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CLINTON J. ANDERSON, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,272.

1. **Carriers: DISCRIMINATION: STATUTORY PROVISIONS.** Article V, ch. 72, Comp. St. 1909, was enacted for the purpose of preventing unjust and unlawful discrimination by common carriers, and section 1*a* of that article, in order to accomplish that purpose, provides a reasonable method of preserving written evidence of the fact that cars were ordered by the shipper for the transportation of his live stock, the date of his order, and the time when the cars were to be furnished.

2. ———: ———: **EVIDENCE.** Where, in an action for damages for an unlawful discrimination by the failure or refusal of the carrier to furnish cars for the transportation of live stock, it appears that the shipper has made a written order therefor in the book which the law provides shall be kept for that purpose, his proof as to the date of his order and the time when the cars were to be furnished to him should ordinarily be confined to his written order.

3. ———: **ALTERATION OF INSTRUMENTS: BURDEN OF PROOF.** Where it is claimed that the order was changed or altered after it was signed by the shipper, the burden of proving that fact is on the one who asserts it.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed in part and reversed in part.*

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

*N. D. Jackson* and *C. H. Kelsey, contra.*

BARNES, J.

Action to recover damages for delay in the transportation of live stock and for an alleged unlawful discrimination. The plaintiff had the verdict and judgment, and the defendant has appealed.

The petition in the trial court contained three counts or causes of action. The first two counts were for delays in transportation, and it is contended by the defendant that the district court erred in allowing the jury to consider the time the stock was in defendant's yard awaiting shipment as a part of the delay. We think the record fails to support this contention. The evidence seems to cover only the delay which occurred after the stock was loaded in the defendant's cars for shipment, and before they reached the market in South Omaha, with its consequent effect upon the condition of the cattle and their market value. The record contains competent evidence which seems to sustain the verdicts rendered upon those counts and the judgment entered thereon. We are therefore of opinion that to that extent the judgment of the district court should be affirmed.

As to plaintiff's third cause of action, a more serious question arises. That cause is based on an alleged unlawful discrimination against the plaintiff, and it is stated, in substance, in the petition, that on the 2d day of October, 1907, the plaintiff was the owner of and had in his possession 233 head of cattle at Cody, Nebraska, which he desired to immediately ship over its line of railroad to the market in South Omaha, Nebraska; that for that purpose he orally requested the defendant to furnish him six cars; that the defendant failed and refused to furnish such cars or any part thereof; that again on the 14th day of October, 1907, he requested and demanded of defendant that the cars for the transportation of his said stock be immediately furnished; that the defendant failed and refused to furnish such cars or any part thereof until the 28th day of October, 1907; that the defendant was at all times from and between the 2d day of October, 1907, and the 28th day of October, 1907, possessed of suitable and sufficient equipment for the transportation of such stock; that on the said 2d day of October, 1907, and from that date continuously until the 28th day of October, 1907, the defendant unlawfully and unduly discriminated against the plaintiff by

furnishing cars daily to divers other shippers of live stock, whose names the plaintiff is now unable to state; that on the 28th day of October, 1907, the defendant furnished the plaintiff with cars for transportation of his stock, and that plaintiff immediately delivered said cattle to the defendant for transportation to South Omaha, Nebraska; that defendant delivered said cattle to the plaintiff at South Omaha, Nebraska, on the 29th day of October, 1907; that the net weight of the plaintiff's said cattle delivered at South Omaha, Nebraska, by the defendant as aforesaid was 134,000 pounds; that the market price of cattle, such as the ones shipped by plaintiff as aforesaid, and the price received by the plaintiff, was on the 29th day of October, 1907, 75 cents per hundred pounds lower than the price paid for such cattle on the date which said cattle would have been in the market at South Omaha had defendant complied with the request of the plaintiff and furnished cars at the dates on which the plaintiff requested and demanded the same; that, by reason of the failure and refusal of the defendant to furnish the cars aforesaid, the plaintiff sustained damages in the sum of $1,005, for which sum, with interest from October 29, 1907, he prayed judgment.

The defendant, by its answer, denied the foregoing allegations, and alleged as a further and separate defense thereto that the only order for cars for the shipment of the cattle in question made by the plaintiff was on the 14th day of October, 1907, at which time he made and signed an order on the book kept by the defendant company at Cody, Nebraska, whereby he ordered seven cars for shipment of the cattle in question on the 27th day of October, 1907; that the cars were furnished at the time ordered, and that said order was the only one ever given as required by law, and that any and all oral requests or conversations were merged and therein superseded and countermanded. To the defendant's answer there was a reply denying each and every allegation therein contained.

It appears from the record that the cause was tried as one for an unlawful discrimination, and it seems to be conceded that that was the nature of the plaintiff's third cause of action. Upon the trial the plaintiff was permitted to testify, over the defendant's objections, that he orally ordered the cars for the shipment of the stock in question on the 2d day of October, 1907; and that he again orally ordered said cars on the 14th day of October, 1907. After the plaintiff had produced his evidence, the defendant was permitted to introduce as a part of its defense an entry in the book described in its answer, which was kept for use at its station in Cody, Nebraska, in accordance with the provisions of section 10555, Ann. St. 1909, which reads as follows: "All shippers of grain, live stock and all other freight in car-load lots, whether as individuals shipping their own grain, freight, or as persons, firms, corporations or associations engaged in the general business of buying and shipping as aforesaid, shall enter written application for cars in a book kept for that purpose subject to public inspection by the station agent nearest to the point at which cars are wanted, or any other person in charge of the railroad company's business at a shipping point, stating the number of cars desired, when desired, and for what class of freight cars are to be used, and what point of the railroad line such cars are wanted, the same being some place at which the railroad company usually leaves cars to be loaded and unloaded, and also the destination of such cars, who shall keep a book for said purpose open for the inspection of the public." This order the plaintiff admitted he had signed; and it conclusively shows that on the 14th day of October, 1907, the plaintiff made a written order for the cars in question which were to be furnished to him on the 27th day of that month.

It appears, without dispute, that the cars were furnished to him at Cody, at the time named in the order, and that he drove his cattle from the ranch on that day and placed them in the defendant's yards for shipment on the following morning. It further appears that, in order to

avoid the effect of the written order above mentioned, the plaintiff testified that he did not know what it contained, and that, so far as he knew, it might have been changed after it was signed by him. On the other hand, the defendant's agent at Cody testified that he had no recollection of the plaintiff's having given him an oral order for the cars mentioned in the written order; that the order was in the same condition as it was at the time it was signed by the plaintiff; that he filled out the order in the presence of the plaintiff, turned the book around to him, and the plaintiff signed it; that the book was one kept in the office of the railroad company at Cody in accordance with the provisions of the statutes, and that no cars were furnished to any one at his station except such as were ordered in writing upon that book, and that no discrimination had been practiced against the plaintiff. There was no allegation in plaintiff's reply that the book had been changed or altered in any manner, and, notwithstanding the foregoing facts, the court instructed the jury as follows: "You are instructed that the burden of proving the written order for cars alleged to have been signed by the plaintiff on October 14, 1907, is on the defendant, and before you would be justified in finding that such written order superseded a prior order, a fair preponderance of the evidence must show that plaintiff signed such written order *in the form in which it was introduced in evidence.*" The court thereby placed the burden of proof upon the defendant to show that the order had not been changed or altered after it was signed by the plaintiff. This is one of the grounds of error assigned by the defendant.

The record discloses that the written order in question bears upon its face no evidence of any change or alteration whatsoever; and, the plaintiff having admitted that he signed it, the burden of proving that it had been changed or altered after he had appended his signature thereto was upon him according to the well-settled rule which has been adopted in this state. *McClintock v. State Bank*, 52 Neb.

130; *Dorsey v. Conrad,* 49 Neb. 443; *Colby v. Foxworthy,* 80 Neb. 239.

The giving of an instruction which places the burden of proof upon the wrong party is reversible error. *Anderson v. Kannow,* 3 Neb. (Unof.) 686.

Defendant further contends that the court erred in giving instruction 9 upon his own motion. By that instruction the plaintiff was allowed to recover on his alleged oral order for cars, and without regard to his written order which superseded his oral order, if any, to wit, the alleged order of October 2. The jury were told, in substance, that the only question in relation to the third cause of action was whether or not the plaintiff had requested the cars on October 2, and they had not been furnished until October 27. It is contended that by this instruction the trial court ignored and practically nullified the provisions of article V, ch. 72, Comp. St. 1909, relating to rates and unjust discriminations, which contains the section of the statutes above quoted. It is argued that the statute in question is mandatory; that it should be construed to be mandatory and conclusive in order to accomplish the object intended by the legislature. The statute requires that the book described therein shall be kept open for public inspection in order that shippers may have ready access to the evidence as to the cars ordered, to consult the same as to the probabilities of receiving cars, and to prevent any claim on the part of the railroad company that it had oral orders antedating the written orders given by shippers. It seems clear that if this statute is held to be directory or permissive, and not mandatory and exclusive, then the door is still open by which a railroad company may claim that, while the book required by the statute to be kept did not show any prior orders, yet it had oral orders, made days and weeks in advance, which it was required to fill in advance of the orders entered upon the book and signed by the shippers. Before the passage of the act in question, frequent controversies arose between the shippers and the carriers as to when the cars were

ordered and when desired by a shipper. In order to prevent controversies of this kind, the legislature provided, among other things, that the shipper shall enter his written order in this book, kept according to the statutory provisions, and that when the order is thus entered it shall be the duty of the railroad company to supply all cars so applied for in the order of application. It would seem therefore that the entry of the order upon the book kept by the railroad company was a prerequisite—a condition precedent to the right to maintain an action for damages for unlawful discrimination in furnishing cars for the shipment of live stock. This is a reasonable regulation and a proper and necessary mode of procedure to lay the foundation for an award for damages upon the ground of unjust and illegal discrimination. This statute imposes no hardship upon the shipper and is fair both to him and the railroad company, and, if enforced, it will obviate disputes between shippers and carriers and prevent discriminations in favor of one shipper and against another.

In construing a statute like the one in question, the supreme court of the United States in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, said: "While repeals by implication are not favored and a statute will not be construed as abrogating an existing common law remedy, it will be so construed if such pre-existing right is so repugnant to it as to deprive it of its efficacy and render its provisions nugatory."

In *District Township of the City of Dubuque v. City of Dubuque*, 7 Ia. 262, 276, it is said: "Affirmative words may, and often do, imply a negative of what is not affirmed, as strongly as if expressed. So, also, if by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise. Affirmative expressions that introduce a new rule imply a negative of all that is not within the purview."

It may be said, however, that as the statute in question

does not abrogate the plaintiff's right to maintain a common law action for unjust discrimination, such right of action still remains, but it is competent for the legislature to require shippers, in order to lay the proper foundation for the maintenance of such an action, to make written instead of oral orders for such cars as they may need in the shipment of live stock. We are therefore of opinion that the method pointed out by the statute is exclusive. To hold otherwise would be to render the statute unavailing and in effect nullify its provisions.

It was suggested upon the oral argument, and is tentatively stated in plaintiff's brief, that the action was simply one for damages based on the failure of defendant to furnish cars to the plaintiff within a reasonable time, and not one for unlawful discrimination. If this were true it would not avail the plaintiff, for the record discloses that the defendant upon the trial offered competent evidence to show that, owing to the unprecedented demand for cars for the shipment of live stock during the month of October, 1907, it was absolutely unable to furnish the cars desired by the plaintiff before the 27th day of that month. It offered to show the extent of its equipment for stock shipping purposes in the year 1906, together with the number of cars shipped over its line of road, upon which the station of Cody is situated, for that year. It offered to show the number of cars of live stock actually shipped over that division of its road during the month of October, 1907. It also offered evidence to show that its increase in equipment had more than kept pace with any demand that within reason might have been expected for that year. It offered evidence of the number of cars of live stock shipped over that division of its road in the month of October, 1908, and the evidence thus offered showed conclusively that the number of such cars transported in October, 1907, exceeded by 670 the number transported either in the month of October, 1906, or 1908. In fact the evidence thus offered and excluded, over defendant's exceptions, if believed by the jury, would have been a complete defense

to that kind of an action. The exclusion of this evidence was reversible error, and therefore from any point of view the judgment of the district court as to that cause of action must be reversed.

The record discloses that by their verdict the jury found and returned a separate amount as to each cause of action and the court rendered judgment accordingly. This enables us to affirm the judgment of the district court as to plaintiff's first and second causes of action and reverse it as to the third cause of action, which is accordingly done, and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

JUDGMENT ACCORDINGLY.

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GEORGE T. HANER ET AL., APPELLEES, V. ELLA K. PALMER, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,309.

1. Appearance. By a general appearance in an action the defendant waives all defects in the original summons.
2. Appeal: PETITION. The objection that the petition in the district court states a different cause of action from the one tried in the justice court cannot be considered, where the record does not contain a copy of the original bill of particulars.
3. Principal and Agent: EVIDENCE. A letter written by an agent of a party with his knowledge and consent ordinarily is competent evidence against him.
4. Appeal: CONFLICTING EVIDENCE. A judgment rendered upon conflicting evidence will not be reversed unless it is found to be clearly wrong.

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

*Joshua Palmer,* for appellant.

*R. M. Proudfit, contra.*

BARNES, J.

The plaintiffs recovered a judgment in the district court for Saline county for money expended in furnishing an abstract of title for the defendant at her request, and she has appealed.

It appears that the plaintiffs commenced their action in justice court, where they recovered a judgment from which the defendant appealed to the district court, where the plaintiffs again had judgment. Complaint is now made of the insufficiency of the summons issued by the justice of the peace, but that question cannot be considered, for the reason that the defendant appeared generally in the justice court, and asked for and procured a continuance of the cause for the period of 30 days. By such appearance she waived all defects in the original summons. *Stelling v. Peddicord,* 78 Neb. 779; *Merchants Savings Bank v. Noll,* 50 Neb. 615.

It is further claimed that the petition in the district court set forth a different cause of action from the one sued on in the justice court. This assignment cannot be considered for the record does not contain the original bill of particulars upon which the cause was tried in the justice court.

It is also stated that the court erred in the admission of a certain part of plaintiffs' evidence, to wit, the letter to plaintiffs requesting them to prepare the abstract in question. The objection is that the defendant did not write the letter herself. It appears that the letter was written with her knowledge and consent by her husband, who, she admits, was her agent and was entrusted with the management of her business. Therefore the letter was competent evidence against her. Finally, it is contended that the judgment is not sustained by the evidence. It appears that the judgment was rendered upon conflicting testimony, and, as it is not shown to be clearly wrong, it must be affirmed, and it is so ordered.

AFFIRMED.

# ELIZA B. WORLEY, APPELLEE, V. SUPREME LODGE ROYAL ACHATES, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,298.

**Insurance:** DELINQUENT ASSESSMENTS: FORFEITURE. Where the supreme lodge of a fraternal beneficiary society in its usual course of business, and for a long period of time, acting by an agent directly employed by it for that purpose, collected delinquent assessments from its members, and without any action on the part of the members, without question and without requiring a certificate of health, continued the certificates in force, it will not be permitted to declare a forfeiture in a case where at a time when it was accustomed to receive such payments it ascertained that the assured was sick and unable to make a health certificate, and thereupon refused to receive the payment of such delinquent assessment unless such certificate was made.

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

*A. H. Burnett,* for appellant.

*Weaver & Giller, contra.*

LETTON, J.

This is an appeal from a judgment upon a fraternal beneficiary certificate in favor of the plaintiff who was the beneficiary named therein. The contract is admitted and forfeiture is relied upon as a defense.

