* 371

25. The right of accused to trial before a jury of the county where the crime was committed is a personal privilege which he waives if the venue is changed at his request. *Kennison v. State* 391

26. Error is not presumed, and a conviction will not be reversed because of alleged error in the selection of a jury

Criminal Law—*Concluded.*
where the record does not affirmatively support such assignment. *Kennison v. State* 391

27. Accused *held* not entitled to an instruction on the theory that the killing was accidental. *Kennison v. State*..... 391

28. Instructions *held* to present the law of self-defense. *Kennison v. State* 391

29. Misconduct of counsel *held* not prejudicially erroneous to defendant. *Kennison v. State* 391

30. An order compelling counsel for accused to argue the cause at night *held* not ground for new trial. *Kennison v. State*.. 391

31. Limiting argument in a murder trial *held* not ground for new trial, especially where counsel did not request an extension of time. *Kennison v. State*..... 391

32. The court's threat to discipline a contumacious counsel *held* not ground for new trial. *Kennison v. State*..... 391

33. Instruction, in a prosecution for selling or keeping for sale malt liquor, *held* to submit the question of the intoxicating properties of the liquor, and that its submission was erroneous, but without prejudice, as it was by procurement of accused. *Luther v. State* 455

Damages. See FRAUD, 2.

1. Physical pain and mental anguish need not be specially alleged, where the injury is such as to necessarily import them. *Fink v. Busch* 599

2. In an action for damages to timber by fire, where the trees have a value separate from the land, instruction that the measure of damages is the difference in value of the land before and after the fire, *held* erroneous. *Hart v. Chicago & N. W. R. Co.* 652

Deeds. See ATTACHMENT, 2.
Proof of an unacknowledged deed made by a subscribing witness, as provided by sec. 10807, Ann. St. 1907, entitles such deed to record, and is presumptive of its due execution. *Wilson v. Wilson* 562

Depositions.

1. Statutes authorizing justices of the peace to take depositions and to punish persons who disobey subpœnas or refuse to answer proper questions are within sec. 18, art. VI of the constitution, providing that justices of the peace shall have such jurisdiction as may be provided by law. *In re Hammond* 636

2. Refusal to answer such improper questions in taking a

Depositions—*Concluded.*

deposition as would constitute an abuse of process is not a contempt. *In re Hammond* 636

3. Secs. 966, 967 of the code do not apply to the taking of depositions before a justice, but sec. 356 *et seq.* control. *In re Hammond* 636

Descent and Distribution.

The district court is without original jurisdiction to distribute the funds of an estate. *In re Estate of Manning*..... 417

Divorce.

Allowance of alimony in lieu of a wife's interest in her husband's property is not an adjudication which prevents her from canceling a deed executed in violation of her homestead rights and interfering with her lien for alimony. *Kimmerly v. McMichael* 789

Dower. See CONSTITUTIONAL LAW, 5.

1. Evidence *held* to sustain finding that a wife was a nonresident, under the statute limiting the dower right of a nonresident widow to lands of which her husband died seized. *Miner v. Morgan* 400

2. A wife has no dower interest in lands conveyed by her husband while she is a nonresident. *Miner v. Morgan*..... 400

Drains.

1. That part of ch. 153, laws 1907 (Ann. St. 1907, sec. 5598 *et seq.*), which authorizes county commissioners to establish a drainage district so as to include land in an adjoining county, *held* not void. *State v. Fuller* 784

2. Boundaries of drainage districts established under ch. 153, laws 1907, may overlap. *State v. Fuller*..... 784

3. Boundaries of a proposed drainage district may be changed by the county commissioners at any time before rights of third persons have accrued, but, if changed, the three weeks' notice of election must be given. *State v. Fuller*..... 784

4. Where county commissioners change the boundaries of a proposed drainage district, but not the notice of election, a landowner who did not participate in the election may bring *quo warranto* to dissolve the district and oust its directors from office. *State v. Fuller* 784

Easements.

Answer *held* sufficient. *Frederick v. Buckminster*..... 135

Ejectment.

1. Judgment for defendant *held* not supported by the evidence. *Chicago, R. I. & P. R. Co. v. Latta*..... 104

Ejectment—*Concluded.*

2. In ejectment, if defendant denies plaintiff's title, he may prove any defense that will defeat the action. *Chicago, R. I. & P. R. Co. v. Welch* 106

Elections.

1. The provisions in sec. 155, 159, art. I, ch. 26, Comp. St. 1907, as to marks on ballots, *held* directory. *Gauvreau v. Van Patten* 64
2. Writing name of person for an office not designated on an official ballot *held* not to avoid the ballot, unless it was done to distinguish it. *Gauvreau v. Van Patten*..... 64
3. The district court *held* without jurisdiction of an original action to contest the nomination of a legislative candidate at a primary election. *Whedon v. Brown*..... 130
4. Change in polling place *held* not to render the election void. *Whitcomb v. Chase*..... 360
5. Where, on appeal to the district court in an election contest, the parties treat a transcript as sufficient and try the case on its merits, the jurisdiction of the district court cannot be questioned for the first time in the supreme court. *Whitcomb v. Chase* 360

Electricity.

Failure of electric light company to comply with certain ordinances *held* negligence rendering it liable to any person injured by reason thereof. *Olson v. Nebraska Telephone Co.* 735

Eminent Domain.

Notice to the owners of land condemned for park purposes, *held* sufficiently definite as to time and place of meeting of appraisers. *Shannon v. Bartholomew* 821

Estoppel.

Where a lessor has accepted the benefits of a lease made to a partnership, he cannot, in a suit for specific performance of a covenant to renew, plead that the partnership was without capacity to take title to real estate. *Gorder & Son v. Pankonin* 204

Evidence. See APPEAL AND ERROR, 1-8. TRIAL.

1. In an action for goods negligently destroyed, evidence of their market value based on the cost, *held* not incompetent, where the cost was less than the market value. *O'Brien Co. v. Omaha Water Co.* 71
2. Testimony at a former trial *held* inadmissible without showing of diligence to secure attendance of witness. *Vandewege v. Peter* 140

Evidence—*Concluded.*

3. An attorney who took part in a trial, but is unable to remember the substance of all the evidence of a witness, *held* incompetent to reproduce it. *Vandewege v. Peter*.... 140
4. Evidence of witness at former trial *held* admissible, where timely steps to secure his attendance by compulsory process have been taken. *Pike v. Hauptman* 172
5. An unacknowledged ancient document coming from doubtful custody may be rejected, where a credible witness testifies that obligor's signature is not genuine. *Peterson v. Bauer* 405
6. A letter may be introduced in evidence where it is shown that it was received in due course of mail in reply to a letter mailed to the writer. *Helwig v. Aulabaugh*..... 542
7. Where plaintiff was unable to secure the depositions or presence of witnesses, *held* not error to permit their testimony at a former trial to be read from bill of exceptions. *Souchek v. Karr* 649
8. In an action for damages to timber by fire, a witness may testify to the number of trees destroyed and their value before and after the fire. *Hart v. Chicago & N. W. R. Co*... 652
9. Where the intentions of an interested witness become a matter for judicial inquiry, they are ascertained by consideration of his conduct, and not by what he declares his intentions were. *Lewis v. McDonald*..... 694

Executors and Administrators.