Dr. H. A. Worley, the assured, was a practicing physician, resident in Omaha. He became a member of the defendant association in July, 1901. Assessments for benefits were made monthly, and during the membership of the doctor assessments 13 to 88, inclusive, became due and payable. The supreme lodge has its headquarters in Omaha; Irving G. Baright is its supreme president, and Miss E. L. Grinnell is its supreme secretary. They have occupied these positions ever since the organization of the

association. Dr. Worley was a member of Omaha Lodge No. 1. The evidence shows that it was customary for the secretary of this lodge to have a desk in the office of the supreme lodge, and also to be employed by the officers of the supreme lodge to procure new members and to collect delinquent assessments, being paid by the supreme lodge an additional compensation to that to which he was entitled as secretary of the local lodge. This collector usually called at the office of Dr. Worley each month for the past due assessment. On one occasion the doctor sent Mr. Dopson, who worked in his office, to the office of the supreme lodge with the assessment then payable. Dopson was then told by the supreme president that he need not bring the assessments, but that a collector would be sent for them each month. This conversation was repeated to Dr. Worley. Assessments were payable on the first day of each month, but were not delinquent until the first of the following month. It was the custom of Dr. Worley to pay his assessments to the collector after they became delinquent, and no questions were asked and no certificate of health was ever required by him.

The record, however, shows a certificate of health signed by the doctor and witnessed by the supreme president in 1904, at a time when he had been delinquent for two months. How this came to be made is unexplained save by the inference that the payment being two months past due a certificate of health was required. The evidence of the supreme secretary shows that the payment of a delinquent assessment was considered by the supreme lodge *ipso facto* as an application for reinstatement. The supreme lodge meets once in four years, and in the interval between its meetings the affairs of the society are managed and conducted by the executive officers. It is the duty of the supreme executive board, which consists of the supreme president, supreme vice-president, supreme past president, supreme secretary, and supreme chaplain, to pass upon applications for reinstatement. A majority of the board constitutes a

quorum. This board seldom met, and it is shown that the supreme secretary and one other member would usually meet once a month, and without certificates of health or other data or information than the report of payment by the delinquent would reinstate all delinquent members, and that occasionally, sometimes after four or five months had elapsed, when a quorum was present, a formal entry would be made ratifying the reinstatements made by the secretary, but that when the ratification was had no health certificates or further information was before the board.

Dr. Worley contracted a cold November 13, was able to be up and attend to patients at his house for about a week, but became worse and died on December 8, 1907. Mr. Clark, who occupied a room adjoining Dr. Worley's office, testified that about the 12th or 15th of November, 1907, Mr. Hopkins, secretary of the local lodge, who was also collecting delinquent assessments, came to the office, inquired for Worley, and was told he was at home sick. Hopkins then explained that he had not called before for the reason that he had been out on his farm in the northwestern part of the state, and that he would be back. The witness told Mr. Dopson, Dr. Worley's office-man, of this conversation. On the 15th or 16th Dopson went to the office of the supreme lodge and offered to pay the October assessment which was delinquent on November 1. He testifies that the supreme secretary told him he would have to pay the November assessment also; that he telephoned to Mrs. Worley, who told him to pay them both if he had money enough; that he had a $10 bill which he gave to the collector, but that the supreme secretary then said she would not accept it unless the doctor signed a health certificate. The money was then returned to him. The fact that Dopson was at the office and offered to pay the assessment is admitted by Miss Grinnell, but she denies saying that he must pay both assessments. She also testifies that at that time she had heard that the doctor was sick, and therefore refused to receive the money without the health certificate. Mr. Hopkins, the secretary and

collector, testifies that he called for the October assessment the latter part of that month, and on its nonpayment told Dr. Worley he would have to attend to its payment himself, but the jury evidently believed Clark's testimony as to a later visit.

The defendant concedes that it has waived the necessity of payment of the assessment upon the day fixed, and that the tender by Dopson complied with one condition of reinstatement by payment of delayed dues and assessments, but contends that it has not waived the necessity of furnishing a certificate of good health such as the by-laws require, and that the failure of Worley to furnish such certificate when demanded by the supreme secretary operated as a forfeiture of all rights under the contract.

We are of opinion, under the evidence, that the supreme lodge had by a long continued course of conduct led the assured to believe that the payment of the assessments within the first month after delinquency and without a health certificate continued the contract in force. The evidence of its secretary shows that this was its manner of doing business not only with Dr. Worley, but with all members who paid their delinquent assessments within such time. We believe Dr. Worley was entitled to rely upon the usual course of business of the supreme lodge, and that the respective rights and obligations as to payment and the necessity of a health certificate were the same as if the money had been tendered before delinquency. The manner of doing business of the supreme lodge virtually extended the period within which a reinstatement could be had without a health certificate being furnished until the first day of the month succeeding that upon which the technical delinquency occurred. The reinstatements before this time were made as a matter of course. Having thus lulled its delinquent members into security by waiving the provisions providing for a forfeiture, it would be manifestly unfair and unjust, whether on the ground of estoppel or on the ground of waiver, to allow the association to insist upon a strict compliance

with its by-laws as soon as it ascertained it was impossible for the assured to do so.

The facts are so different from those of any other case which has been before this court that it is unnecessary to refer at length to former decisions. The feature which distinguishes this case from those cited by defendant is that the assured dealt directly with an employee of the supreme lodge itself, and with its officers, and not with the officer of a subordinate lodge.

The writer still adheres to the views expressed in his dissenting opinion in the case of *Modern Woodmen of America v. Pringle*, 76 Neb. 384, 388, in a case where there was no knowledge by the supreme body of the attempted waiver by the officer of the local lodge and no ratification, but in this case the supreme body itself acted and the case falls within the rule of *Modern Woodmen of America v. Lane*, 62 Neb. 89; *Supreme Tent, K. of M. W., v. Volkert*, 25 Ind. App. 627; *Erdmann v. Mutual Ins. Co.*, 44 Wis. 376; Niblack, Accident Insurance and Benefit Societies (2d ed.) sec. 300, and cases cited in those opinions.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

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RICHARD O. RICHARDS, APPELLEE, V. MISCINDA SMITH ET AL., APPELLANTS.

FILED FEBRUARY 15, 1911. No. 16,300.

**Mortgages: FORECLOSURE: UNRECORDED DEED: PRIORITIES.** Under the provisions of section 16, ch. 73, Comp. St. 1909, a sheriff's deed to a purchaser without notice based upon proceedings foreclosing a recorded mortgage will convey a title superior to that obtained by a deed executed by the mortgagor before the foreclosure proceedings, but not recorded until after the recording of the sheriff's deed.

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

*A. M. Morrissey* and *A. G. Fisher,* for appellants.

*A. W. Crites, contra.*

LETTON, J.

This is an action in ejectment. Judgment for plaintiff, and defendants appeal. Both parties claim title through one A. L. Brandt. On July 5, 1893, the land was conveyed to Brandt. This deed was filed for record on the 6th day of July. The plaintiff claims title by virtue of a sheriff's deed made in proceedings to foreclose a mortgage on the premises executed by Brandt on that day in favor of one Telford, which mortgage was afterwards assigned to Martha R. Falk. The sheriff's deed bears date of June 4, 1897, and was recorded on June 10, 1897. It conveyed the premises to Martha R. Falk, the plaintiff in that action, who on March 4, 1901, conveyed the premises to plaintiff by deed of general warranty.

The evidence for the defendants shows that on the same day that Brandt executed the mortgage he conveyed the premises to one Emma J. Allen by warranty deed. The defendants derived title by conveyance from her. The deed to Emma J. Allen was not recorded until June 16, 1899, about two years after the recording of the sheriff's deed. In the foreclosure proceedings A. L. Brandt, W. J. Bowden, John Doe, and Mary Doe were made parties defendant. No summons was issued in the case, and the only service was by publication. The defendants contend that the evidence shows that at the time the foreclosure proceedings were begun defendants' grantor, Emma J. Allen, was in possession of the land by a tenant named Wright, and that since the tenant was not served with summons the foreclosure proceedings could not affect their interests nor the interests of their grantor, Emma J. Allen, and therefore conveyed no title as against them.

Defendants concede in their brief that if a summons had been served upon the tenant of Emma J. Allen the proceedings would probably bind her, and that if Brandt had been sued before he conveyed the title he and his grantees would probably have been bound. The trouble with this argument is that it ignores the effect of the recording acts. The sheriff's deed conveying the title obtained from Brandt through the foreclosure was placed upon record before the deed to Emma J. Allen under which the defendants claim.

Under section 16, ch. 73, Comp. St. 1909, all deeds and mortgages which are required to be recorded "shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments, shall be first recorded." This statute has been construed in the following cases: *Mansfield v. Gregory,* 8 Neb. 432; *Harral v. Gray,* 10 Neb. 186; *Hubbart v. Walker,* 19 Neb. 94; *Sheasley v. Keens,* 48 Neb. 57; *Rumery v. Loy,* 61 Neb. 755; and *Munger v. Beard & Bro.,* 79 Neb. 764.

The question presented is whether the grantee in an unrecorded deed has a better title than a purchaser without notice at sheriff's sale under foreclosure of a mortgage executed before the unrecorded deed, whose deed is recorded first. Under the foregoing provisions of the statute, the unrecorded deed from Brandt to Emma J. Allen, being recorded after the sheriff's deed based upon the recorded mortgage to Telford, was void as against the purchaser at the sheriff's sale. No person lived on the land which was unenclosed and used for grazing. It is true the witness Allen says he leased the land to the Wright brothers for 1895, 1896 and 1897, but he also says they used it for grazing and fails to show any visible possession other than that of wild land by grazing animals. We think the evidence fails to show occupation by any one sufficient to constitute notice to the purchaser at the sheriff's sale. The fact that no service was made upon the Wrights is not material since they claim no interest and their term has

long since expired. It seems to be contended that the service of summons in a foreclosure case upon a tenant and not upon his landlord would bind the interest of the landlord; but, of course, this is not the law. The defendants have been in the actual possession of the land since 1900. This action was begun in 1907, so that the statute of limitations had not run when the action was begun. At the time they purchased the sheriff's deed was on record, so they cannot be said to be innocent purchasers. There is no satisfactory evidence of adverse possession prior to the time that the defendants purchased the land.

The case was tried to the district court without the intervention of a jury. From the whole record, we are of opinion that its judgment was correct, and it is therefore

AFFIRMED.

FAWCETT, J., not sitting.

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## JACK C. GALLOWAY V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1911. No. 16,933.

1. **Criminal Law:** ASSISTANT PROSECUTOR. Where it appears that the fact that additional counsel was to assist the county attorney was known to counsel for the accused from and before the time of the beginning of the trial, and before any jurors were impaneled, and no prejudice is shown to have occurred to the rights of the accused, an objection to the appearance of such additional counsel was properly overruled.

2. ———: IMMATERIAL EVIDENCE. Ordinarily a judgment will not be reversed on account of the admission of immaterial evidence unless some prejudice has resulted to the accused, and this is especially true where other evidence of the same transactions is received without objection.

3. **Rape:** INSTRUCTIONS. An instruction should respond to the issue before the court, and where the accused is charged with rape on a child under 15 years of age it is not error to refuse an instruction which is applicable alone to a charge of rape upon a child over 15 and under 18 years of age.

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

*Bartos & Bartos,* for plaintiff in error.

*Arthur F. Mullen, Attorney General,* and *George W. Ayres, contra.*

LETTON, J.

Plaintiff in error brings these proceedings to review a judgment of conviction of rape upon a female child under the age of 15 years. A number of errors are assigned which will be examined, but in different order from that in which presented.

In making his statement to the jury, something was said by counsel for the accused which was objected to by Mr. G. N. Venrick. Defendant's counsel then objected to the appearance of Mr. Venrick in the case, for the reason that Venrick was not the county attorney nor a deputy county attorney, nor appointed by the court in the case. The objection was overruled and exception taken. It is now contended that this ruling was erroneous. At the hearing upon the motion for a new trial, a showing was made by the state to the effect that Mr. Venrick is a young lawyer who had been associated with the county attorney in his office and in the trial of criminal cases for about nine months at the time of the trial; that counsel for defendant had during all that time known these facts; that Venrick had appeared as counsel in this case from the time the case was called and before any jurymen were called into the box, and the fact that Venrick was to appear with the affiant was known to defendant's counsel before and ever since he had been appointed to defend. This court has carefully preserved the rights of the accused in such matters even to the extent of saying that assistant counsel should be selected and appointed for the prosecution before the trial, so that the defendant may in all fair-

ness be permitted to examine the panel of jurors with reference to the fact that such counsel is to be employed. *Knights v. State,* 58 Neb. 225. No request was made to be allowed to re-examine the jurors, and the circumstances shown by the record in this case neither show any prejudice to the defendant nor indicate that any error was made in overruling the defendant's objection.

It is next complained that the court erred in permitting testimony to be given with respect to what was done by the wife of the accused and Mina McKenzie, the sister of the complaining witness, at a time when both the accused and the prosecuting witness were absent. In order to understand this point it will be necessary briefly to state the facts in the case. On the 22d of April, 1909, an advertisement appeared in the Nebraska State Journal of Lincoln, Nebraska, as follows: "Wanted, Girl to work with man and wife in vaudeville; reference unnecessary; $5.00 per week and all expenses; 209 North 9th St. Suite 1." This advertisement attracted the attention of the prosecuting witness, Grace McKenzie, who answered it and applied in person at the place specified. The accused and his wife were at the room, which was in a lodging house. After some conversation at that place, several other meetings were had with the prosecuting witness, both there and in the presence of her mother at the rooms where the mother and children lived. The family was poor, and consisted of the mother, two daughters, Mina, who was 16 years of age, and Grace, who would be 15 years old on September 1, 1909, and a son about 7 or 8 years old. The older girl worked in the daytime in a restaurant at University Place, a suburb of Lincoln, and the mother also worked out by the day. After some conversation with the mother, she assented to Grace going with the accused and his wife, provided the older sister Mina was also employed. An agreement was finally made by which Mina was employed at $5 a week and expenses, ostensibly to sing and dance in vaudeville houses in different towns, and Grace was to go with them for three weeks for her clothes and

expenses, and after that was to be paid at the same rate if she proved satisfactory. It was also arranged that Mrs. Galloway and Mina should go to Fremont to visit a friend of Mrs. Galloway's and that the accused and Grace should go to Omaha to procure some stage dresses, and from there should proceed to Fremont to meet the others. Up to this point there appears to be no dispute in the testimony. On the evening of April 23 the girls with Mr. and Mrs. Galloway and a man called Brown, who seemed to be associated with the accused, went to the Burlington station in Lincoln together. Brown, Mrs. Galloway, and Mina left on a train, and Galloway and Grace took another train which departed shortly afterward. Grace testifies she believed that the others had gone to Fremont, and that she and Galloway were taking a train to Omaha. After their train had passed two or three stations and reached the little station of Burks, in Saline county, she says the accused told her it was necessary to leave the train there and to walk across to another station in order to take another train for Omaha; that they left the train, walked some distance along the railroad track, and then along a wagon road to a secluded spot on the banks of a creek, where the accused feloniously assaulted her. She testified that they then walked several miles into the town of Crete, where the accused took her to a hotel, procured a room and registered for her; that he then left her, saying that he was going to look for the other girls; that she stayed at the hotel that night alone, and the next morning the accused returned and took her to another hotel, where she found the remainder of the party. After breakfast that morning the two men procured some fishing tackle, some lunch and a number of bottles of beer, and the whole party spent the day fishing in the river a short distance from the town. That night Mrs. Galloway, Brown, and Grace took the train to Wilber, leaving Mina and the accused at Crete. When they reached Wilber, Mrs. Galloway went to the hotel with Grace, registered for her under an assumed name, paid for the room with money which she had ob-

tained from the girl, and left her at the hotel. The next morning complaint was made by Grace to the wife of the hotel keeper as to her treatment by the accused, and he was arrested near Wilber later in the day.