1. Where objections are interposed in the county court to the allowance of a claim against a decedent's estate, the issues thus framed will be liberally construed in the district court. *Fitch v. Martin* 124
2. The adoption of a report of an administrator and findings thereon in a supplemental report, *held* to carry the whole accounting into the second report, and that an appeal to the district court from an order settling the final report brought up the whole record. *Etmund v. Etmund*..... 151
3. Where a partial transcript on appeal from the county court was filed in the district court within time, *held* not error to allow a portion of a transcript in the same case, formerly filed in the district court, to be made a part thereof. *Etmund v. Etmund* 151
4. The inventory filed by an executrix is not conclusive against her. *In re Estate of Fletcher*..... 156
5. An executrix will not be given credit in her account for money expended for her personal advantage concerning the estate. *In re Estate of Fletcher* 156

Executors and Administrators—*Continued.*

6. A widow is entitled, under subd. 1, sec. 176, ch. 23, Comp. St. 1905, to the chattels therein specified, and also to $200 in cash from her husband's estate, and such property is not assets of the estate. *In re Estate of Fletcher*..... 156
7. The maintenance of the widow and minor children of a testator pending settlement of his estate may be charged upon the real estate, if the income therefrom and the personal property be insufficient. *In re Estate of Fletcher*.... 156
8. Notice of application for an allowance to a widow, *held* not jurisdictional. *In re Estate of Fletcher*..... 156
9. An order granting a widow an allowance is appealable. *In re Estate of Fletcher* 156
10. The statute limiting the time within which the estates of decedents shall be settled, *held* not to control provisions of a will. *In re Estate of Fletcher*..... 156
11. Under sec. 5045, Ann. St. 1907, it is the duty of the county court to appoint a special administrator. *Estate of Keegan v. Welch* 166
12. A special administrator can be appointed without notice to heirs or devisees. *Estate of Keegan v. Welch*..... 166
13. A written promise fully performed, *held* to create a debt against the estate of the promisor, and that the writing was properly received in evidence. *Russell v. Estate of Close* 232
14. Appeal *held* to present to the district court only the question of an administrator's compensation, and not to bring up the entire account for review. *In re Estate of Wilson*.. 252
15. The court in its discretion can allow an administrator reasonable compensation for legal services performed by him. *In re Estate of Wilson*..... 252
16. Administrator *held* entitled to compensation for extraordinary services. *In re Estate of Wilson*..... 252
17. On appeal in the district court the claim of an administrator for compensation should be tried by the court. *In re Estate of Wilson* 252
18. An executor cannot hold devised lands in trust, unless the testator created in him a trust estate, or a trust is necessary to carry out his intentions. *In re Estate of Buerstetta*, 287
19. Evidence *held* insufficient to require reopening of executor's final accounts. *In re Estate of Greenwood*..... 429
20. Adult heirs, who received as part of their share of an estate money from an administrator's sale of real estate,

Executors and Administrators—*Concluded.*

cannot sue to set aside the sale on the ground that the land was a homestead. *Mote v. Kleen* 585

21. It is the duty of an executor, on giving a bond conditioned to pay debts and legacies, to surrender possession of property specifically devised to another. *In re Estate of Pope*.. 723

22. Where, on appeal to the district court, it is stipulated that no question will be raised as to whether a claim is a personal or official liability of an executor, the supreme court will not disturb a judgment allowing the claim, on the ground that an action should have been brought against the executor. *In re Estate of Pope*..... 723

Forcible Entry and Detainer.

1. In an action on a supersedeas bond in forcible entry and detainer, plaintiff cannot recover according to a lease for the preceding year, but only a reasonable rent. *Kendall v. Uland* 527

2. In an action on a supersedeas bond in forcible entry and detainer, evidence of tenant's reasons for refusing possession *held* irrelevant, and allegations with reference thereto properly stricken from the petition. *Kendall v. Uland*..... 527

3. In an action on a supersedeas bond in forcible entry and detainer, allegation concerning a lease for the preceding year *held* properly stricken from petition as an attempt to plead evidence, though the lease is admissible as evidence. *Kendall v. Uland* 527

Fraud.

1. In an action for fraud, an instruction that plaintiff must establish that a promise was made deceitfully with intent to defraud, *held* not to impose too great a burden on plaintiff. *Cerny v. Paxton & Gallagher Co*..... 88

2. In an action by mortgagor against mortgagee for the difference between the price at which the goods sold and their market value, on the ground that the mortgage was obtained by fraud, *held* not error to instruct the jury to consider the value of the stock if sold in bulk, and not at retail. *Cerny v. Paxton & Gallagher Co*..... 88

Fraudulent Conveyances.

Fraud is not presumed from the mere fact that an insolvent debtor assigns property or pays money to his attorney for services rendered or to be rendered. *Yeiser v. Broadwell*.. 302

Habeas Corpus.

Irregularities in proceedings before a justice committing a recusant witness cannot be reviewed upon habeas corpus. *In re Hammond* 636

Highways.

1. A public highway established under sec. 3, ch. 47, laws 1866, includes land to the full width required by the statute, and that the petition and order establishing the highway do not mention its width, *held* immaterial. *Taylor v. Austin*, 581
2. Neither petitioner for a highway nor his grantees can complain that notice of the time for presenting the petition to the county board was not given. *Taylor v. Austin*..... 581
3. A party cannot acquire prescriptive title to a public highway. *Taylor v. Austin*..... 581

Homestead.