It is the admission of the testimony of Mina McKenzie describing the movements of Mrs. Galloway and herself after they reached Crete which is assigned as being prejudicially erroneous. This testimony was to the effect that the witness believed they were going to Fremont until Mrs. Galloway suggested that they get off at Crete, and that after they reached there Mrs. Galloway went to a hotel and procured a place for the witness to stay; that the next day when they were all together at the fishing picnic, whenever the sisters would approach each other, Mrs. Galloway would come up and interrupt them and begin to talk about rehearsals, and that afterward the party again separated, as was testified to by Grace. The theory of the state evidently was that both the accused and his wife had knowledge of the criminal act; that the reason that Grace made no complaint the next day was that Mrs. Galloway purposely prevented her from communicating with her sister; and that the evidence was material as explaining her failure to complain. It is shown, however, that Grace had opportunity to complain to others at the hotel in the absence of both the accused and his wife, and we are not inclined to place much stress upon this suggestion. There were other doings of the party at Crete admitted in evidence, but none showing any criminal act of any kind. It is true that evidence of another crime would not be admissible and might be prejudicial under the issues framed, but the evidence objected to falls far short of showing any connection with any other offense. Moreover, much evidence along this line was received without objection, and the accused and his wife told practically the same story as to the doings of the party at Crete. The defendant insists that this was evidence of a conspiracy and that no conspiracy was charged, but, as we have seen, the evidence fails to show anything more than a concert of action between the defendant and his wife at the very most.

The jury were entitled to know what the circumstances were as to the making or failure to make complaint, and it would have been difficult to do so without showing what was done by the party after they reached Crete. The facts shown as to no complaint being made and of the friendly terms which seemed to exist were evidence in favor of the accused rather than against him, and while perhaps not very material we cannot see wherein the defendant suffered any prejudice by the admission of this testimony.

Defendant complains of the refusal of the court to give instruction No. 6 tendered by him, which instructed the jury that if they believed Grace McKenzie to be over 15 years of age and under 18 and unchaste, or if they entertained a reasonable doubt as to her chastity, they should acquit unless they believed she was under 15. The accused was charged with an assault on a child under 15 years of age, and the court instructed on its own motion that in order to convict the jury must be satisfied beyond a reasonable doubt that the complaining witness was a female child under that age. The instruction tendered did not respond to the issue before the jury and was properly refused, and the instruction given was as favorable to the accused as the charge warranted.

Error is also assigned as to the overruling of defendant's challenge to the juror Jacobec. We think this juror was competent, and the challenge was properly overruled.

It is also complained that the evidence does not support the verdict. We are of opinion that the story of the complaining witness is sufficiently corroborated and the evidence ample to sustain the conviction.

It is also complained that the sentence imposed is excessive. The maximum punishment was inflicted, and while the penalty seems severe, under all the circumstances in the case, we are not prepared to say that it is so excessive as to warrant us in interfering with the discretion of the trial court.

We find no prejudicial error in the proceedings of the district court, and its judgment is

AFFIRMED.

BARNEY MCCABE, APPELLEE AND CROSS-APPELLEE, V. EQUITABLE LAND COMPANY, APPELLANT; ROLLIN B. BALLARD, INTERVENER, CROSS-APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,267.

1. Mortgages: CONSTRUCTIVE SERVICE: NAMES. "For the purpose of giving constructive notice to a defendant in a suit to foreclose a mortgage, where he is not sued on a written instrument signed by himself, his legal name includes his first Christian name and surname." *Butler v. Smith*, 84 Neb. 78.

2. Quieting Title: VOID FORECLOSURE PROCEEDINGS: RIGHTS OF MORTGAGOR. If a valid real estate mortgage has been foreclosed, even though the proceedings are void, the mortgagor will not be heard to question the title acquired thereby unless he pays or tenders the amount of the debt and interest.

3. ———: ———: ———. And if the purchaser subsequently pays taxes levied on the land and delinquent, the mortgagor, as a condition to equitable relief, will also be compelled to pay the amount of those taxes with interest.

4. ———: INTERVENTION: EVIDENCE. If a third person intervenes in a suit wherein a mortgagor and mortgagee are litigating their interests in real estate, and it appears that the land was conveyed to the intervener 18 years theretofore to secure payment of his grantor's matured debt, and the intervener offers no evidence to prove the amount thereof, but contends that he owns the land by title in fee simple, a decree quieting title in the plaintiff will not be disturbed on the intervener's appeal.

APPEAL from the district court for Box Butte county: JAMES J. HARRINGTON, JUDGE. *Affirmed in part and reversed in part.*

*Albert W. Crites*, for appellant.

*A. W. Morrissey*, for cross-appellant.

*William M. Iodence, contra.*

ROOT, J.

This is an action to quiet in the plaintiff title to a tract of land in Box Butte county. Rollin B. Ballard inter-

vened and also asserted title to the real estate. The plaintiff prevailed, and the intervener and the defendant severally appeal.

January 1, 1890, the plaintiff executed his promissory note, payable five years thereafter, to the McKinley-Lanning Loan & Trust Company, and to secure its payment mortgaged the land in suit. In 1891 the plaintiff conveyed the land by quitclaim deed to Rollin B. Ballard, a resident of Iowa. The defendant, the Equitable Land Company, became the owner of the mortgage debt, and in 1903 commenced an action to foreclose its lien. In the petition filed in that action R. B. Ballard and Barney McCabe are named as defendants. No process was served upon McCabe and the only notice given to Ballard was by publication. Neither of these defendants appeared in the action, nor does the proof show that they knew that it had been commenced, until long after judgment. In 1904 the land was purchased at sheriff's sale by the Equitable Land Company. The sheriff's deed and all of the other conveyances herein referred to were duly recorded. Since about 1899 the land has been used in connection with other tracts for pasturing sheep, but, except during a brief interval in 1898, the plaintiff has at all times, since the mortgage was executed, exercised complete dominion over the real estate. The plaintiff contends that the conveyance to Ballard was intended as a mortgage, that the demand secured thereby was largely fictitious and has been satisfied, and that the statute of limitations bars a foreclosure. The district court found generally in the plaintiff's favor and quieted his title to said premises.

We are satisfied that the conveyance to Ballard is a mortgage. In 1891 McCabe and Ballard were jointly engaged in purchasing, shipping and selling live stock in Iowa. Ballard's bookkeeper secured the conveyance while McCabe was ill. McCabe testified that he did not owe the amount set forth in the written defeasance signed by Ballard, and that Ballard subsequently collected partnership assets sufficient to pay the greater part of that debt.

There is no evidence to contradict McCabe. Ballard contends that he owns the land, and that McCabe had a mere right to repurchase it upon conditions which have not been performed. The pleadings gave ample notice of the plaintiff's contention, and since the amount actually due Ballard when the deed was made is in doubt, and we cannot find that fact from the evidence nor ascertain whether any part of the debt is yet unpaid, Mr. Ballard must take the consequences flowing from his attitude in failing to testify to the transactions.

Upon the defendant's appeal we find that it owned the note given by the plaintiff to the McKinley-Lanning Loan & Trust Company and has not parted with its title thereto, and that the debt has not been paid. Since process was not served upon McCabe in the foreclosure suit, he is not bound thereby. Ballard at all times has been a nonresident of Nebraska, and notice by publication to "R. B. Ballard" did not give the court jurisdiction over him. *Butler v. Smith,* 84 Neb. 78, and cases cited in that opinion.

The plaintiff not only asks the court to cancel the mortgage, but also assails the proceedings in the foreclosure suit. The purchaser at the sheriff's sale acquired the rights of the plaintiff, and of the defendants upon whom process was served. In the instant case the owner of the mortgage was that purchaser, so that it still owns the mortgage debt and the mortgage lien. This mortgage was valid in its inception, and capable of enforcement at the time the foreclosure proceedings were instituted. The mortgage debt has not been paid, nor has the mortgage been canceled or released. This court has uniformly held that, if a valid real estate mortgage has been foreclosed, the mortgagor will not be permitted to assail the title acquired thereby without first paying or offering to pay the mortgage debt. *Loney v. Courtnay,* 24 Neb. 580; *Stull v. Masilonka,* 74 Neb. 309; *Barney v. Chamberlain,* 85 Neb. 785. The plaintiff relies upon section 61*a*, ch. 73, Comp. St. 1909, but that act does not purport to authorize a court of equity to cancel void judicial proceedings without

imposing reasonable conditions upon a plaintiff seeking that relief.

The plaintiff argues that the defendant, by submitting its title to the court, waived the protection of the principles involved in these decisions, and that the court, independently of statute, had the right to annul the sheriff's deed without imposing conditions upon the mortgagor. The defendant did not come into court on its own motion, but appeared in response to a summons issued at the plaintiff's request. The decisions cited by the plaintiff to sustain his position, that the court should decree which party has the better title to the real estate, with one exception deal with cases where neither party objected to the jurisdiction of the court until after judgment, at which time the defeated party argued that the action should have been at law. The statute of limitations was not involved in any of these cases. *Peterson v. Ramsey,* 78 Neb. 235, does not modify or overrule *Loney v. Courtnay* or *Stull v. Masilonka, supra,* but the principles announced in these cases are approved.

The plaintiff has paid no part of the mortgage debt of $500, nor has he paid all of the taxes levied upon his land. The defendant, or those under whom it claims, have paid taxes as follows: $3.33 paid May 11, 1905; $24.48 paid September 25, 1903; $1.25 paid January 2, 1904; $1.33 paid April 20, 1905; and $1.65 paid March 15, 1906. Payment of the mortgage debt, with 7 per cent. annual interest thereon from January 1, 1890, and payment of the money paid as aforesaid for taxes, with like interest from the date of every payment, should have been made a condition precedent to granting the plaintiff equitable relief.

The decree, therefore, is affirmed upon the intervener's appeal, but reversed upon the defendant's appeal, with directions to enter a judgment in conformity with this opinion, and the defendant shall recover its costs.

JUDGMENT ACCORDINGLY.

BARNEY MCCABE, APPELLEE, V. MARY E. REED; GIRARD TRUST COMPANY, CROSS-APPELLANT; ROLLIN B. BALLARD, INTERVENER, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,277.

Mortgages: SUIT TO CANCEL: OWNERSHIP OF DEBT: EVIDENCE. If the defendant in an action to cancel a mortgage produces the notes secured thereby, and it appears that he has controlled and had undisputed possession of the instruments for many years under a claim of title thereto, these facts will sustain a finding that he is the owner thereof, notwithstanding they are indorsed payable to the order of a third person.

APPEAL from the district court for Box Butte county: JAMES J. HARRINGTON, JUDGE. *Affirmed in part and reversed in part, with directions.*

*A. M. Morrissey,* for appellant.

*Boyd & Barker,* for cross-appellant.

*William M. Iodence, contra.*

ROOT, J.

The material facts in this case are almost identical with those referred to in *McCabe v. Equitable Land Co., ante,* p. 453. There is this difference: Mrs. Reed, the owner of a certificate of tax purchase, commenced an action to foreclose her lien upon the land involved in this action, and impleaded the mortgagee as a defendant, and a subsequent holder of the note secured by the mortgage intervened. In that suit a decree was rendered foreclosing the tax lien and the mortgage. The intervener in that action purchased the land at sheriff's sale in October, 1904, but did not take possession of the real estate. The court in the instant case canceled the mortgage and quieted the title to the real estate in the plaintiff upon condition that he should pay the defendant the amount of

the tax lien, and, if he failed to do so, that the land should be sold to satisfy that lien.

The evidence with respect to Rollin B. Ballard's interest in the land is identical with the evidence upon that issue in *McCabe v. Equitable Land Co., supra,* and, for the reason stated in our opinion in that case, Mr. Ballard's appeal in this case should not be sustained.

The plaintiff argues that the defendant did not prove that the intervener in the tax foreclosure suit owned the note and mortgage in question. The note and the mortgage are attached to the files in that case. These instruments, with all the indorsements thereon, were received in evidence during the trial of this case. The note bears several restrictive indorsements which purport to vest title in the McKinley-Lanning Loan & Trust Company. An agreement between McCabe and the McKinley-Lanning Loan & Trust Company for an extension of the maturity of the mortgage debt was offered in evidence but excluded by the court. This agreement was indorsed by the payee to the intervener in the tax foreclosure suit, the Girard Life Insurance, Annuity & Trust Company, but the indorsement was excluded. The original payee of the note entered a voluntary appearance in Mrs. Reed's suit, and summons was served upon the trustee named in the mortgage deed, but prior thereto they had parted with all title to the mortgage debt. The delivery of a negotiable promissory note indorsed to the order of a third person will not in itself transfer title to the note (*Gaylord v. Nebraska Savings & Exchange Bank,* 54 Neb. 104), but an equitable assignment will result from the sale and delivery of the note without an indorsement, and the equitable owner may maintain an action thereon in his own name (*Greeley State Bank v. Line,* 50 Neb. 434). And the possession of an unindorsed negotiable promissory note by some person other than the payee or indorsee may sustain a finding that the equitable title followed the possession. *Cather v. Damerell,* 5 Neb. (Unof.) 175.

In the instant case the original note and mortgage were produced in the tax foreclosure case by the intervener therein, and they have remained in the custody of the clerk of that court for more than six years. No one other than that person asserts title to those instruments, and we are of opinion that there is *prima facie* proof of title in the intervener in the tax case, the defendant in this action. *Sanford v. Litchenberger,* 62 Neb. 501. The note is for $500, and bears interest from February 1, 1888. Payment of the principal sum, with 7 per cent. annual interest from that date, should have been made a condition precedent to granting the plantiff equitable relief. *McCabe v. Equitable Land Co., supra.* The defendant also paid taxes upon the land subsequent to the sheriff's sale, viz., for 1904, $1.33; for 1905, $1.65; for 1906, $1.65; but the proof does not show the dates upon which those payments were made.

The decree of the district court therefore is affirmed upon the intervener's appeal, but reversed upon the defendant's appeal, with directions to take evidence to prove the date those taxes were paid and to enter a decree in conformity with this opinion. The costs of this appeal to be taxed to the defendant Girard Trust Company; but in all other respects it shall recover costs.

JUDGMENT ACCORDINGLY.

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ANDREW J. METZ, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,288.

1. **Master and Servant: INJURY TO SERVANT: EMPLOYER'S LIABILITY ACT.** A railway company's servant employed in its water supply department and engaged in digging a well to be used in supplying its locomotive engines with water is within the protection of section 3, ch. 21, Comp. St. 1907.

2. ———: ———. If a servant thus employed and while engaged in that work is injured as a result of the negligence of a fellow servant, the employer is at least *prima facie* liable therefor.

3. Appeal: NEGLIGENCE: INSTRUCTIONS. In such a case, if the defendant pleads that the plaintiff's injuries were caused by the negligence of a fellow servant, and the court instructs the jury that the defendant is not liable for injuries caused by risks that were known to the plaintiff or were obvious to a man of his experience and understanding, and there is no proof that the plaintiff was negligent, a verdict in his favor will not be reversed because of errors in the court's charge which could not have prejudiced the defendant.

4. Hearsay evidence tending to prove a material fact, if admitted without objections, may sustain a finding of the existence of that fact. The probative force of such evidence is for the jury and not for the court to determine.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

*James E. Kelby, Halleck F. Rose, Frank E. Bishop* and *Hazlett & Jack,* for appellant.

*Shepherd & Ripley, contra.*

ROOT, J.

In January, 1908, the defendant was constructing a well about 30 feet in diameter adjacent to its pumping station near the city of Lincoln, and the plaintiff was injured while in its employ in that service. The excavation was about 55 feet deep, and a steam pump installed at the bottom of the well was used to discharge, through a four-inch pipe, the inflowing water, so that the well might be dug deeper. This pipe rested against three 12 by 14 cross-timbers, one at the top of the well, another 14 feet below, and a third 14 feet further down. A piece of 2 by 6 plank was spiked to each beam close to and on either side of the pipe, and a similar piece of plank joined the other two pieces so as to enclose the pipe. The beams were securely fastened at each end to steel rails which extended across the well at right angles to the beams and

were anchored in a rock wall which had been built around the exterior of the well. The normal operation of the pump caused the pipe to vibrate, and whenever sand or particles of rock interrupted that operation the pipe would "buck" and churn so as to spring these beams as much as two inches, and the pipe itself would rise and fall as much as five inches. While the plaintiff was working at the bottom of the well, two of the planks became detached and fell upon his head, cutting his scalp and injuring him more or less seriously. The plaintiff prevailed, and the defendant appeals.