1. A widow need not account to the estate of her husband for rents of the homestead accruing subsequent to his death. *In re Estate of Fletcher*..... 156
2. Mortgage on homestead *held* not the result of the free will and voluntary action of the wife. *Nebraska Central B. & L. Ass'n v. McCandless* 536
3. The sole deed of a married man conveying his homestead and other lands is void as to the homestead estate, but valid as to the other lands. *Wilson v. Wilson*..... 562
4. Where an oral agreement between parents and son, that when the parents died the son should have certain lands, was held valid except as to a homestead, which was afterwards conveyed to a daughter, *held* that the homestead should be appraised as of the date of the oral agreement. *Teske v. Dittberner* 701
5. The undivided half interest of a husband in lands owned by himself and wife as cotenants is subject to homestead exemption. *First Nat. Bank v. McClanahan*..... 706
6. Where a husband deserts his wife, leaving her in possession of homestead, she is entitled to it as it existed at the time of his desertion. *First Nat. Bank v. McClanahan*..... 706
7. Striking answer of wife to petition of judgment creditor under sec. 6 of the homestead act (Comp. St. 1907, ch. 36), *held* error. *First Nat. Bank v. McClanahan*..... 706
8. In a suit by a divorced woman to quiet title to the former homestead, *held* that the court may subject the property to her lien for alimony by canceling a void deed, where the pleadings and proof warrant such relief. *Kimmerly v. McMichael* 789
9. A mortgage on a homestead, neither signed nor acknowledged by the wife, is void. *Kimmerly v. McMichael*..... 789

Homicide. See CRIMINAL LAW.

Indictment and Information.

1. Where two or more counts are properly joined, and there is evidence tending to prove each, the state will not be required to elect on which it will rely. *Poston v. State*..... 240
2. Where an information contains three counts referring to the same transaction, defendant *held* not prejudiced if, before he introduces any evidence and as soon as brought to the court's attention, it compels the state to elect. *Lillie v. State* 268

Injunction. See NUISANCE, 3-6.

Insane Persons.

Evidence, in a suit by the guardian of an incompetent to set aside his ward's conveyances made before the guardian's appointment, *held* to sustain validity of the conveyances. *Gutru v. McVicker* 555

Insurance.

1. Where a benefit association has not complied with sec. 1, ch. 47, laws 1897, its governing body cannot adopt a constitution or by-law changing the terms of a certificate. *Johnson v. Bankers Union of the World* 48
2. Where the constitution and by-laws of a benefit association are changed, increasing the monthly assessments, *held* that the society, in settling with a beneficiary, may deduct the difference between the assessment in force when the certificate was issued and the increased rate from the time it went into effect until the member's death, but not for the remainder of his life expectancy. *Johnson v. Bankers Union of the World* 48
3. Where a beneficiary surrenders his policy under an agreement that the company will pay the full amount thereof or return it, and the company retains the policy, remitting only a portion of the amount, *held* the amount paid is a partial payment, and the beneficiary may sue for the remainder. *Bergeron v. Modern Brotherhood of America*.... 419
4. Filling in a receipt signed in blank on the back of a policy for less than the amount agreed to be paid thereon will not relieve an insurance company of its full liability under the agreement. *Bergeron v. Modern Brotherhood of America* 419
5. Where a policy was surrendered under an agreement that the company would pay or return it, *held* that retention of the policy was a ratification of the agreement, and a waiver of all defenses existing prior thereto. *Bergeron v. Modern Brotherhood of America*..... 419

Insurance—*Concluded.*

6. Statement in proof of loss as to cause of death of insured may be contradicted in an action on the policy, unless there is equitable estoppel. *Hart v. Knights of the Maccabees of the World* 423
7. A fraternal insurance company cannot have the benefit of by-laws and amendments thereto as a defense, unless certified copies thereof were filed with the auditor of public accounts. *Hart v. Knights of the Maccabees of the World*.. 423
8. The burden is on defendant to establish a plea of forfeiture based on false representations in an application for insurance. *Higgens v. Supreme Castle of the Highland Nobles* 504
9. Forfeiture of insurance policy will not be declared because of misstatements in application written by agent of the insurer, where the facts were truthfully stated by applicant. *Higgens v. Supreme Castle of the Highland Nobles*.. 504
10. Only those interested in an insurance contract can enforce it. *Stanisics v. Hartford Fire Ins. Co*..... 768
11. Beneficiary *held* proper party to sue for failure of insurer to issue policy. *Carter v. Bankers Life Ins. Co*..... 810
12. An action against a domestic insurance company may be brought in any county where the cause of action arose, and summons may issue and be served in any other county. *Carter v. Bankers Life Ins. Co*..... 810
13. Under the facts, *held* that a contract of insurance existed, though no policy was issued. *Carter v. Bankers Life Ins. Co.* 810
14. Where insurer refuses to issue a policy as required by the terms of an oral contract, an action for damages may be maintained by the beneficiary. *Carter v. Bankers Life Ins. Co.* 810
15. Sec. 15, ch. 52, laws 1903, requiring life insurance policies to be signed by certain officers, *held* to apply only to companies formed thereunder. *Carter v. Bankers Life Ins. Co*.. 810

Intoxicating Liquors. See APPEAL AND ERROR, 16, 28. CRIMINAL LAW, 11, 13.

1. A movable screen in a saloon which obstructs a view of the interior is a violation of sec. 7179, Ann. St. 1907. *Woods v. Varley* 19
   Woods v. Krivohlavek 22
2. One who during the previous year had obstructed his doors or windows by screens, *held* not a proper person to receive a liquor license. *Bolton v. Becker*..... 21

Intoxicating Liquors—*Continued.*

3. Where it is proved that applicant for a liquor license has within a year sold or given liquor to a minor, his application should be denied. *Williams v. Phillips* 105
4. A corporation may be licensed to sell intoxicating liquors at wholesale, but not at retail. *Rohrer v. Hastings Brewing Co.* 111
5. Under sec. 25, ch. 50, Comp. St. 1907, the signers of a petition for a liquor license must be *bona fide* freeholders. *Powell v. Morrill* 119
6. The wife of an applicant for a liquor license, though a freeholder, is not a qualified petitioner. *Powell v. Morrill*.. 119
7. In an action for damages under sec. 7168, Ann. St. 1907, it is sufficient to plead and prove that defendant sold or gave intoxicating liquors to the person from whose act the damage arose, at or about the time of the injuries. *Davis v. Borland* 281
8. In an action against liquor dealers for loss of support by death of a person, instruction as to length of time loss will continue *held* erroneous. *Davis v. Borland*..... 281
9. In an action by a wife against liquor dealers for nonsupport by her husband, *held* competent to introduce the Carlisle table of mortality to show his expectancy of life, where permanent impairment of earning capacity is shown. *Acken v. Tinglehoff* 296
10. In an action by a wife against liquor dealers for loss of support, she may prove that necessaries were furnished the family by the county and suffering of the family. *Acken v. Tinglehoff* 296
11. Liquors sold by defendant need not be the sole cause of an injury to permit a recovery. *Acken v. Tinglehoff*..... 296
12. In an action for damages against liquor dealers, where there is evidence to support the verdict, judgment will not be set aside as excessive. *Acken v. Tinglehoff*..... 296
13. In an action by a wife against liquor dealers, an instruction permitting the jury to consider permanent impairment from whatever cause, *held* not erroneous, where the uncontradicted evidence showed that it was caused solely by habitual drunkenness. *Acken v. Tinglehoff*..... 296
14. Rule 27 of the excise board of the city of Lincoln, authorizing a fine of over $200 for a violation of the excise rules, *held* valid to the extent of $200. *State v. Dudgeon*..... 371
15. Rules of the excise board of the city of Lincoln within its authority, duly adopted and published, are of like effect as city ordinances. *State v. Dudgeon* 371

Intoxicating Liquors—*Continued.*

16. Prosecution of a saloon-keeper for violation of ordinance forbidding him to keep open after 11 o'clock P. M. is a civil action and it is unnecessary to show guilty intent. *Pulver v. State* 446
17. The prohibition by secs. 11 and 20, ch. 50, Comp. St. 1907, of the sale or keeping for sale malt liquor without a license, *held* to apply to all malt liquors, whether intoxicating or not. *Luther v. State* 455
18. To sustain a conviction for selling or keeping for sale malt liquor, *held* that the state is not required to allege or prove that the liquor is intoxicating. *Luther v. State*..... 455
19. Liquor traffic in a city or village can only be carried on under city or village ordinances, but a general ordinance applicable to all cases, *held* sufficient. *Rosenberg v. Rohrer*, 469
20. The burden is on petitioner for liquor license to show that a sufficient number of the signers of his petition are freeholders. *Rosenberg v. Rohrer*..... 469
21. Signing petition for liquor license by councilman, *held* to disqualify him, and that the withdrawal of the petition and filing another without his signature did not remove the disqualification. *Rosenberg v. Rohrer*..... 469
22. Certificate of register of deeds that persons of the same names as those to a petition for liquor license were freeholders, *held* an insufficient identification of the parties. *Rosenberg v. Rohrer* 469
23. Certain deeds *held* incompetent to show that signers of petition for liquor license were freeholders at the time of signing. *Rosenberg v. Rohrer* 469
24. In an action against liquor dealers for loss of support, the wife may show that she was compelled to perform menial labor and to accept aid from the county. *Eastwood v. Klamm* 546
25. In an action against liquor dealers for loss of husband's support, evidence that "he is not able to work now like he did before he got his leg broke," *held* admissible. *Eastwood v. Klamm* 546
26. Under the statute (Comp. St., ch. 50), *held* that, in addition to loss of support, the wife may recover for medical attendance and funeral expenses. *Keeling v. Pommer*..... 510
27. A saloon keeper fined by police court for violation of city ordinance cannot appeal to the district court under sec. 324 of the criminal code. *State v. Brandt*..... 656
28. Power given to a board of fire and police commissioners by statute to license, regulate, or prohibit sale of liquors con-

Intoxicating Liquors—*Concluded.*

fers the right to revoke a license upon violation of any statute, city ordinance, or reasonable rule of the board. *State v. Hoctor* 690

29. A rule of the board of fire and police commissioners of South Omaha, providing that any city officer may complain of the violation of law by a licensee, does not prevent others from making complaint. *State v. Hoctor* 690

Judgment.

1. Where issue has not been joined nor trial had on the merits, the doctrine of *res judicata* does not apply. *Herpolsheimer v. Acme Harvester Co.*..... 53
2. The doctrine of *res judicata* stated. *Herpolsheimer v. Acme Harvester Co.* 53
3. A court cannot enter personal judgment against a nonresident constructively served, nor can any finding touching his personal liability operate as an estoppel in a personal action subsequently brought. *Gates v. Tebbetts*..... 573
4. Where a justice overrules an objection to jurisdiction of the person, error will lie, but the ruling cannot be assailed collaterally. *Bradley & Co. v. Matley*..... 589
5. In an action by brokers for commissions, judgment *held* not supported by the pleadings. *Duval v. Advance Thresher Co.* 593
6. Dismissal of creditor's suit because the judgment creditor was indebted to defendant in an amount greater than the judgment, *held* not to extinguish the judgment. *Lashmett v. Prall* 732
7. In a proceeding to revive a dormant judgment by motion, the judgment debtor cannot plead as a defense an independent cause of action. *Lashmett v. Prall*..... 732
8. In suit by heirs to cancel deed to S. and his mortgage to M., the question of indebtedness of S. to M. was not put in issue. *Held*, That a provision in the decree which sought to destroy the liability of S. to M. was void. *Jarmine v. Swanson* 751
9. To vacate a default judgment under section 606 of the code, defendant must present a meritorious defense. *Sloan v. Hallowell* 762
10. Where the ground of defendant's motion to vacate a default judgment is that the petition does not state a cause of action, it will be liberally construed. *Sloan v. Hallowell*..... 762
11. In equity the relief to which plaintiff is entitled may be granted pursuant to his general prayer, where defendants

Judgment—*Concluded.*

understand the issue and resist his allegations by evidence. *Kimmerly v. McMichael* 789

12. A judgment irregularly entered is not subject to collateral attack. *George v. Dill*..... 825

Landlord and Tenant.

Evidence *held* to sustain finding that a buyer purchased crops of a tenant without notice of a landlord's lien. *Shelley v. Tuckerman* 366

Larceny.

Instruction *held* defective and erroneous. *Emerson v. State*, 663

Licenses.

1. City charter *held* not to authorize city council to exact a license tax from persons the regulation of whose compensation is not permitted. *McCauley v. State*..... 431
2. Owner of wagons kept for hire to various firms under monthly contracts, *held* not the owner of vehicles used for pay, nor is his compensation subject to control by the city council under the Omaha charter. *McCauley v. State*..... 431

Mandamus.

Peremptory writ of mandamus to compel a carrier to furnish cars for a shipper *held* properly allowed. *State v. Chicago & N. W. R. Co*.....524

Marshaling Assets.

A marshaling of securities is allowable only where the common debtor of two or more creditors is the owner of several funds out of which payment is to be made. *Cooper Wagon & Buggy Co. v. Irvin*..... 832

Master and Servant.