The defendant severely criticises the court's charge, and stoutly maintains that the instructions requested by it should have been given. The plaintiff defends the charge, and says that in any event, under the issues and the evidence, no verdict other than for the plaintiff should have been returned. The facts stated in the petition will sustain a judgment in the plaintiff's favor. The defendant by way of answer denies any negligence on its part, and alleges that the plaintiff's injuries were caused by his own negligence and the negligence of his fellow servants, and pleads assumption of risk.

At the time the plaintiff was injured, chapter 48, laws 1907 (Comp. St. 1907, ch. 21, sec. 3 *et seq.*) was in force, and by its terms a railway company operating railway cars in Nebraska is made liable to any of its employees injured by reason of the negligence of a fellow servant while the injured employee is engaged in construction or repair work. In *Swoboda v. Union P. R. Co.*, 87 Neb. 200, this act was held to be a valid law. The petition and the proof establish that the well in question was used in connection with the defendant's railway, and the defendant pleads that the plaintiff was employed in its water supply service at the time of the injury. The plaintiff was within the protection of this statute, and the answer therefore admitted a qualified liability. There is no proof, as we understand the record, that the plaintiff assumed the risk of injury resulting from his fellow servant's carelessness,

and there is no proof that the injury resulted from his own carelessness. It may be questioned whether under the issues and the evidence the question of assumption of risk should have been submitted to the jury, but it was, and by their verdict they say the risk was not assumed. The vital issues were the extent of the plaintiff's injury and the amount he should recover therefor.

The defendant's counsel urge that the recovery is excessive. If the plaintiff testified truthfully, the verdict is not excessive, and that fact was one for the jury and not this court to determine.

Complaint is made that there is no basis for an assumption in a hypothetical question that the plaintiff's skull was fractured. The plaintiff's wound was dressed by Dr. Everett, the defendant's surgeon. The plaintiff was permitted, without objection, to testify that Dr. Everett said at the time with reference to the outer wall of the plaintiff's skull, "It is just broken through," and "It is chewed up pretty bad." Two physicians testified for the plaintiff. In part their conclusions were drawn from a personal examination of the plaintiff and in part from a hypothetical state of facts, which included an assumption that the plaintiff's skull had been fractured. Dr. Everett denied having made the statement testified to by the plaintiff, but it was for the jury to find whether he said so or not. The defendant argues that, although Everett did make the statements, it is not bound thereby. Hearsay testimony admitted without objection may sustain a finding based solely thereon. *Sheibley v. Nelson,* 84 Neb. 393. Dr. Finney also testified that there is a depression or indentation beneath the scar upon the plaintiff's head, and testifies, in effect, that this condition may have been caused by an injury to the skull. There was therefore no error in permitting the physicians to answer the hypothetical question.

While we do not approve the court's charge in every particular, we are of opinion that upon the entire record it is not prejudicially erroneous. There is sufficient evi-

dence to sustain the verdict, and the judgment of the district court therefore is

AFFIRMED.

BARNES and LETTON, JJ., concur in the result.

FAWCETT, J., not sitting.

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JOHN M. WESTERFIELD, APPELLANT, V. LARDNER HOWELL ET AL., APPELLEES.

FILED FEBRUARY 15, 1911. No. 16,294.

**Quieting Title: VOID FORECLOSURE PROCEEDINGS: PURCHASE SUBJECT TO MORTGAGE.** If a valid real estate mortgage has been foreclosed, even though the proceedings are void, one who purchased the equity of redemption subject to the mortgage will not be heard to question the title acquired by reason of those proceedings, unless he pays or tenders the amount of the mortgage debt and interest.

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

*Ellery H. Westerfield,* for appellant.

*A. Muldoon, contra.*

ROOT, J.

This is an action to quiet in the plaintiff title to a tract of land. The defendants prevailed, and the plaintiff appeals.

In 1892 the plaintiff purchased the land in controversy subject to a mortgage which was subsequently foreclosed. The defendants purchased the land at the sheriff's sale. The plaintiff asserts that in the foreclosure proceedings the court did not acquire jurisdiction over the real estate,

and that the decree and the sheriff's deed are void. The plaintiff does not contend that the mortgage was invalid, paid or satisfied at the time those proceedings were instituted, or that the mortgage debt has been paid, but relies upon section 61*a*, ch. 73, Comp. St. 1909, which provides for quieting title to real estate as against unenforceable liens. The plaintiff does not confine his petition to the mortgage lien, but assails the foreclosure proceedings and the sheriff's deed. He has not paid, nor does he offer to pay, the mortgage debt. The district court therefore was right in dismissing the petition. *Loney v. Courtnay*, 24 Neb. 580; *Stull v. Masilonka*, 74 Neb. 309; *Barney v. Chamberlain*, 85 Neb. 785.

The judgment of the district court is

AFFIRMED.

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## JERRY J. HANKS V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1911. No. 16,749.

1. **Criminal Law:** CONTINUANCE: DISCRETION OF COURT. An application to continue a criminal case which has been set for trial upon a day certain at the request of the accused is addressed to the sound discretion of the trial court, and if it does not appear that the reasons given for requesting the continuance were not known to the accused at the time the order setting his case for trial was made, a judgment of conviction will not ordinarily be set aside because that continuance was not granted.

2. **Rape:** EVIDENCE. An undergarment worn by the prosecutrix at the time of an alleged criminal assault may, if identified, be admitted in evidence.

3. ———: ———. If it satisfactorily appears from the evidence that the prosecutrix is not the wife, sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to these facts.

4. ———: ———. The evidence examined and commented upon in the opinion, and *held* sufficient to corroborate the prosecutrix.

5. ———: INSTRUCTIONS. "The failure of the court to instruct the jury, that a defendant charged with rape cannot be convicted

without evidence corroborating the prosecutrix, is not error, unless it appears that such an instruction was requested." *Edwards v. State*, 69 Neb. 386.

6. Error will not be presumed, but must affirmatively appear.

7. Criminal Law: LIMITATION OF ARGUMENT. A conviction will not be set aside because the trial court limited counsel to an hour and 15 minutes on a side in which to argue the cause to the jury, although the practice is not approved.

8. ———: ARGUMENT: EXCEPTION. "Abuse of privilege by counsel in addressing the jury, to be available on appeal, must be excepted to at the time." *Hill v. State*, 42 Neb. 503.

9. ———: JURORS: COMPETENCY: REVIEW. If the court upon conflicting affidavits finds that a venireman, before being called as a juror in a criminal cause, did not express an opinion that the accused was guilty, this court will not ordinarily hold to the contrary.

10. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A new trial will not be granted for alleged newly discovered evidence cumulative in character and to some extent tending to impeach the state's witnesses with respect to collateral facts testified to by them, where it appears that many of the witnesses relied upon to give the newly discovered evidence testified during the trial, and there is no showing of diligence before trial to procure or present the newly discovered evidence.

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

*Hamer & Hamer, G. T. H. Babcock* and *Earl R. Ferguson*, for plaintiff in error.

*Grant G. Martin, Attorney General*, and *George W. Ayres, contra.*

ROOT, J.

From a sentence of seven years' imprisonment in the penitentiary for committing rape, Jerry Hanks, who will be referred to as the accused, has prosecuted a petition in error to this court.

The court did not err in refusing to continue the case. By agreement of the county attorney and counsel for the

accused, the case had been set for trial on a day certain, and there is no suggestion that the absence of the alleged witnesses was not known to Mr. Hanks or to his counsel at the time that agreement was made, nor is there a sufficient showing of diligence to procure the witnesses for the trial.

Over the accused's objections the state introduced in evidence a torn muslin undergarment. The prosecutrix testified in effect that the garment was worn by her at the time of the assault; that it was torn by the accused, and that it is in the same condition now that it was except that it has been washed. The evidence was admissible, its probative weight being for the jury. *McMurrin v. Rigby,* 80 Ia. 322; *State v. Peterson,* 110 Ia. 647.

The evidence discloses that shortly preceding the night of the country ball, where the accused met the prosecutrix, he boasted to friends that he proposed to accomplish his purpose that night; that the accused in company with the prosecutrix departed from his uncle's home where the ball had been given, ostensibly for a buggy ride, but that he drove to a secluded spot at the bottom of a deep cañon and there remained with the prosecutrix for about an hour and that when they returned she was exhausted and weeping; that shortly thereafter she made complaint to her sister, and when the accused was brought into her presence and charged with the offense, he answered, "He guessed if she (the prosecutrix) said so, he did." That night the accused went to Iowa where he was subsequently apprehended. The accused stated to his friends, shortly after the offense was committed, that he might have some trouble, but could settle it for $300 or $500, and subsequently offered to pay money to stop the prosecution. The accused was a witness in his own behalf, and, while admitting the intercourse, testified that the prosecutrix readily consented thereto. The jury may be pardoned if they did not believe all of the defendant's testimony. There are also other material facts and circumstances appearing in the evidence tending in some degree to corroborate the prosecutrix' statement.

There is a conflict in the evidence concerning the prosecutrix' appearance, demeanor and statements at the time she returned with the accused from the buggy ride. It was, however, for the jury to say whether they would believe the witnesses for the state, on the one side, or the accused and his relatives, on the other. If that conflict is resolved in favor of the state, there is sufficient corroborative evidence to sustain the verdict. *Murphy v. State,* 15 Neb. 383; *Richards v. State,* 36 Neb. 17; *Wood v. State,* 46 Neb. 58; *State v. Meyers,* 46 Neb. 152; *Henderson v. State,* 85 Neb. 444; *McMath v. State,* 55 Ga. 303; *State v. Harris,* 150 Mo. 56; *State v. Pollard,* 174 Mo. 607; *State v. Bedard,* 65 Vt. 278; 33 Cyc. 1458. We are also of the opinion that there is sufficient evidence to sustain a finding that the prosecutrix is not the wife, sister or daughter of the accused, although no witness testified in express terms that no such relationship existed.

Not having requested the court to instruct that the prosecutrix should be corroborated, the accused waived the right to have that instruction given. *Edwards v. State,* 69 Neb. 386. Although the court did not instruct that there should be no conviction unless the prosecutrix was corroborated, it did, in addition to instructing that the burden was on the state to prove its case beyond all reasonable doubt, caution the jury that from the nature of the accusation the defendant labored under great difficulty in making out his defense; that they should carefully consider the evidence and the instructions, and that if the prosecutrix consented, no matter how tardily, and finally voluntarily submitted to the accused, he was not guilty. The instructions seem to have been copied from those given by the trial court in *Richards v. State, supra,* and approved by this court. The court was not assisted by counsel for the accused either by instructions requested or exceptions taken to those given and in our opinion Mr. Hanks has no just ground for complaint with respect to the court's charge.

The contention that additional instructions were

privately given to the jury is not sustained by the record, and has no support except in the affidavit of Mr. Ferguson, counsel for the accused, who says that he is reliably informed that such is the fact. The county attorney states under oath that the jury were charged in the presence of the accused and of his counsel. Error will not be presumed, but must affirmatively appear.

By overruling the motion for a new trial the court found upon conflicting affidavits that the juror Blundell had not, before being called into the jury box, expressed an opinion that the accused was guilty. Neither did the accused or his counsel testify that they did not know Mr. Blundell's state of mind before he was accepted as a juror, nor did counsel ask Mr. Blundell upon his *voir dire* examination whether he had expressed an opinion concerning the merits of the case. This subject is largely within the discretion of the trial judge, and we are satisfied with his ruling. *Clough v. State*, 7 Neb. 320; *Lamb v. State*, 41 Neb. 356; *Tracey v. State*, 46 Neb. 361.

No objection was made or exception taken to the court's order that counsel should have but one hour and 15 minutes on a side within which to argue the case to the jury. Mr. Ferguson states, in effect, that as he was closing his argument and approaching the climax of his peroration, the court informed him that his time was up, and that he was thereby placed in a ridiculous light before the jury and his argument greatly impaired. According to the established holdings of this court, the order was not erroneous. *Kennison v. State*, 83 Neb. 391, and cases cited. We again express our disapproval of a limitation to so narrow a period where the defendant's liberty is at stake, but shall not overrule our former holdings. No objections were made or exceptions taken to the arguments of counsel for the state at the time they were made, and for this reason no foundation was laid to sustain the assignment of misconduct of the assistant county attorney.

The alleged newly discovered evidence is largely cumulative; some of it tends in a degree to impeach cer-

tain of the state's witnesses with regard to collateral facts testified to by them, but practically all of it will be given, if opportunity affords, by relatives of the accused who testified during the trial. The county attorney filed affidavits contradicting these affidavits filed by the accused. There is an entire absence of any showing of diligence on the part of the accused or of his counsel, Messrs. Ferguson and Babcock, who had charge of the case up to the time a verdict was returned. Criminal trials would never end if a new trial were given upon the showing made in this case. *Lillie v. State*, 83 Neb. 268.

The accused was tried in a community where he had resided for years, and where he was surrounded by a host of relatives, respectable substantial citizens; his counsel were given great latitude in introducing evidence and in cross-examining the state's witnesses. The prosecutrix and the accused told their respective versions of the transaction, and the jury has said, by their verdict, that the prosecutrix and not the accused should be believed, and we are satisfied that the evidence sustains that finding. The court's charge was fair to the accused, and, independently of the limitation of time within which his counsel were required to present their argument, we find nothing unsatisfactory in the record.

Upon the entire record, there is no error prejudicial to the accused, and the judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

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BERNHARDT J. JOBST, APPELLEE, V. HAYDEN BROTHERS, APPELLANT; JOSEPH R. LEHMER ET AL., APPELLEES.

FILED FEBRUARY 15, 1911. No. 16,791.

1. **Damages**: BUILDING CONTRACT. Where a builder's contract provides for the payment of a definite sum per day as liquidated dam-

ages for every day's delay in delivering possession of a building to the owner thereof, and that stipulation is upheld, no other damages should ordinarily be allowed for delay.

2. Appeal: REMAND. When a judgment of the district court is reversed and a cause remanded with specific directions, it is the duty of the district court to follow the mandate. *State v. Farrington*, 86 Neb. 653.

3. ———: ———. The judgment of this court upon the former appeal permitted the district court to consider delays caused by the defendant in altering the plans which the plaintiff agreed to follow in constructing the defendant's building.

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

*Smyth, Smith & Schall*, for appellant.

*Gurley & Woodrough* and *I. E. Congdon, contra.*

ROOT, J.

Upon a former appeal this case was remanded to the district court with directions to ascertain how much of the plaintiff's delay in completing the building was caused by the owner's failure to have the site in proper condition and how much was owing to other causes for which the owner was not repsonsible, and to allow the defendant the stipulated damage of $25 a day for every day's delay for which the plaintiff and not the defendant was responsible. 84 Neb. 735. The parties were given the right to introduce more testimony upon the issues. Upon the second hearing considerable additional testimony was taken, and upon a consideration of all the evidence the court found that the defendant should be allowed damages for 71 days, and modified the judgment first rendered. The defendant appeals.

The defendant's first contention, that it should have been allowed $11,588.77 damages for six months' delay in delivering possession of the basement and subbasement, must be resolved against it. It is true that although the

plaintiff had until September 1, 1905, to complete the building, he agreed to deliver to the defendant the basement and subbasement on or before June 1 of that year. But it is also a fact that the plaintiff's liability to pay liquidated damages for failing to deliver possession of the building commenced to run from September 1. In the defendant's counterclaim no demand is made for damages other than the $25 a day, and no breach is alleged for the plaintiff's failure to deliver possession of the subbasement or basement independently of the failure to deliver possession of the entire building. Without regard to the considerations arising from the defendant's failure for months subsequent to June 1, 1905, to complete the excavation in the northwest corner of the basement, it is sufficient to say that it has so construed the contract as to confine its demand to the stipulated damages for the entire building, and the district court was right in ignoring this item of damages argued at the bar, but not asserted in any pleading.