1. A contract of employment may be proved by letters. *Helwig v. Aulabaugh* 542
2. Employee wrongfully discharged must make reasonable efforts to secure other employment. *Hellwig v. Aulabaugh*, 542
3. In an action by an employee for wrongful discharge, an undenied allegation of the petition, stating the amount he earned elsewhere, *held* to present no issue for the jury. *Helwig v. Aulabaugh* 542
4. Where a village so installs a gasoline tank that it leaks and causes an explosion in which an employee of the village is injured, whether the village was negligent, *held* question for the jury. *Reed v. Village of Syracuse*..... 713
5. Where an explosion of gasoline followed the lighting of a match by an employee, whether he was guilty of contribu-

Master and Servant—*Concluded.*

tory negligence, *held* question for the jury. *Reed v. Village of Syracuse* 713

6. The danger of an explosion of gasoline in the pumping pit of a village waterworks, of which an employee had no notice, *held* not an ordinary and obvious risk assumed by him. *Reed v. Village of Syracuse*..... 713
7. A water commissioner appointed under subd. 15, sec. 69, art. I, ch. 14, Comp. St. 1903, has general management of village waterworks, and the village owes to persons employed by him the duty to provide a reasonably safe place to work. *Reed v. Village of Syracuse*..... 713
8. Where defenses of assumption of risk and contributory negligence are relied on, *held* error to withdraw case from jury, unless such defenses are established by the clearest evidence. *Olson v. Nebraska Telephone Co*..... 735
9. A contract by which a master seeks to impose on his servant duties and obligations which the law imposes on the master, and to relieve himself from liability for negligence, *held* against public policy, and void. *Olson v. Nebraska Telephone Co.* 735

Monopolies.

1. An indictment for violation of sec. 1, art. II, ch. 91*a*, Comp. St. 1907, known as the "anti-trust law," must allege that the acts complained of were in restraint of trade within this state. *Howell v. State* 448
2. Instruction that certain article of the constitution of a coal dealers' association was in itself a violation of the anti-trust law, *held* erroneous. *Howell v. State*..... 448
3. Accused *held* a member of a coal exchange and liable to a criminal prosecution if the association were criminal. *Howell v. State* 448

Mortgages.

1. An action cannot be maintained on a renewal note while a decree on the original note and mortgage is in full force and effect. *Gibson v. Gutru* 718
2. In a suit to foreclose, where there was no issue of payment, plaintiff *held* entitled to decree for full amount of debt. *Toliver v. Stephenson* 747
3. Where a mortgage was given on the homestead owned by the wife and other lots owned by the husband, and a second mortgage on the husband's lots, on foreclosure of the mortgages, a decree requiring the first mortgagee to exhaust the husband's property before the homestead, *held* proper. *Cooper Wagon & Buggy Co. v. Irvin*..... 832

Municipal Corporations.

1. The power of a village to build a jail is implied from the power granted to enforce its ordinances by fine and imprisonment. *Dunkin v. Blust* 80
2. A village board will be restrained from proceeding with an expenditure without the making and publication of the estimate of expenses required by sec. 87, art. I, ch. 14, Comp. St. 1907. *Dunkin v. Blust* 80
3. The mayor in cities of the second class can cast the deciding vote on an application for a liquor license in case of a tie vote of the council. *Rohrer v. Hastings Brewing Co*.... 111
4. The mayor of a city has no power to suspend an ordinance which contains no provision in itself empowering him so to do. *Pulver v. State* 446
5. Act of March 10, 1871 (laws 1871, p. 125), conferring on county boards power to vacate streets within incorporated villages, was repealed by the act of March 1, 1879 (laws 1879, p. 193). *Van Buren v. Village of Elmwood*..... 596
6. Village warrants in excess of 85 per cent. of the current levy for the purpose for which drawn, unless there is sufficient money in the treasury to the credit of the proper fund for their payment, are void, and their payment will be enjoined at the suit of a resident taxpayer. *Ballard v. Cerney* 606
7. Sec. 8308, Ann. St. 1907, regulating the adoption of ordinances by the city of South Omaha, *held* not to apply to ordinances adopted by the board of fire and police commissioners. *State v. Hoctor* 690
8. In the absence of a statute prescribing a manner for adoption of ordinances by a board of fire and police commissioners, any reasonable mode is sufficient. *State v. Hoctor*.... 690
9. Park commissioners appointed by the mayor and city council of Omaha, *held* invested with all powers vested in park boards by the charter, and authorized to designate real estate for park purposes. *Shannon v. Bartholomew*..... 821
10. Appointment of appraisers of lands taken for park purposes *held* valid, under sec. 142 of the Omaha charter (Comp. St. 1905, ch. 12*a*). *Shannon v. Bartholomew*..... 821

Negligence.

1. Contributory negligence is a matter of defense, and need not be negatived in the petition. *O'Brien Co. v. Omaha Water Co.* 71
2. Where the facts as to negligence are such that reasonable

Negligence—*Concluded.*

minds can draw but one conclusion therefrom, the court should direct a verdict. *Davis v. Chicago, B. & Q. R. Co.*... 611

3. The question of negligence is for the court where there is no conflict in the evidence. *Olson v. Nebraska Telephone Co.*. 735

New Trial. See CRIMINAL LAW, 4, 18, 21, 22, 30-32.

1. In an action against three liquor dealers for loss of support, a verdict against two of the defendants and in favor of the third, *held* not alone sufficient to establish that the jury were governed by partiality or prejudice. *Eastwood v. Klamm* 546

2. A new trial will not be granted for misconduct of jury, where it was known and not called to the court's attention before verdict. *Shepherdson v. Clopine*..... 764

3. A party *held* not entitled to a new trial for surprise occasioned by evidence, where he could have procured evidence to refute it by securing a short continuance, but does not request it. *Remington Typewriter Co. v. Simpson*..... 848

Nuisance.

1. It is essential to the right of an individual to enjoin a public nuisance that he should show special injury. *Woods v. Lincoln Traction Co.* 23
Ayers v. Citizens R. Co. 26

2. A village jail properly constructed and suitably situated is not *per se* a nuisance. *Dunkin v. Blust*..... 80

3. The right to restrain an adjoining owner from using his property as a bawdyhouse is a right belonging to the land, and that the property was so used before plaintiff purchased is no defense. *Seifert v. Dillon* 322

4. The right of an adjoining owner to restrain illegal use of property as a bawdyhouse is unaffected by lapse of time. *Seifert v. Dillon* 322

5. That municipal authorities tolerate the maintenance of a bawdyhouse constitutes no defense to a suit by a nearby owner to enjoin such maintenance where special damages are shown. *Seifert v. Dillon* 322

6. Nearby owner *held* to sustain special injury from use of premises as a bawdyhouse. *Seifert v. Dillon*..... 322

Partnership.

Though the sale of partner's interest to a stranger does not make him a member of the firm, the members may agree to admit him. *Gorder & Son v. Pankonin*..... 204

Payment.

Where purchaser of a note gave an ordinary bank draft therefor, payment was complete when the draft passed beyond the buyer's control. *First State Bank v. Borchers*.... 530

Physicians and Surgeons.

Ch. 97, laws 1905, providing for the examination and licensing of veterinary surgeons, *held* constitutional. *In re Barnes*, 443

Pleading. See APPEAL AND ERROR, 30, 38. DAMAGES, 1. FORCIBLE ENTRY AND DETAINER, 2, 3. SPECIFIC PERFORMANCE, 12.

1. A plea of general settlement and payment of all claims, *held* not inconsistent with a general denial. *Fitch v. Martin*, 124
2. Where the sufficiency of a pleading is not questioned by demurrer or otherwise, and a trial is had on the theory that it tenders a certain issue, if it can be construed to raise such issue, it will be held to do so. *Frederick v. Buckminster* 135
3. Where a party answers after an adverse ruling on his motion or demurrer, and goes to trial, he waives any error in such ruling. *Worrall Grain Co. v. Johnson*..... 349
4. Reply in suit to quiet title *held* not to introduce a new cause of action. *Miner v. Morgan* 400
5. A defendant who submits his defense on issues raised by the reply waives the objection that it introduces a new cause of action. *Miner v. Morgan*..... 400
6. Allowance of amendment to reply after the case was submitted, *held* not an abuse of discretion. *Higgens v. Supreme Castle of the Highland Nobles*..... 504
7. Overruling motion to require plaintiff to set out in full a copy of application for insurance, *held* without prejudice, where it is shown that defendant has the missing portion. *Higgens v. Supreme Castle of the Highland Nobles*..... 504
8. A petition in equity not attacked before decree will be liberally construed. *Kimmerly v. McMichael*..... 789
9. Overruling motion to amend petition to redeem from a tax sale so as to correctly describe the land, *held* error. *Banchor v. Lowe* 801

Principal and Agent.

1. An agent for the sale of farm machinery and twine, *held* to have power to bind his principal by a certain agreement. *Herpolsheimer v. Acme Harvester Co.* 53
2. A creditor asking one partner to consult with his copartner does not thereby make him his agent, and he is not bound by his statements. *Cerny v. Paxton & Gallagher Co*... 88
3. Agent and principal *held* jointly liable for agent's misrepresentations. *Willard v. Key*..... 859

Principal and Surety.

1. The rule that a discharge of the principal releases the surety does not apply where one becomes surety for a person incapable of contracting. *Gates v. Tebbetts*..... 573
2. A surety on a contract is not released because plaintiff in an action thereon fails to inform the court that another party is the principal. *Gates v. Tebbetts*..... 573

Public Lands.

1. Under act of congress of March 3, 1875 (18 U. S. St. at Large, ch. 152), any party entering public lands over which a railroad survey has been extended, after approved map was filed in the district land office, took the land subject to the railroad right of way. *Moran v. Chicago, B. & Q. R. Co.* 680
2. That the profile of survey of railroad right of way was sent directly to the secretary of the interior, instead of being transmitted through the district land office, *held* immaterial. *Moran v. Chicago, B. & Q. R. Co*..... 680

Quieting Title.

In a suit to quiet title, certain deed *held* to convey a title paramount to liens of attachments subsequently levied. *Mahoney v. Salsbury* 488

Railroads. See WATERS, 9-11.

1. Railroad company *held* not required to inclose its right of way where it would increase danger to human life. *Burnham v. Chicago, B. & Q. R. Co*..... 183
2. Where it plainly appeared that the safety of the employees of a railroad company required that its right of way remain uninclosed, the court should withdraw the question from the jury. *Burnham v. Chicago, B. & Q. R. Co*..... 183
3. Contributory negligence *held* to preclude a recovery, though the railroad was not fenced as required by law. *Smith v. Union P. R. Co*..... 198
4. The occupier of premises owes no duty to a licensee as long as he inflicts no wanton or wilful injury upon him. *Shults v. Chicago, B. & Q. R. Co*..... 272
5. In an action against a railroad company for killing horses, an instruction as to proof requisite to a recovery *held* not prejudicial. *Fee v. Chicago, B. & Q. R. Co*..... 307
6. A lessee of the owner and builder of a railroad is charged in law with notice of inadequate construction of a watercourse, and liable for resulting damage. *Smith v. Chicago, B. & Q. R. Co*..... 387

Railroads—*Concluded.*

7. Instructions in action for death *held* to have properly submitted the issues. *Wally v. Union P. R. Co*..... 658
8. Evidence in action for death *held* to sustain verdict for plaintiff. *Wally v. Union P. R. Co*..... 658
9. The use for agricultural purposes of the right of way of a railroad is not adverse to the enjoyment of the easement. *Moran v. Chicago, B. & Q. R. Co*..... 680

Rape.

1. Evidence *held* insufficient to sustain conviction. *Mott v. State* 226
2. The uncorroborated evidence of complaining witness *held* insufficient to sustain conviction. *Mott v. State*..... 226

Receivers.

Where a note payable to a corporation is really owned by a third party, a receiver for the corporation may indorse it to the real owner. *Gibson v. Gutru*..... 718

Religious Societies.

1. Members of a church, having no title to its property except as members thereof, may be enjoined from using the property contrary to the determination of its governing authorities. *St. Vincent's Parish v. Murphy*..... 630
2. Decrees of governing authority as to church government are binding on local associations, and courts will not ordinarily review them. *St. Vincent's Parish v. Murphy*..... 630

Replevin.

Where an officer seizes property in attachment, and is sued in replevin by a stranger, he need not prove the attaching creditor's debt, unless the property was taken from the stranger. *Curtis-Baum Co. v. Lang*..... 728

Robbery. See CRIMINAL LAW.

Evidence *held* to sustain verdict of robbery from the person. *Foster v. State* 264

Sales.