The former opinion of this court (84 Neb. 735), written by Mr. Commissioner CALKINS, will not bear the construction contended for by the defendant. Judge CALKINS reasoned that, although the defendant's promise to waive the time clause was made, it was not sustained by a consideration, and should not be enforced as a contract, but that, if the plaintiff relied thereon, the defendant would be estopped from insisting upon the provision in the contract that no allowance shall be made for delays unless within 24 hours after cause therefor arose the contractor shall have delivered to the architect a written claim for an extension of time because of such delay. The defendant now contends that whether or not the plaintiff did rely upon that promise is a question of fact and should have been determined by the court upon the second appeal; that no such finding was made, and that there is no evidence to sustain a finding of that character, and for that reason it should recover damages at $25 a day from September 1, 1905, to July 25, 1906.

The defendant's counsel do not follow Judge CALKINS' argument to its conclusion. The commissioner says: "It would have been an idle act for the plaintiff to ask an extension when the owner had already promised not to insist upon the completion of the building at the time stipulated. Such a promise naturally lulled the contractor into a sense of security, and was well calculated to prevent him from taking steps under the provisions of the contract quoted. We therefore conclude that the plaintiff was entitled to an extension of the time equal to the period of delay caused by the failure of the owner to have his property in condition for the erection of the building." The mandate, among other things, directs the district court to ascertain that time from the evidence. So, therefore, the district court did not misconstrue the opinion or the mandate.

The finding that the defendant should recover for but 71 days' delay is vigorously criticised by the defendant and as earnestly commended by the plaintiff. The evidence upon this issue is in hopeless conflict. Some of the witnesses by their testimony evince considerable feeling, and while all of them are apparently intelligent men, the weight to be given their testimony depends to a considerable extent upon their credibility, a factor the trial court could determine much better than we can.

The building as originally designed was to cost but $52,963, but alterations and extras increased its cost to $66,124. Many of these departures from the original plan compelled the plaintiff to order new and different structural steel, and these altered beams could only be procured in Pennsylvania upon special orders which were not always promptly filled. In but one particular are we inclined to disturb the findings of the district court. The court found that possession of the building was delivered to the defendant July 1, 1906. Mr. Joseph Hayden, president of the defendant, testified that they were not given that possession until July 25 or July 27. Counsel for

plaintiff, while combatting this statement, do not direct our attention to any particular part of a somewhat voluminous bill of exceptions containing evidence to support their contention. We, however, have read the testimony given by Mr. William Hayden on the former trial, and he testifies that they took possession immediately after July 10, 1906, the day plaintiff wrote the defendant that it might commence installing shelving in the different parts of the building. We find nothing in the record to justify us in saying possession of the building was delivered earlier than July 11, 1906. The defendant therefore should have been allowed for 81 days' delay, or $2,025 instead of $1,775.

The defendant complains because the court permitted the plaintiff to file an amendment to his petition wherein the delay occasioned by the alterations is specifically pleaded. Our former opinion and mandate justifies this ruling. It is not just that the plaintiff should pay $25 a day to the defendant for delays caused by acceding to its demands. *Carter v. Root,* 84 Neb. 723.

The judgment of the district court, therefore, is modified by increasing the allowance of damages in favor of the defendant to $2,025, and, as modified, the judgment is affirmed; the defendant to recover the costs of this appeal.

AFFIRMED AS MODIFIED.

FAWCETT, J., not sitting.

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## JOHN H. KRAUSE V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1911. No. 16,867.

1. **Grand Jury.** Section 584 of the criminal code provides that a grand jury shall be drawn and summoned to appear at the first term of the district court in every year, unless that court, or a judge thereof, shall otherwise direct in writing.

2. ———: SELECTION. If the county commissioners substantially follow the statute in selecting the 60 names from which the clerk of the district court and the sheriff draw the names of the persons who are to act as grand jurors, a plea in abatement to an indictment will not be sustained because the county clerk did not enter upon the journal of the board a record of those proceedings.

3. **Criminal Law:** PLEA IN ABATEMENT. It is not a good plea in abatement to an indictment that it was returned by a grand jury of which the complaining witness was a member.

4. ———: CONTINUANCE. A judgment of conviction will not be set aside because the accused was denied a continuance to procure an absent witness, where it appears that his testimony is immaterial.

5. ———: WITNESSES: IMPEACHMENT. In laying the foundation to impeach a witness by his testimony given before the grand jury, the county attorney is not required to state the questions propounded to the witness by the grand jury and his answers thereto, but it is sufficient if the gist of that testimony is recited. In like manner, the grand jurors may testify to the substance of the witness' testimony.

6. ———: EVIDENCE. The trial court in its discretion may permit a witness to testify that he saw a mark in the sand close to the point where the accused shot at the prosecuting witness, that it was made by a bullet, and was in line with the points where the testimony shows that the accused and the prosecuting witness stood at the time the shot was fired.

7. ———: INSTRUCTIONS. "In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do." *Barr v. State*, 45 Neb. 458.

8. ———: SEPARATE COUNTS: ELECTION. It is within the sound discretion of the trial court to overrule a request to compel a county attorney to elect upon which of two counts in an indictment he will ask for a conviction, where one count is for feloniously shooting at the prosecuting witness with the intent to kill and the other count charges a like shooting with intent to wound.

9. ———: SENTENCE REDUCED. Upon a consideration of mitigating circumstances, the sentence imposed by the district court is found to be excessive and is reduced to two years.

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

*C. Patterson* and *A. W. Crites,* for plaintiff in error.

*Grant G. Martin, Attorney General,* and *Frank E. Edgerton, contra.*

ROOT, J.

John H. Krause prosecutes error proceedings to reverse a judgment of imprisonment for five years in the penitentiary for feloniously shooting at William Kline.

We find nothing in the record to suggest that the jury were not summoned in accordance with chapter 171, laws 1909. In our opinion this act provides that a grand jury shall be drawn in the manner provided by law and summoned for the first term of the district court in every year, unless the district court, or a judge thereof, shall otherwise order in writing.

We find no error in the selection of the grand jury. While the county clerk did not make an entry on the journal of the board of those proceedings, yet a list of the names of the persons from whom the jurors were selected was delivered to the clerk of the district court and the jury were selected therefrom. The commissioners performed a duty imposed upon them by law, not as a board of county commissioners, but as jury commissioners. The legislature might lawfully have required any other county officer or officers, or some person selected for that particular purpose, to choose the jury. The statute does not provide that the commissioners shall make a record of their proceedings in preparing the list, and, so long as they acted in conformity with the law, proof of that fact may be made by parol evidence.

The plea that the prosecuting witness was a member of the grand jury must also be overruled. The authorities are not in harmony as to how far an indicted person may go behind an indictment, or what objections he may make, which, if sustained, will require the court to annul the accusation. We are of opinion that, where the statute

does not provide otherwise, the general rule stated in Thompson and Merriam, Juries, sec. 533, should apply: "The only objections which can be taken to grand jurors by plea in abatement must be such as disqualify the juror to serve in any case. In other words, the plea must show the absence of positive qualifications demanded by law." *State v. Easter,* 30 Ohio St. 542; *Gibbs & Stanton v. State,* 16 Vroom (N. J.) 379; *Lascelles v. State,* 90 Ga. 347.

Section 439 of the criminal code permits an accused person to except to an indictment by a motion to quash, by plea in abatement, or by demurrer. Section 440 provides that the motion to quash may be made when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged. Section 442: A demurrer may be interposed when the facts stated in the indictment do not constitute an offense punishable by the laws of the state, or when the intent is not alleged but is necessary to make out the offense charged. Section 441: "A plea in abatement may be made when there is a defect in the record, which is shown by facts extrinsic thereto."

The statute does not provide that the presence of a prosecuting witness upon the grand jury shall be ground for exception to the indictment returned. In fact, the oath administered to grand jurors contemplates that they shall advise each other of all violations of the law concerning which they have knowledge or information, but that they shall present no person through malice, hatred or ill will. "Saving yourself and fellow jurors, you * * * shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The counsel of the state, your own, and your fellows', you shall keep secret, unless called on in a court of justice to make disclosures. You shall present no person through malice, hatred or ill will, nor shall you leave any person unrepresented through fear, favor, or affection, or for any reward or hope thereof; but in all your pre-

sentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding." Criminal code, sec. 395. The legislature having provided the grounds upon which and the procedure by which an indictment may be attacked, none others should be recognized.

There is dictum in *Patrick v. State,* 16 Neb. 330, which countenances challenges to the favor or to the polls, if interposed before the jury is sworn. However much discretion the district judge may have to consider those objections before the jury is accepted, we are confident the accused has no right to interpose them in a plea in abatement.

There was no error in refusing a continuance because of the absence of the witness Wilson. The accused proposed to prove by this witness that the altercation between the parties occurred upon the accused's land. There is no evidence to disprove that contention, and the fact is immaterial in the circumstances of this case.

There was no error in permitting the state to impeach the witness Collins by showing that his testimony before the grand jury with respect to material matters was different from his testimony during the trial. Nor was it essential that the precise questions propounded to the witness and his answers thereto, while before the grand jury, should have been stated to him on cross-examination. The time and place were referred to with particularity, and the gist of his testimony repeated. The testimony before the grand jury was not preserved in detail; there is no suggestion that the questions in any manner qualified his answers, and a sufficient foundation was laid for the impeaching testimony. 7 Ency. of Evidence, 132.

No error was committed in permitting the witnesses to testify that they observed a mark made by a bullet in the sand some distance from the points where the accused and the complaining witness were standing and in line thereof, according to the testimony of Mr. Kline. The accused fired the shot while standing upon a brace within

a windmill tower and from two to five feet from the ground. The tower is in a hollow. The land around it is sandy, and, by reason of a rain which had fallen the preceding night, this sand presented a smooth surface. The accused fired a loaded revolver, which was pointed in the direction of the prosecuting witness. Mr. Kline testifies that the bullet passed in close proximity to his head, and that he saw the mark in the sand immediately after the shot was fired. This case does not come within the principles announced in *Clough v. State,* 7 Neb. 320, and in *Russell v. State,* 62 Neb. 512. None of these witnesses attempted to say that the mark was made by a bullet from Mr. Krause's revolver, but merely that the mark was there and had been made by a bullet.

The only exception to the instructions argued in this court is that the jury were not told that the indictment contained in law a charge of simple assault, so they could find the accused guilty of a misdemeanor, and not a felony. For the reason that no such request was made by counsel for the accused, the assignment must be overruled. *Barr v. State,* 45 Neb. 458.

There was no error in not compelling the county attorney to elect upon which count he would rely for a conviction. The difference between the counts is in the charge of intent, and the jury were the sole judges of whether that intent was to wound or to kill. *Candy v. State,* 8 Neb. 482. The punishment is the same for either act. Criminal code, sec. 16.

Whether the judgment is sustained by sufficient evidence depends upon the credibility of the witnesses. The accused admitted that he fired the shot; his intent must be ascertained from all the facts and circumstances made apparent by the evidence. If the accused, subsequently to the shooting, made the statement testified to by two witnesses, there is considerable foundation for a finding that he intended to at least wound the complaining witness. Possibly the fact that the two small children of the prosecuting witness and his wife were present when the shot

was fired may have influenced the jurors to find that the intent was to kill. We cannot say, in the light of all the evidence, that the verdict is not sustained by sufficient evidence. However, we ought not to forget that the accused made no further attempt to injure the complaining witness, nor that, in the two years preceding the encounter, the complaining witness made threats of a serious character against Mr. Krause, and, while armed with a rifle, had pursued him to the house of a neighbor. We think there are mitigating circumstances which impel us to say the sentence is too severe, and we therefore shall reduce it to two years, and, as thus modified, the judgment is affirmed.

JUDGMENT ACCORDINGLY.

FAWCETT, J., not sitting.

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SAMUEL O'BRIEN, APPELLANT, V. RUDOLPH B. SCHNEIDER ET AL., APPELLEES.

FILED FEBRUARY 15, 1911. No. 16,956.

1. **Drainage Districts:** ESTABLISHMENT: FINDINGS OF BOARD. A finding made by a board of supervisors in passing upon a petition filed under the provisions of article V, ch. 89, Comp. St. 1907, that "it will be for the public health, convenience and welfare to form a district as prayed for in said petition," fixing the boundaries of the district and finding that "said boundaries will do justice and equity to all persons and promote the interests of said district," is equivalent to finding that it will be conducive to the public health, convenience and welfare to drain the lands described in the petition.

2. ———: ———: PETITION. The petition upon which the supervisors of Dodge county acted in fixing the boundaries and calling an election for the formation of the Elkhorn drainage district, examined in the opinion, and *held* sufficient as against a collateral attack.

3. ———: ———: BOND. The bond required by section 3, art. V, ch. 89, Comp. St. 1907, need not be signed by the petitioners as principals, and the county clerk may accept a petitioner as surety on the bond.

4. ———: ———: ———. A bond signed by principals and surety, and approved by the clerk, is not invalid for the reason that it is conditioned to become void if the district prayed for is formed, or if the petitioners shall pay the expense incurred by the county by reason of the petition.

5. ———: ———: ASSESSMENTS. The proceedings leading up to and including the formation of a drainage district and the assessments subsequently levied therein are not void because the scheme of drainage finally accepted will not benefit a small fraction of the tracts included within the district and upon which no assessments are levied.

6. ———: ———: NOTICE: APPORTIONMENT OF BENEFITS. The fact that the directors are not required to give notice before adopting a plan for draining the lands within the district does not render the act void, nor does the fact that an apportionment of benefits precedes the construction of the improvements invalidate the legislation.

7. ———: ———: ———: ———. A provision in the statute that the directors of the district shall, with the assistance of an engineer after he has prepared a detailed statement of the proposed plan of drainage, apportion to every forty-acre tract and every city or village lot within the district its fair proportion of the total benefits to accrue from the construction of the system of drainage, but that the apportionment shall not become final until after all persons interested have been given notice of the time and place where said apportionment will be confirmed, and giving every property owner the right to protest, to a hearing, and to appeal from the order of the board, is not unconstitutional and void because all assessments shall be made upon the basis of that apportionment, unless a change of plans necessitates a new apportionment.

8. ———: ———: LIMITATION OF ASSESSMENTS. While the act does not in precise language limit the aggregate of assessments that may be levied for all necessary purposes to the benefits that will accrue to the lands within the district, it appears from a consideration of the entire act that the legislature so intended.

APPEAL from the district court for Dodge county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

*F. W. Button* and *I. L. Albert,* for appellant.

*Courtright & Sidner, contra.*

ROOT, J.

This is an action in equity to restrain the directors of a drainage district from levying special assessments upon the plaintiff's land, from collecting any such assessments, and from acting as officers of the district. The defendants prevailed, and the plaintiff appeals.

The statute under which the drainage district was formed is chapter 153, laws 1907 (Comp. St. 1907, ch. 89, art. V). The plaintiff contends that the act is unconstitutional and void. Considerable of the argument is addressed to propositions determined in *State v. Hanson,* 80 Neb. 724, 738. The principles announced in that case will not be reconsidered, but we will pass to the subjects not presented in that case but urged in the instant one as decisive of the invalidity of the law.

Section 11 of the act provides that the board with expert assistance shall by a system of units apportion to every lot or forty-acre tract which will be benefited by the proposed improvement its proportion of benefits. That is to say, to the tracts least benefited one unit shall be apportioned, and to every tract receiving a greater benefit a greater number of units or fractions of units shall be apportioned according to the benefits to be received. A notice shall be given of the time and place when and where the directors will meet for the purpose of equalizing said apportionment, at which time any person interested may object thereto. If any person feels aggrieved by an order made at the hearing, he may appeal to the district court, where the issue is to be heard in a summary manner, and from its judgment an appeal will lie to this court. The distribution of benefits when finally adjusted shall continue as the basis upon which assessments will be made to pay all expenses and costs incident to the organization

and maintenance of the district and the construction and repair of improvements therein, except in case a change in plans or an extension or enlargement of the improvements requires a different apportionment. In that event a new apportionment shall be made. Counsel argue that this procedure is vicious, and that the limit of assessments under this statute is not the special benefits accruing to the land, but the aggregate of expenses and expenditures. No system of assessment can bring about absolute equality or attain exact justice among property owners or taxpayers. The best that can be expected is a substantial approximation of burdens according to benefits, and the legislature is vested with great discretion in providing the methods by which that approximation shall be attained. *Chadwick v. Kelley,* 187 U. S. 540; *City of Findlay v. Frey,* 51 Ohio St. 390; *Allen v. Drew,* 44 Vt. 174; *Mason v. Spencer,* 35 Kan. 512. Statutes which provide for an apportionment of benefits preceding the construction of improvements to be used as the basis upon which all assessments shall be made are not void for the reason that the property owner is not permitted to contest the amount of every levy. He is required to pay no more than his just proportion of the cost and expense of making and maintaining the improvement, and the directors, by their first hearing and apportionment, acquire jurisdiction to make the subsequent levies. *People v. Chapman,* 127 Ill. 387. *Neal v. Vansickle,* 72 Neb. 105, does not hold to the contrary. We there condemned a statute which provided for a "level assessment" of not to exceed a definite sum per acre. The opinion recognizes the right, although it doubts the wisdom, of levying an assessment in anticipation of benefits to accrue from public improvements. Nor do we think a fair construction of the statute leads to the conclusion that the district directors may levy assessments, exclusive of interest charges and the cost of repairs, which in the aggregate will exceed the benefits to the land assessed. We should not presume that the legislature ignored the constitution, but rather that it intended

the drainage officials to act within the limits of the fundamental law. *Voigt v. Detroit City,* 184 U. S. 115; *Martin v. District of Columbia,* 205 U. S. 135; *Ritter v. Drainage District,* 78 Ark. 590; *Village of Passaic v. State,* 37 N. J. Law, 538. We therefore conclude that the plaintiff's contention that the statute is repugnant to the constitution, and therefore void, is not well taken.

The plaintiff contends that the district has not been formed because the petition does not describe the character of the improvements to be made and because the board of supervisors did not find that the anticipated improvements will be conducive to the public health, convenience, or welfare. The petitioners alleged that it will be conducive to public health, convenience and welfare to form a district and to make and maintain improvements therein under the provisions of the act of the legislature herein considered. In our judgment the petition is not so indefinite as to be vulnerable to a collateral attack. The board of supervisors, after an examination of the proposed district and after receiving the advice of the county surveyor, found that it "will be for the public health, convenience and welfare to form a district as prayed for in said petition with certain modifications of the boundaries thereof as hereinafter provided." They also found "that said boundaries will do justice and equity to all persons and promote the interests of said district if formed." The boundaries of the proposed district are also set forth in detail. The drainage act contemplates the drainage of land by the construction of drains, dykes or levees, or by the construction, straightening, widening, deepening or alteration of existing drains, or watercourses, or by riprapping or otherwise protecting the banks of watercourses or by control of surface water or streams of running water. The earlier drainage acts permitted the construction of a main ditch with laterals, and were so hedged about with formalities and conditions that the officers charged with the duty of their administration encountered many difficulties. The supervisors were not permit-

ted to exercise a discretion in the alteration of plans, although such changes were dictated by conditions not anticipated when a ditch enterprise was inaugurated, and time and money were frequently expended with very unsatisfactory results. To remedy such conditions and to enact a law capable of a practical application in the valleys of such watercourses as the Elkhorn, the Nemaha, and other like streams in Nebraska, the later drainage acts were passed.

Article V, ch. 89, Comp. St. 1907, contemplates that county commissioners or boards of supervisors, when petitioned by the requisite number of qualified petitioners and after a bond has been given to hold the county harmless, shall determine whether the creation of a drainage district, practically as suggested in the petition, and the prosecution of the public improvements authorized by law therein, will be conducive to the public health, welfare or convenience. If so, they alter the boundaries of the district, if in their judgment such boundaries should be changed, and after due notice the individuals upon whom the burden of that improvement will be placed vote for or against the formation of the district. It would have been better if the supervisors in the instant case had plainly stated that in their judgment the public health, welfare or convenience would be advanced by draining and protecting from water the lands described in the petition and by creating a district for that purpose. They did find that the public health, welfare and convenience will be advanced by the formation of a district "as prayed for in the petition." The petition prays that the district be formed for the purpose of prosecuting such improvements therein as may be authorized under the drainage act of 1907, and we think the finding said to be absent was in effect made. *State v. Hanson,* 80 Neb. 724, 738; *Oliver v. Monona County,* 117 Ia. 43. The act under consideration does not direct the supervisors to enter upon their journal a record of their findings, and hence the case of *State v. Colfax County,* 51 Neb. 28, is not in point. Nor is the act

invalid because the directors are not compelled to notify the landowners of the time when and place where a plan will be adopted for draining the lands within the district. Notice of that character is a matter of grace, and not of right, which the legislature may grant or withhold in its discretion. While the statute does not provide for notice before the directors shall adopt a system of drainage, the property owner is given notice of the time when benefits will be apportioned to his land. At that time the engineer must have prepared a detailed plan, and, if the expense of carrying that scheme into execution will exceed the benefits that will accrue to the land within the district, a hearing upon the objections will develop that fact and the plan will not be adopted. Experience teaches that benefits generally exceed the cost of constructing and maintaining a drainage system. In the case at bar the plaintiff charged in his petition that his land will not be benefited to the extent of the levy possible thereon, but no attempt was made to prove that fact, and we are of opinion that the evidence is ample to sustain a finding that his benefits will largely exceed any assessments that may be levied by the directors upon the plaintiff's farm.

The exceptions to the bond should be overruled. The statute requires the petitioners to "file a bond with surety or sureties to be approved by said county clerk, which bond shall run to the said county and be conditioned to pay all expenses of said county by reason of said proceedings in case said district be not formed." A bond was filed with the clerk and approved by him. The undertaking is signed by two of the petitioners as principals and by one of them as surety, and by its terms they are bound unto the county "for the payment of expenses of said county by reason of the proceedings hereinafter mentioned," and it is conditioned to be void, "if said district be formed, or if Maurice Nelson and others shall pay all the expenses of said county by reason of said proceedings in case said district be not formed," otherwise it is to remain in full force and effect. The statute does not require the peti-

tioners to sign the bond, but to file a bond. A document is filed with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept. *Reed v. Inhabitants of Acton*, 120 Mass. 130; 3 Words and Phrases, p. 2765. The fact that all of the petitioners did not sign the bond is immaterial. *Clark v. Strong*, 14 Neb. 229; *Bollman v. Pasewalk*, 22 Neb. 761; *Stump v. Richardson County Bank*, 24 Neb. 522; *Eckman v. Hammond*, 27 Neb. 611.

Neither does the statute provide that the surety shall be other than a petitioner. Unless the petitioners sign the bond, they are not liable for costs, and there is no good reason why the clerk should not accept a solvent petitioner as surety on the undertaking.

The statement that the bondsmen will pay the cost if Morris and others do not, in the event that the district is not formed, does not vitiate the bond. It would have been as well had no mention been made of Morris and others, but the county is protected, and we think the statute has been satisfied in this regard. In *Casey v. Burt County*, 59 Neb. 624, cited by plaintiff, the bondsmen's liability was limited, and the undertaking was not conditioned that the signers should pay even the limited liability if the board should find against the improvement.

We do not think the fact that a number of small tracts, aggregating 600 acres out of the total of 40,000 acres within the district, will not be assessed renders the formation of the district void. There is nothing in the record to suggest that the inclusion of these tracts of land was fraudulent or that the presence thereof in any manner prejudiced the plaintiff, nor that the finding of the engineer that the ditches when constructed would not benefit those lands is not sustained by the evidence.

Upon the entire record, we find that the decree of the district court is right, and it is

AFFIRMED.

FAWCETT, J., not sitting.

HENRY HEROLD, APPELLEE, V. WILLIAM W. COATES, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,226.

1. **Process: OMISSION OF SEAL ON COPY.** A copy of the seal under which a summons is issued is not an essential part of the copy required by the statutory provision that "service shall be by delivering a copy of the summons to the defendant personally." Code, sec. 69.

2. **Libel and Slander: TRIAL: INSTRUCTIONS.** In an action for slander, an instruction to find as a fact that defamatory words pleaded in the petition were spoken of and concerning plaintiff is erroneous, where their utterance was put in issue by the answer and contested at the trial by direct testimony on behalf of each party.

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

*Byron Clark* and *W. A. Robertson,* for appellant.

*Matthew Gering, J. J. Sullivan* and *A. L. Tidd, contra.*

ROSE, J.

The petition contains two counts, the first for slander and the second for malicious prosecution. There was a verdict in favor of plaintiff for $5,000 on the first cause of action and for $7,500 on the second. On the count for malicious prosecution a new trial was granted. On the count for slander a judgment was rendered on the verdict in favor of plaintiff, and defendant has appealed.

1. The overruling of an objection to the jurisdiction of the court is the first error assigned. In the argument on this point it is asserted that the copy of the summons delivered by the sheriff to defendant did not contain a copy of the seal of the district court nor otherwise show the original was issued under seal. This omission is the basis of the assignment. Though defendant is appellant here,

he did not bring up the original summons nor a copy thereof. With the record in such a condition it will be presumed the original summons was issued under seal in the manner prescribed by statute. Code, secs. 64, 880. This presumption is not overcome by the mere production of a sheriff's copy with the seal omitted. The summons being perfect, the question is: Did the sheriff's copy meet the requirements of the statute which declares that "the service shall be by delivering a copy of the summons to the defendant personally?" Code, sec. 69. The copy delivered to defendant embodies the statutory contents of a summons, and shows that the original was issued by the clerk of the district court. It also contains the words, "Witness my official signature and the seal of said court." It was a perfect copy except that the seal was not reproduced. To hold under such circumstances that the sheriff did not deliver a "copy" of the summons to defendant would require a construction too narrow and technical. A copy of the seal is not an essential part of the copy contemplated by statute. *Kelley v. Mason*, 4 Ind. 618; *Hughes v. Osborn*, 42 Ind. 450; *Sietman v. Goeckner*, 127 Ill. App. 67; *Peters v. Crittenden*, 8 Tex. 131.

2. An instruction containing the following language is assailed as erroneous: "As to the first cause of action, you are instructed that the defendant in his answer impliedly admits the speaking of the alleged slanderous words stated in the first cause of action in plaintiff's petition, which he denies, but seeks to avoid their legal effect by alleging in substance that the alleged slanderous statements are true and privileged. * * * The defendant, therefore, having admitted the speaking of the words claimed to be slanderous by the plaintiff, you are directed to find as a fact that the defendant did speak of and concerning the plaintiff the alleged defamatory words contained in the first cause of action stated in plaintiff's petition."

According to the petition, the defamatory words spoken of and concerning plaintiff by defendant, omitting the

innuendoes, are: "Herold has stolen more than $2,000 worth from me." "Henry Herold has stolen from me more than $4,000." "Henry Herold has stolen from me about $17,000." "Herold, the damn whelp, has stolen me blind. He has stolen over $6,000, and I do not know how much more. He was several days in Peoria out with a whore. He was seen out buggy-riding with her." "Herold has robbed me of about $17,000."

As shown by the instruction assailed, the court charged that defendant in his answer admitted the speaking of the words quoted, including those relating to plaintiff's behavior at Peoria, and directed the jury to find as a fact that they were spoken of and concerning plaintiff by defendant. To justify the instruction plaintiff relies on the following allegations of the answer: "Defendant further alleges that the plaintiff was in the employ of this defendant, managing and controlling defendant's stores at Wyoming and Kewanee, Illinois, and in Plattsmouth, Nebraska, and that he had control of all purchases and sales and the proceeds thereof, and represented that he was selling goods and making large profits thereon and discounting all bills, which representations defendant believed and relied upon until in December, 1907, when this defendant found that there were unpaid bills for goods purchased by plaintiff on this defendant's account, aggregating about $12,000, which were due and payable, and of which theretofore this defendant had been kept in ignorance; and that on account of the unexpected presentation of such large amounts this defendant was wholly unprepared to pay the same, and on account of the persistency of the persons holding said claims for their payment this defendant applied to different banks for loans with which to pay said debts, and in answer to inquiries as to his need of money was compelled to and did make explanations as aforesaid of his indebtedness and his prior ignorance thereof, and that defendant had also found shortages in stock and moneys from sales and uncharged items of moneys from sales and uncharged items of moneys and

goods, by which he had suffered great losses, the aggregate of which was then and still is unknown to defendant, all of which apparent and unexplained shortages in moneys, goods and accounts had occurred since February 15, 1907, and were based upon inventories made by the plaintiff, and that about the periods of time alleged in said first cause of action of the alleged speaking of the alleged defamatory words, this defendant made such explanation to the persons of whom he desired to borrow money and stated the foregoing facts, and also made such statements and explanations to creditors or their representatives when asked for payment of their claims, and which explanations he made for the purpose of getting extensions of time to pay said claims, and likewise made such explanations to the associates in business of this defendant who were entitled to know the cause of this defendant's financial embarrassment and which was affecting their joint business, and that all of such statements were made at a time and under such circumstances where and when the communications were privileged, and were made without malice and not for repetition or publication. This defendant further alleges that it is true that the plaintiff took goods and moneys of this defendant and converted the same to his own use, without the knowledge and consent of defendant, and had done so prior to the dates named in said first cause of action, and this defendant further alleges that he did not make any statement except where it was necessary to protect his own interest and property and for lawful purposes."

In reviewing the instruction criticised, the inquiry will be limited to the direction that defendant in his answer admitted speaking of and concerning plaintiff the following: "He was several days in Peoria out with a whore. He was seen out buggy-riding with her." In the answer the uttering of these words was denied in a separate paragraph denying each and every allegation in the first count of the petition except plaintiff's employment and the fact that he was a married man. The admissions of the answer

relate to business matters, and under any fair interpretation of the pleading the words last quoted, at least, are not included. Besides, their utterance was treated by the parties, at the trial, as a disputed question of fact. A witness for plaintiff testified that they were spoken as alleged in the petition, and defendant, without objection, testified that he never at any time or place used the word "whore" in speaking of plaintiff or charged him with being out with such a character. On the record presented, therefore, the utterance of the defamatory words last quoted was an issue of fact and the testimony relating thereto was in direct conflict. In charging that defendant admitted the speaking of such words and in directing the jury to find as a fact that they were spoken of and concerning the plaintiff, the trial court erred to the prejudice of defendant.

It is urged by plaintiff that the instruction is not reviewable for want of an exception at the proper time, but an exception is noted in the usual manner on the instruction itself, and it appears to have been taken pursuant to an established custom in the trial court.

REVERSED AND REMANDED.

ROOT, J., not sitting.

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CHARLES H. HURLBUT ET AL., APPELLEES, V. LESTER PROCTOR, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,278.

1. Appeal: DENIAL OF AMENDMENT. The denial of leave to amend a pleading during the trial is not reversible error, if the record fails to disclose that the trial court in so ruling abused its discretion.

2. ———: FAILURE TO EXCEPT. Failure to mark an instruction "given" is not available as error in absence of an exception on that ground.

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

*George A. Adams* and *W. W. Towle,* for appellant.

*Burr & Marlay, contra.*

ROSE, J.

This is an action for breach of warranty in the sale of a crib of corn purchased by plaintiffs from defendant. From a judgment on a verdict in favor of plaintiffs for $100, defendant has appealed.

The petition alleges and the answer admits that the corn was purchased February 8, 1907. During the trial the court refused to allow defendant to amend his answer by alleging the sale was made at an earlier date, and the ruling is assigned as error. It is familiar law that the denying of leave to amend a pleading during the trial is not reversible error, if the record fails to disclose that the trial court in so ruling abused its discretion. *Hubenka v. Vach,* 64 Neb. 170. No abuse of discretion is shown. The case had previously been tried before a justice of the peace, and there is nothing to indicate a change in the testimony or in anything else requiring an amendment of the answer in the particular stated.