1. Evidence in an action for price of harvester twine, *held* to sustain verdict for plaintiffs. *Herpolsheimer v. Acme Harvester Co.* 53
2. Evidence, in an action to recover the difference between the sum advanced on wheat and what it sold for, *held* to support verdict for plaintiff. *Worrall Grain Co. v. Johnson* 349
3. In an action for breach of warranty that a horse was sound, *held* that the variance between the pleading and proof was not such as to require a reversal. *McCullough v. Dunn*.... 591

Sales—*Concluded.*

4. In an action for breach of warranty of a horse, evidence of a witness that a certain horse was diseased *held* admissible; the horse being identified by other witnesses. *McCullough v. Dunn* 591
5. Transaction *held* not to constitute a conditional sale or lease under sec. 26, ch. 32, Comp. St. 1907. *Singer Sewing Machine Co. v. Omaha Umbrella Mfg. Co* 619

Specific Performance.

1. Specific performance will not be enforced unless the court can clearly see on what proposition the minds of the parties met. *Stanton v. Driffkorn* 36
2. Specific performance will not be enforced unless the contract was entered into with perfect fairness. *Stanton v. Driffkorn* 36
3. Evidence *held* insufficient to establish a claim for specific performance. *Stanton v. Driffkorn* 36
4. Specific performance of a contract between the sole devisee and her children, whereby most of the property is to be distributed among the children in consideration of the dismissal of objections to the probate of the will, will not be enforced unless evidence of the contract is clear; and no presumptions will be indulged in its favor. *In re Estate of Panko* 145
5. In a suit by a partnership for specific performance of a covenant to renew a lease, *held* immaterial that at certain times during the first term other persons held an interest in the partnership. *Gorder & Son v. Pankonin* 204
6. Description in a lease which is acted on, *held* sufficiently definite to entitle plaintiff to specific performance of covenant to renew. *Gorder & Son v. Pankonin* 204
7. One is not confined to an action for damages for refusal to fulfil a covenant to renew a lease, but may enforce specific performance of the covenant. *Gorder & Son v. Pankonin* 204
8. An oral contract to adopt a child and will her property may be enforced in equity. *Peterson v. Bauer* 405
9. In a suit for specific performance of an oral contract with testator to adopt a child and will her property, certain statements of testator *held* admissible. *Peterson v. Bauer* .. 405
10. In a suit to enforce an oral contract to adopt a child and will her property, evidence *held* to show performance by the child. *Peterson v. Bauer* 405
11. Whether an oral contract to devise realty shall be specifi-

Specific Performance—*Concluded.*

cally enforced after performance by one party depends upon the facts of each case. *Peterson v. Bauer*..... 405

12. In suit for specific performance, sustaining general demurrer to answer, *held* error. *Benedict v. Minton*..... 782

Statute of Frauds.

1. Written memorandum of sale of lot *held* insufficient under the statute of frauds. *McCarn v. London*..... 201
2. Where by agreement between partners a new member is admitted, he acquires an interest in the partnership property by operation of law; and such transfer is not within the statue of frauds. *Gorder & Son v. Pankonin*..... 204
3. Contract of insurance in suit *held* not obnoxious to statute of frauds. *Carter v. Bankers Life Ins. Co*..... 810

Statutes.

1. Statutes with reference to general taxes are liberally construed. *State v. Several Parcels of Land*..... 13
2. Ch. 82, laws 1907, which prohibits corporations from being interested in retail liquor traffic, *held in pari materia* with the Slocumb law (Comp. St. 1907, ch. 50). *Rohrer v. Hastings Brewing Co.* 111
3. Statutes *in pari materia* must be construed together. *Rohrer v. Hastings Brewing Co.* 111
4. Long-continued practical construction of a statute *held* entitled to considerable weight in interpreting it. *Rohrer v. Hastings Brewing Co.* 111

Street Railways.

1. A street railway company *held* guilty of negligence if it fails to give warning of the approach of its cars at a public crossing, or if it operates them at an excessive speed. *Stewart v. Omaha & C. B. Street R. Co*..... 97
2. A pedestrian about to cross tracks of a street railway at a public crossing *held* not bound to observe the same degree of care as in crossing steam railway tracks. *Stewart v. Omaha & C. B. Street R. Co*..... 97
3. Whether plaintiff was guilty of contributory negligence in crossing a street car track *held* question for jury. *Stewart v. Omaha & C. B. Street R. Co*..... 97

Taxation. See CONSTITUTIONAL LAW, 1, 2. PLEADING, 9.

1. Certain assessment *held* valid. *Chicago House Wrecking Co. v. City of Omaha*..... 179
2. Sec. 3, art. IX of the constitution, giving to the owner or persons interested in real estate two years to redeem from

Taxation—*Concluded.*

tax sale, applies to judicial as well as administrative sales. *Smith v. Carnahan* 667

3. Where a county, without an administrative sale, forecloses a tax lien and obtains a decree, a sale thereunder is a judicial sale not final until confirmation, and the owner has two years thereafter to redeem. *Smith v. Carnahan*.. 667

4. An order of confirmation of tax sale which does not expressly deny right of redemption will not be so construed. *Smith v. Carnahan* 667

5. On redeeming from such a judicial sale, the owner should pay the full amount of taxes and costs and 12 per cent. interest. *Smith v. Carnahan* 667

6. A purchase at tax foreclosure sale by one whose duty it was to pay the taxes operates as payment only. *Toliver v. Stephenson* 747

7. Duty of mortgagor to pay taxes follows the title, and his grantee cannot purchase at a tax foreclosure sale and defeat the mortgage. *Toliver v. Stephenson*..... 747

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 1, 5. CRIMINAL LAW.

1. An error of 10 cents in computing interest, not called to the attention of the court and jury, *held* waived. *Nichols & Shepard Co. v. Steinkraus* 1

2. Instructions based upon the issues and evidence, if reflecting them correctly, are not erroneous. *Nichols & Shepard Co. v. Steinkraus* 1

3. An instruction broader than the pleadings *held* not erroneous; it being in harmony with the theory upon which both parties tried the case. *Herpolsheimer v. Acme Harvester Co.* 53

4. Requested instruction, the substance of which has been given, *held* properly refused. *O'Brien Co. v. Omaha Water Co.* 71

5. Where there is no evidence of contributory negligence, instructions submitting that question *held* properly refused. *O'Brien Co. v. Omaha Water Co*..... 71

6. It is not error to reject an offer of proof not within the limits of the question on which the offer is based. *Pike v. Hauptman* 172

7. Instructions should be construed as a whole. *Morris v. Miller* 218

8. Where there is competent evidence to establish all of the elements necessary to a recovery by plaintiff, *held* not error

Trial—*Concluded.*

to refuse to direct a verdict for defendant. *Russell v. Estate of Close* 232

9. An instruction to find for defendant if certain facts are proved, *held* not equivalent to a direction to find for plaintiff if any of the facts are not proved. *Fee v. Chicago, B. & Q. R. Co.* 307
10. Instruction neither within the pleadings nor the evidence *held* properly refused. *Boesen v. Omaha Street R. Co.*..... 378
11. Instructions should be considered together. *Boesen v. Omaha Street R. Co.* 378
12. A litigant may waive his right to have an issue submitted to the jury. *Helwig v. Aulabaugh* 542
13. Instruction as to measure of damages in an action for assault and battery *held* not prejudicial. *Fink v. Busch*..... 599
14. It is not error to refuse to submit a defense which is unsupported by evidence. *Fink v. Busch*..... 599
15. In action on note, under the uncontradicted evidence, *held* that the court properly directed a verdict for plaintiff. *Second Nat. Bank v. Snoqualmie Trust Co*..... 645
16. It is not error to refuse an instruction that singles out a witness and informs the jury that she is competent to testify upon a given subject. *Souchek v. Karr*..... 649
17. On appeal to district court, *held* error for counsel or the court to inform the jury of the result of the trial in the lower court, and also error for the court to reprimand opposing counsel for objecting to such conduct. *Adams v. Fisher* 686
18. An instruction submitting issue regarding which there is no evidence, *held* erroneous. *Quinby v. Union P. R. Co*..... 777
19. An instruction which assumed to determine all the issues, *held* not erroneous because it excluded certain defenses not supported by evidence, or which were covered by other instructions. *Hinton v. Atchison & N. R. Co*..... 835

Vendor and Purchaser.

1. Where a grantee failed to record his deed, a subsequent grantee *held* protected in his title. *Chicago, R. I. & P. R. Co. v. Welch* 106, 110
2. Provision in contract for sale of land *held* to make time of the essence of the contract. *Cadwell v. Smith*..... 567
3. A public road on the margin of land *held* not such an incumbrance as will exempt the purchaser from payment for the land included therein. *Killen v. Funk*..... 622

Waters.

1. Whether the leaky condition of a hydrant indicated the defect which culminated in its bursting, *held* question for jury. *O'Brien Co. v. Omaha Water Co*..... 71

2. In an action against a water company for flooding a cellar by the bursting of a hydrant, instructions *held* not erroneous as telling the jury that, if the hydrant was in a leaky condition, it was defective, and that the leaky condition was evidence of the defect. *O'Brien Co. v. Omaha Water Co.* 71

3. Railway company *held* bound to know that damage might result from an inadequate artificial watercourse. *Smith v. Chicago, B. & Q. R. Co*..... 387

4. Plaintiffs *held* entitled to restrain defendants from cutting off the city water from their hotel on payment of rentals based on an approximate estimate of amount used. *Hoover v. Deffenbaugh* 476

5. Water rentals demanded by a city against hotel owners *held* unreasonable. *Hoover v. Deffenbaugh*..... 476

6. One who has not acquired right of way for an irrigation canal over the public lands prior to homestead entry must arrange for such right with the entryman or proceed to appropriate the land. *Rasmussen v. Blust*..... 678

7. Construction of irrigation canal through the public lands without consent of the government or a right of way from a homestead entryman, who allows the land to revert to the government, gives the proprietor of the canal no claim to the land against a subsequent entryman. *Rasmussen v. Blust* 678

8. Equity will not protect upper riparian owners in maintaining a dam constructed without lawful authority, and, where the evidence is conflicting as to whether a lower owner is damaged, he will be relegated to an action at law. *Radford v. Wood* 773

9. In an action for damages for the negligent damming of flood waters, certain evidence *held* admissible. *Hinton v. Atchison & N. R. Co.* 835

10. A railroad company is required to build sufficient bridges or culverts in an embankment across a valley to permit the passage of such flood waters as might reasonably be expected. *Hinton v. Atchison & N. R. Co.* 835

11. In an action against a railroad company for damages caused by flood waters, certain evidence *held* properly excluded. *Hinton v. Atchison & N. R. Co*..... 835

Wills.

1. Unless reserved, standing crops pass by deed or devise. *In re Estate of Andersen*..... 8
2. In construing a will, courts will consider it in its entirety. *In re Estate of Buerstetta*..... 287
3. In a will contest, evidence *held* to support finding that testator was of unsound mind. *In re Estate of Frederick*.. 318
4. Where the district court by decree fixed the amount testator's widow should receive for maintenance under his will, *held* that the legal effect was the same as though that sum had been written in the will, and that she should receive it from the date of testator's death. *Smullin v. Wharton* 328
5. Where the only way of fixing the amount the widow should receive for maintenance under a will was by a suit, the same not having been previously ascertained, the taxable costs should be charged to the estate, and not against her personally. *Smullin v. Wharton* 328
6. Where, after contest, a will is admitted to probate, the reasonable attorneys' fees and expenses of testator's widow in defending the will should be charged to the estate devised and bequeathed. *Smullin v. Wharton*.....328, 346
7. Interest on allowance for support disallowed. *Smullin v. Wharton* 328, 346
8. Widow *held* entitled to maintenance from the trust estate. *Smullin v. Wharton* 346
9. Unless reserved, standing crops pass to the devisee. *In re Estate of Pope* 723
10. Where land is let and rent reserved in a share of the crops, the title to the land and to the landlord's share of the crops pass by his devise of the land. *In re Estate of Pope*..... 723

Witnesses.

1. Where a party testifies to conversations between himself and his attorney they cease to be privileged. *Cerny v. Paxton & Gallagher Co*..... 88
2. A witness who testifies that an applicant for a liquor license is of respectable character may be cross-examined concerning specific unlawful acts of the applicant. *Powell v. Morrill* 119
3. It is not proper to interrogate a claimant against a decedent's estate on the assumption that his services were performed for the deceased. *Fitch v. Martin*..... 124
4. Where a claimant against a decedent's estate was cross-examined concerning certain entries in a diary, the admis-

Witnesses—*Concluded.*

sion in evidence of entries in the diary relating to other transactions with decedent, *held* error. *Fitch v. Martin*... 124

5. Evidence in disbarment proceedings *held* not to divulge any privileged communications. *In re Watson*..... 211

6. Where defendants introduced a part of plaintiff's evidence relating to a transaction between her and the deceased, *held* that they thereby waived the protection afforded the estate by sec. 329 of the code. *Russell v. Estate of Close*.. 232

7. Cross-examination should be restricted to matters covered by the examination in chief. *Callahan v. State*..... 246

8. A party claiming title under a deed made by a deceased person is incompetent to prove delivery. *Wilson v. Wilson*, 562