It is suggested by defendant that an instruction appearing in the record was not marked "given," as required by statute. The transcript, however, shows it was in fact given. There was no exception to the instruction on that ground, and the omission therefore is not available as error. *City of Chadron v. Glover,* 43 Neb. 732.

An instruction referring to the witnesses and directing the jury to consider "their apparent fairness or bias, if any such appears," and "their apparent fairness or bias, if any such is proved," is criticised as erroneous. It is argued that the words "appear" and "proved" differ in meaning, and that it is not sufficient under the charge to

show that bias of a witness "appears," but that it must be "proved." There is no substantial ground for this criticism.

The assignments fail to disclose a reversible error and the judgment is

AFFIRMED.

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AMERICAN FIRE INSURANCE COMPANY, APPELLEE, V. EDWARD E. HOWELL, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,289.

Insurance: TERMINATION OF AGENCY: COMPENSATION. An insurance agent, who retained a stipulated compensation and whose agency was terminated by his principal within a year, in strict conformity with the terms of his employment, *held* not entitled to an additional contingent commission, the right to which depended upon the agency continuing for a year and on the collection of a larger amount of premiums than those collected.

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

*W. H. Herdman,* for appellant.

*John P. Breen, contra.*

ROSE, J.

The subject of controversy is the amount of commissions due defendant for writing insurance and collecting premiums as plaintiff's agent at Omaha from June 20, 1905, to April 20, 1906. Plaintiff sued defendant for $458.42, an alleged balance due for premiums after deducting the agent's stipulated commissions. Defendant pleaded a counterclaim of $399.57, based on an additional contingent commission authorized, as he alleges, by the terms of his agency. A demurrer to the answer was sustained. Defendant refused to plead further, and judgment was rendered against him for the full amount of plaintiff's claim. Defendant has appealed.

After allowing defendant a commission of 30 per cent. of the premiums on risks of one class and a commission of 15 per cent. of the premiums on risks of another class, which he in fact received, the contract of employment provides: "It is further agreed an additional contingent commission of 10 per cent. will be paid on the net results of the business at the end of each contingent year from date, the said contingent commission to be computed by deducting from the net premiums written and remitted to the company the amount of losses paid on risks now in force on the books of the company at this agency, and on all risks hereafter written by the agent, together with all local agency expenses, including state and local taxes and licenses. It is understood and agreed that, if the agency should be terminated by resignation or otherwise (the right of resignation or removal at any time is recognized by both parties) before the end of any contingent year, the agent is to receive no contingent commission for the part of the year expired at the termination of the agency, and that this contingent agreement does not extend beyond the termination of the agency. It is further provided and agreed that when, at the end of any contingent period, there shall remain any unsettled losses in the agency, the computation and payment of the contingent fees shall be deferred until such losses shall have been determined. It is further understood and agreed that the 10 per cent. contingent commission shall not be earned and payable unless the net premiums on desirable business according to the rules and prohibitions of the company shall equal or exceed the sum of $7,500 during any one contingent period."

The pleadings disclose the following facts: Defendant had an established insurance agency and controlled a large number of valuable risks. With reference to a portion of this business the contract was made. Defendant was induced to accept the agency by reason of the contingent commission. Owing to the earthquake disaster at San Francisco, plaintiff was compelled to reinsure its risks in

another company and go out of business. In less than a year after the agency was established it was terminated by a peremptory telegram from plaintiff, when the net result of defendant's business in premiums under his agency was $3,995.71. Ten per cent. of this sum, as a contingent commission in addition to the other commissions mentioned, is the amount of defendant's counterclaim. Was it properly disallowed by the trial court in sustaining the demurrer to the answer? This is the question presented. Defendant urges three propositions: "(1) That the agency contract by its terms was to continue for a fixed and definite period of one year at least; (2) that the agency contract contains no provision authorizing the principal to terminate said contract without cause on the part of the agent prior to the expiration of such period of one year; (3) that by terminating said agency agreement the appellee breached and violated his contract with the appellant and is liable therefor to the appellant in damages."

This reasoning cannot be adopted, because it asserts propositions not found in the contract. The only provisions for a definite period of one year relate to the "contingent year" which is made a basis for computing the contingent commission. The right of either party to terminate the contract at any time is recognized in specific terms. It is definitely stated that, if the agency should be terminated before the end of the contingent year, the agent shall receive "no contingent commission for the part of the year expired at the termination of the agency, and that this contingent agreement does not extend beyond the termination of the agency." Plaintiff terminated the contract in strict compliance with its own terms before any right to the contingent commission arose. There was no breach of the contract for which plaintiff is liable in damages, and, when terminated according to its own terms in the manner disclosed, it did not require payment of the contingent commission. The trial court so held, and the judgment is

AFFIRMED.

JOHN H. PETTIT, APPELLEE, V. MICHAEL LOUIS, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,296.

1. **Evidence: RECITALS IN RELEASE OF MORTGAGE.** The recital in a release of a mortgage that it was executed in consideration of the payment of the debt named therein, while *prima facie* evidence of the fact stated, is not conclusive thereof, and such recital may be overcome by evidence which clearly shows that said debt had not in fact been paid.

2. **Limitation of Actions: SUIT BY MORTGAGOR TO QUIET TITLE.** In the hands of a mortgagee in possession, a mortgage never becomes barred by lapse of time in the sense that the mortgagor can, in a court of equity, quiet his title against the mortgage without first doing equity by paying it.

3. **Mortgages: RIGHTS OF MORTGAGEE IN POSSESSION.** Section 55, ch. 73, Comp. St. 1909, does not prevent parties to a mortgage from stipulating therein for the investiture of the mortgagee with the right of possession and right to the rents and profits of the mortgaged premises in the event of default on the part of the mortgagor; and in case the mortgage contains such an express stipulation, and the mortgagee peaceably obtains possession of said mortgaged premises, he may, after default on the part of the mortgagor, hold such possession as against the mortgagor or his grantees until said mortgage is fully paid.

4. ———: ———. Where one who has purchased lands at a tax foreclosure sale and gone into peaceable possession of the same under a sheriff's deed issued in such foreclosure proceeding subsequently purchases an outstanding mortgage, not then barred by the statute of limitations, and it subsequently transpires that the foreclosure proceeding under which he obtained possession of the mortgaged premises is void, he may nevertheless, if the mortgagor is in default, defend his possession of said premises as a mortgagee in possession.

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

*B. F. Hastings,* for appellant.

*E. E. Spencer* and *Charles S. Roe, contra.*

FAWCETT, J.

From a decree of the district court for Hayes county, quieting plaintiff's title to the northwest quarter of section 19, township 8, range 34, in said county, defendant Louis appeals.

On November 1, 1888, one Joseph Camp, then being the owner of the land in controversy, executed to one Darrow a promissory note for $500, due November 1, 1893, and his mortgage deed securing the same. The mortgage was duly recorded November 10, 1888. February 19, 1889, Darrow assigned the mortgage to Lucretia Jerome. July 11, 1892, Camp conveyed to Joseph Z. Briscoe, and on October 4, 1895, Briscoe, his wife joining, conveyed the land to plaintiff, John H. Pettit. This deed was not recorded by Pettit until March 28, 1908, nor, so far as the record shows, was any claim of ownership or right of possession made by Pettit until this suit was commenced and summons served on September 24, 1908. On August 9, 1900, defendant Louis instituted proceedings in the district court for Hayes county to foreclose a tax lien upon the lands, making Briscoe and his wife defendants. Service was attempted to be had upon the Briscoes by publication upon an affidavit of nonresidence. The suit proceeded to decree and sale, and a sheriff's deed was issued to Louis October 15, 1901. The deed was immediately recorded and Louis at once took possession of the premises. At the time the action to foreclose the tax lien was commenced and service attempted by publication, Briscoe and his wife were, and had for a number of years been, actual residents of Lancaster county, Nebraska, and defendant now concedes that the court in that suit did not have jurisdiction of the persons of the Briscoes and that his deed was therefore void. Defendant Louis paid all taxes assessed against the premises for the years 1897 to 1907, inclusive. On May 23, 1901, defendant Louis purchased the Camp note and mortgage from Lucretia Jerome and received from her an

assignment of the same, which was duly filed on June 13, 1901. On March 9, 1905, defendant Louis executed and filed for record a release of the mortgage referred to, the release reciting that it was executed "in consideration of the payment of the debt named therein." Defendant Louis at all times, after entering into possession of the land under the sheriff's deed in the tax foreclosure suit, up to the time of the commencement of this suit, had been in the actual, peaceable and unchallenged possession of the lands. Plaintiff commenced this suit September 24, 1908, to set aside the sheriff's deed obtained by defendant Louis, and to redeem from his tax lien, and also to quiet his title against the mortgage above referred to; the prayer as to the mortgage reading as follows: "That the aforesaid mortgage appearing of record against said premises from Joseph Camp and Frances Camp to the defendant, Lew E. Darrow, be decreed not to be enforceable as a lien against said premises by reason of the lapse of time, and the same be canceled and discharged of record, and the cloud upon plaintiff's title by reason thereof be removed; * * * that the title of this plaintiff in and to said premises be quieted as against said defendants, and all of them; that this plaintiff be put into possession of said premises; and for such other and further relief as justice and equity may require."

Defendant assigns eight principal reasons why the judgment of the district court should be reversed. Having reached the conclusion that the seventh assignment must be sustained, and as that conclusion is decisive of the case, it will not be necessary to consider any of the other assignments. The seventh assignment is: "Defendant Louis being the mortgagee in possession, plaintiff could only redeem by paying the amount due on the mortgage." Plaintiff in his brief concedes that there is "but the one question to be determined by this court, the rights of the parties herein with respect to the mortgage involved in this controversy." As we understand plaintiff's argument, it is that defendant was not a mortgagee in possession for

the reasons: First, that the release shows that the mortgage had been paid; second, that it was barred by the statute of limitations; third, that there was no stipulation in the mortgage giving the mortgagee the right to the possession of the premises until after foreclosure of the same; and, fourth, that plaintiff never in any lawful way obtained the possession or right to the possession of the property. We will consider these points in the order named.

1. The release, it is true, recites that it was executed "in consideration of the payment of the debt named therein." Is this recital in the release conclusive? We think not. It clearly appears that Mr. Louis thought that, as against the owner of the fee, he had obtained a good title under his sheriff's deed, but, in order to avoid any controversy with the mortgagee, he sought out the holder of the mortgage and purchased and obtained an assignment of the same. He made this purchase May 23, 1901. Nearly four years thereafter, or on March 9, 1905, no one in the meantime having questioned his title and right of possession, he executed and filed the release. Plaintiff argues that there is no evidence in the record to show that the mortgage had not in fact been paid. In this plaintiff is in error, as we think he furnished proof of the nonpayment himself. The deposition of plaintiff was taken and introduced in his own behalf. After testifying that he had purchased the land in controversy, we have the following: "Q. About what date was that purchase made? A. On the 4th day of October, 1895. Q. When you purchased that land, was there any incumbrance on it? A. Yes, sir; there was a mortgage on it of $500 given by Joseph Camp to Lew E. Darrow. Q. And the above described property was deeded to you subject to that mortgage, was it? A. Yes, sir. Q. Mr. Pettit, since you obtained title to said land, have you ever paid any principal or interest on that mortgage? A. No, sir." If plaintiff had purchased the land subject to this particular mortgage, over nine years prior to the date defendant released the same, he assuredly would be the one who had paid it if it had in fact

been paid. It is not to be presumed that any one else would have paid it for him; and, having testified that he had not paid any part of the principal or interest on it, we think it is quite clearly established that the mortgage had not been paid, and that the release was executed by Mr. Louis, simply for the purpose of clearing his supposed title upon the record.

2. That the mortgage would have been barred at the time this suit was instituted, had a third party been attempting to foreclose the same, or had Mr. Louis been attempting to foreclose it without being in possession of the property, will be conceded; but in the hands of a mortgagee in possession, a mortgage never becomes barred, in the sense that the mortgagor or his grantee can ask a court of equity to quiet his title against the mortgage without himself doing equity by paying it.

3. There is this stipulation in the mortgage: "The said first parties agree to pay all taxes and assessments levied upon said premises, when the same are due (this condition the record shows had been broken), and insurance premiums for amount of insurance hereinafter specified, and, if not so paid, the holder of this mortgage may, without notice, declare the whole sum of money herein secured due and payable at once, or may elect to pay such taxes, assessments and insurance premiums, and be entitled to interest on the same at the rate of 10 per cent. per annum until paid, and this mortgage shall stand as security for the amount, so paid, with such interest. But whether the holder of this mortgage elect to pay such taxes, assessments or insurance premiums or not, it is distinctly understood that the holder hereof may immediately cause this mortgage to be foreclosed, and shall be entitled to immediate possession of the premises, and rents, issues and profits thereof." We do not think that the words, "the holder hereof may immediately cause this mortgage to be foreclosed," should be construed to mean that he *must* cause the mortgage to be foreclosed before the next clause should be operative, viz., "and shall be entitled to im-

mediate possession of the premises, and rents, issues and profits thereof." The stipulation in this mortgage appears to be substantially the same as the one in the mortgage under consideration in *Felino v. Newcomb Lumber Co.*, 64 Neb. 335. We there held: "A provision in a real estate mortgage that, in case of a default in the payment of the debt thereby secured, the mortgagee shall be entitled to the immediate possession of the premises, is valid as to the parties and subsequent purchasers and incumbrancers chargeable with notice." We there considered section 55, ch. 73, Comp. St. 1909, which provides: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof," and held: "This provision leaves it competent for the parties to a mortgage to stipulate for the investiture of the mortgagee with the legal title and right of possession, which carries with it the right to the rents and profits. As we have seen, in this case the mortgage expressly provided that upon the forfeiture of the mortgage, or in case of default in any of the payments, the mortgagee should be entitled to the immediate possession of the premises. Of this provision subsequent purchasers and incumbrancers, including the plaintiff in this case, were as fully charged with notice as with any other provision of the mortgage. * * * In *McIntyre v. Whitfield*, 13 Smedes & M. (Miss.) 88, it was held that a stipulation similar to the one contained in defendant's mortgage might be enforced by the mortgagees taking possession and holding it." In *Hobson v. Huxtable*, 79 Neb. 340, we held: "In case a defendant as a matter of equity is entitled to be subrogated to the lien of a mortgage upon real estate, it is within the power of a court of equity, as a condition precedent to granting equitable relief to the owner of the real estate, to compel the payment of that mortgage, even though by its terms said lien be barred by the statute of limitations." In *Bank of Alma v. Hamilton*, 85 Neb. 441, we held: "If a litigant asks affirmative equitable relief, he will be required to do justice himself

with regard to any equity arising out of the subject matter of the action in favor of his adversary, and the statute of limitations is no bar to the imposition of such conditions."

4. We are unable to concur in plaintiff's contention that defendant never in any lawful way obtained the possession or right to the possession of the property. He obtained possession of the property under a deed ordered by the district court, in a proceeding which he thought was in all respects regular. He obtained his possession peaceably, without resorting to any force and without objection from the plaintiff or any one else. He retained that possession for over four years before he purchased the mortgage. Having become the owner of the mortgage while he was in peaceable possession of the property, and the mortgage containing a stipulation authorizing him to take possession in the event of a default by the mortgagor, we think he was entitled to claim that he was in possession as mortgagee, regardless of the question as to his right of possession under his sheriff's deed. In 1 Jones, Mortgages (3d ed.) sec. 715, it is said: "A mortgagee who has acquired possession before his mortgage became due, by virtue of some other title, is to be deemed at the maturity of his mortgage as holding as a mortgagee in possession upon a forfeiture; and therefore, although he has lost the title under which he originally entered, he may defend his possession under his mortgage." A court of equity will not draw fine distinctions or indulge in mere technicalities to favor the commission of a wrong. That to permit plaintiff to oust defendant of his possession of the property in controversy without payment of the mortgage, subject to which plaintiff took his title, would be a wrong, seems to be too clear to admit of a doubt. Plaintiff obtained his deed October 4, 1905, subject to this mortgage. He kept his deed off the records for 12 years. He never paid any taxes, or any portion of the principal, or any installment of interest upon the mortgage. He retained his secret ownership of the property in controversy during

all of the time that defendant was foreclosing his tax lien, obtaining his sheriff's deed, purchasing the mortgage and releasing the same, and for more than three years thereafter. Having failed in the performance of every duty required of him, he now, after the land has doubtlesss greatly increased in value, emerges from his hiding, offers to redeem from the tax lien, and boldly asks to have his title quieted against the mortgage, subject to which he took his title, without paying any portion of the same. A court of equity will not grant such an unjust request.

The judgment of the district court is reversed and the cause remanded, with directions to enter a decree permitting plaintiff to redeem from the tax sale by the repayment to defendant of all taxes paid by him, with lawful interest, and for permanent improvements made by defendant, if any; and upon further payment to defendant of the mortgage in controversy, with interest thereon at the rate of 10 per cent. per annum from November 1, 1893, less the reasonable rental value of the lands in controversy during the time defendant has been in possession of the same.

REVERSED.

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## DAVID EMERY WHERRY ET AL., APPELLEES, V. PAWNEE COUNTY, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,895.

1. Counties: COUNTY BOARD: POWERS. "A county board or board of county commissioners are clothed not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law." *Berryman v. Schalander*, 85 Neb. 281.

2. ———: CLAIM FOR TORT: LIMITATIONS. An action upon a claim for a tort or for unliquidated damages may be commenced in a court of competent jurisdiction, or by filing a claim with the county board, at the election of the claimant; and, if the latter course is pursued and the claim is rejected by the board, the claimant

may appeal from the action of the board to the district court, and in such case his action will be deemed to have been commenced upon the date of his filing of his claim with such board.

3. Trial: ACTION FOR DAMAGES: SUBMISSION OF QUESTION OF NOTICE. In an action for damages for negligence in failing to keep a bridge upon the public highway in reasonably safe condition for travel, where the uncontradicted evidence clearly established both written and oral notice to the proper county official, prior to the accident, of the unsafe and dangerous condition of such bridge, it is not error for the district court to fail to submit the question of notice to the jury.

4. Appeal: QUESTION OF NEGLIGENCE: VERDICT: REVIEW. And in such an action, where the questions of negligence and contributory negligence are both properly submitted to the jury and the verdict of the jury in response thereto is supported by sufficient competent evidence, it will not be disturbed in this court.

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

*J. C. Dort*, for appellant.

*F. A. Barton, contra.*

FAWCETT, J.

From a judgment of the district court for Pawnee county in favor of plaintiffs for damages in the loss of a mule by reason of the dangerous condition of a bridge upon a public highway in defendant county, defendant appeals.

The damage complained of was sustained March 3, 1906. On the 28th of the same month plaintiffs filed a claim for damages with the county clerk of defendant county, asking the county board to approve and allow the same. On June 12 the board rejected the claim, and on the 27th of the same month plaintiffs gave notice of appeal and filed an appeal bond with the county clerk. Thereafter plaintiffs filed their petition in the district court. This petition was first assailed by a motion to strike the petition from the files and dismiss the action upon the ground that

the court was without jurisdiction, for the reason that the action sought to be maintained shows that "it is an attempt to appeal from the county commissioners' decision, and the action is not appealable." This motion was overruled and an answer filed, which by leave of court was subsequently withdrawn and a demurrer interposed based upon the same grounds as the motion. The demurrer was overruled, whereupon defendant refiled its answer, in which it again alleged the want of jurisdiction of the court, and that plaintiffs did not commence their action within 30 days of the time of said injury; that more than 30 days had elapsed from the time of the injury before the cause was docketed in the district court; that defendant at the time of the injury had no knowledge or information that the bridge or culvert was defective; that whatever defects existed in the bridge the same were plainly visible to the plaintiffs' agent and were known to him at and before the time the injury complained of occurred; and that any damage or loss sustained by plaintiffs was caused by the gross carelessness and negligence of plaintiffs' agent in crossing over the defective bridge or culvert, "when there was ample room to pass over said bridge or culvert without crossing over the defective part, and in not driving entirely around said culvert or bridge, where the road as traveled by the public plainly and clearly showed the travel was going, and of which the plaintiffs' agent had notice and full knowledge." The reply is a general denial.

The main contention urged is that the action of the plaintiffs is one sounding in tort, and not one arising upon an express or implied contract. It is argued by defendant that "before a claimant for damages, alleged to have been sustained by the negligence, carelessness or wrong-doing of a board of county commissioners, can secure relief, he must first establish his claim, then it would become the duty of the county board to cause a warrant to issue in settlement thereof." By section 22, art. I, ch. 18, Comp. St. 1909, the powers of a county are defined:

"Third. To make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." Section 23 in defining the powers of county boards provides: "Fifth. To examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county."

*Berryman v. Schalander,* 85 Neb. 281, involved the power of the county board to allow the county attorney, who was a salaried officer, his necessary traveling expenses in going to different parts of the county to attend preliminary examinations of persons charged with criminal offenses. By thus avoiding the large expenditure in sheriff's and witnesses' fees, which would have resulted had such offenders and witnesses been brought to the county seat for such preliminary examination, a considerable sum was saved annually to the county. After quoting with approval from *Lancaster County v. Green,* 54 Neb. 103, we held: "A county board or board of county commissioners are clothed not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law." In the opinion we said: "Did the board have the power to pay the necessary expenses of the county attorney incurred while prosecuting the business of his office in a manner which was saving to the county large sums of money each year? To hold that it did not have such power would not only be a strained construction of the statute, but would, we think, be against public policy." In like manner we think that to hold that the county board, when a claim for damages, resulting from the county's negligence in not keeping in reasonably safe condition for travel one of its bridges, has been filed with the board and the board is satisfied that the claim is reasonable and just, must decline to pay such claim until it has been established in court, and a large sum for costs added thereto, "would not only be a strained construction of the statute, but would, we think, be against public policy."

*Richardson County v. Hull,* 24 Neb. 536, was an action to recover from the county the sum of $509.43 which had been paid into the county treasury for taxes upon a certain tract of land not subject to assessment. The claim was not filed with the county board, but the action was commenced in the district court. One of the county's contentions was that plaintiff should have presented his claim to the board of county commissioners, and that it could only be brought to the district court by appeal from that board. In the opinion by COBB, J., it is said: "The proposition that 'it is not competent for the board of county commissioners to determine whether the "mistake or wrongful act" contemplated in this section is committed or not' involves the paradox that the county shall not, and cannot, do the very act which the statute plainly declares it shall do, which is absurd; and it involves the further proposition that the county, through its constituted authority, is powerless to act, and cannot act in any such case until it shall be sued in a court of competent jurisdiction and judgment rendered against it, which may be perplexing, inexpedient, and unnecessary. This I do not believe to be the law. The reverse of the conclusions reached by me, in the case at bar, are expressed with much force in the opinion of Chief Justice Dixon in *Stringham v. Board of Supervisors of Winnebago County,* 24 Wis. 594. It is not my purpose to review that opinion, and it is with hesitation that I confess an inability to agree with that decision, especially in an opinion of such an able jurist, and so well characterized by his usual vigor and confidence." After showing the similarity of the Wisconsin statute and subdivision 5 of section 23 of our statute, *supra,* the opinion continues: "The language of either statute seems sufficient to confer the power on the county board to hear and determine the claim or demand of a citizen against the county, of whatever nature, under contract or by tort, especially when the right of appeal is preserved as well to the claimant as to any citizen taxpayer who may feel aggrieved by an adverse decision,"

Under the authority of that case, where, it will be seen, the question was carefully considered, the claim in the case under consideration was properly filed with the county board, and the appeal from the adverse ruling of the board conferred upon the district court jurisdiction.

Counsel for defendant cites *Douglas County v. Taylor*, 50 Neb. 535, and that case cites *Nance v. Falls City*, 16 Neb. 85; *Village of Ponca v. Crawford*, 18 Neb. 551; and *Hollingsworth v. Saunders County*, 36 Neb. 141. *Douglas County v. Taylor* was an action by the owner of land abutting upon a public highway, one-half of which was in the city and the other half outside of the limits of the city, for damages occasioned by a cut and fill which the county made and constructed in the highway in front of his property. In the syllabus it is held: "That no legislative enactment was necessary to enable Taylor to maintain his action; that the district court had original jurisdiction to try the claim of Taylor against the county; that it was not a claim required by section 37, art. I, ch. 18, Comp. St., to be filed with the county clerk of said Douglas county and passed upon by its board of commissioners; the word 'claims' in said section 37 has reference only to claims originating in contract, express or implied, between the claimant and the county." This holding of the syllabus would appear to be in conflict with the holding in *Richardson County v. Hull, supra,* but in the opinion, on page 545, it is said: "We think that the word 'claims' in that section refers only to claims originating in contract, express or implied, between the claimant and the county, and that a claim against a county for damages caused to the claimant's property by the county's taking it for public use, or damaging it by the construction of a public improvement, is not such a claim as need be first filed with the county clerk and passed upon by the county authorities; but an action on such a claim may be brought, in the first instance, in any court having jurisdiction of the subject matter." It seems to us that this was what the court in that case meant to decide, viz.,

that it was such a case as "may" be brought, in the first instance, in any court having jurisdiction of the subject matter, and "need not" be first filed with the county clerk. We do not think it was the intention of the court to there decide that first filing the claim with the county board, and then appealing from an adverse ruling of the board to the district court, would not give the district court jurisdiction.

Prior to the decision in *Douglas County v. Taylor,* the court, consisting of the same judges who decided *Richardson County v. Hull;* decided the case of *Nance v. Falls City,* 16 Neb. 85, and in that case followed the decision of the supreme court of Wisconsin in *Bradley v. City of Eau Claire,* 56 Wis. 168; *Ruggles v. City of Fond du Lac,* 53 Wis. 436, and *Kelley v. City of Madison,* 43 Wis. 638, and held that "the word 'claims' in section 80 of the chapter relating to cities of the second class applies alone to those arising upon contract, and not upon tort." In *Village of Ponca v. Crawford,* 18 Neb., 551, another member of the court, as it was composed when *Richardson County v. Hull* was decided, cited *Nance v. Falls City, supra,* without any discussion of the question. When these three eminent judges came to carefully consider the Wisconsin cases again, in *Richardson County v. Hull,* they disapproved all three of the cases cited and followed in *Nance v. Falls City,* and also repudiated *Nance v. Falls City,* and likewise repudiated a similar holding in the last paragraph of the syllabus in *Kaeiser v. Nuckolls County,* 14 Neb. 277. It is subsequently stated, in *Hollingsworth v. Saunders County,* 36 Neb. 141, 146, that the language used in *Richardson County v. Hull* "is merely *obiter dicta.*" In that statement we think the learned judge who wrote the opinion was in error, as the decision in *Richardson County v. Hull* turns squarely upon the proposition that the provision in our statute giving a county board power to "settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county," was broad enough to include "the claim or demand of a citizen

against a county, of whatever nature, under contract or by tort." The language there used was not the mere dictum of the writer of the opinion, but was the deliberate conclusion reached by the court after all three of the members of the court, as it then stood, had a second time considered the Wisconsin cases, and had reviewed their former decision in *Nance v. Falls City,* and also after they had decided *Village of Ponca v. Crawford.* We think the conclusion there announced was eminently sound and should have been followed in *Douglas County v. Taylor* and *Hollingsworth v. Saunders County.* (If it were necessary to overrule the last two cases noted, the writer would not hesitate to do so, buttressed as he would be by the sound reasoning in and decision of *Richardson County v. Hull.*) But we think this case can be properly decided and a just rule announced without overruling any of the cases above cited. An examination of those cases will show that it is not held in any of them that an action sounding in tort or for unliquidated damages *must* be commenced in court, and that it *cannot* be instituted by filing a claim with the county board. In *Cass County v. Sarpy County,* 83 Neb. 435, which was an action by one county against the other to compel payment of one-half of the cost of repairs of a bridge over the Platte river between said counties, Cass county filed its claim with Sarpy county, and upon its disallowance appealed to the district court. The provision of the statute is that in such a case the county which has made the repairs may "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 that case we held that the words "recover by suit," as used in the statute, "include a suit instituted by an appeal from the disallowance of a claim by a county board."

The requirement of the statute (Comp. St. 1909, ch. 78, sec. 117) that, in asserting a claim against a county for damages by reason of a defective bridge, said action

must be commenced within 30 days of the time of the injury, was designed to give the county timely notice of the assertion of the claim, and, if the claimant presents his claim to the county by filing it with the county clerk within 30 days from the time of the accident, it is a sufficient compliance with the statute, and the prosecution of his claim or action is commenced in time; and the fact that the county board retains possession of the claim until after the 30 days have expired, and then acts upon it and rejects it, so that the appeal from the action of the board is not filed in the district court until more than 30 days after the accident, will not operate as a bar to the action.

Upon a careful reconsideration of the question, and of the cases cited, we hold that an action upon a claim for a tort or for unliquidated damages may be commenced in a court of competent jurisdiction, or by filing a claim with the county board, at the election of the claimant; and that, if the latter course is pursued and the claim is rejected by the board, the claimant may appeal from the action of the board to the district court, and in such case his action will be deemed to have been commenced upon the date of the filing of his claim with such board.

It is next contended that the court erred in giving instruction No. 2, requested by plaintiffs. The objection urged against this instruction is that it ignores the question of knowledge or of notice to the county board, either actual or constructive, of the dangerous condition of the bridge. This contention must fail. That the bridge was a public bridge is established without contradiction, and the question of knowledge of or notice to the defendant of its dangerous condition for many months prior to March 3 was not, under the evidence, an open question. The witness Cox testified that he was a rural mail carrier, that his usual route required him to cross that bridge every 24 hours; that the bridge was really dangerous as early as December of the preceding year; that he had given the road overseer of that district both verbal and

written notice of the dangerous condition of the bridge; that he had also complained to the postmaster at Burchard, and that the postmaster had, in his presence, called the attention of Supervisor J. J. Powell to the dangerous condition of the bridge and had requested him to have it repaired. He testified to giving another notice just two days before the accident: "Q. When had you spoken to him before that? A. I spoke to him every time he didn't run away from me when he saw me coming." It would seem from this testimony, which was not contradicated, that actual notice had been repeatedly given to the proper official, and that the failure of defendant to repair the bridge was gross and wanton. Mr. Cox also testified that on the day of the accident the ground on the east side of the bridge in the public road, which seems to have been the only side where teams could turn out, "was very muddy and mirey." This testimony is corroborated by Mr. Shirts, who lived about a half mile from the bridge. He testified that the ground on that day was "very mirey and muddy," and that the dangerous condition of the bridge had existed for six months. We do not think the court erred in not submitting the question of knowledge of the defendant to the jury.

Defendant's next complaint is that the court erred in refusing to give instructions 1 and 8, requested by defendant. This contention is disposed of adversely to defendant by our holding under the first subdivision of this opinion. It is next contended that the evidence clearly shows contributory negligence on the part of plaintiffs' agent in driving across the bridge in its dangerous condition, which must have been apparent to the agent; and it is argued that although plaintiffs' agent might have felt that he could drive his team across the bridge with safety, by reason of the fact that his horses would not come in contact with the hole in the middle of the bridge, the mule, which was being led behind, and which was the animal injured, might be traveling in the middle of the road and be in danger of getting into the hole. By their ver-

dict the jury found that the plaintiffs were not guilty of contributory negligence; and, after having safely relied upon the "mule train" for his hard tack and beans during his four years' service in the civil war, the writer is not willing now to impute negligence to the mule.

Upon careful examination of the entire record, we fail to find any prejudicial error. The judgment of the district court is therefore

AFFIRMED.

LETTON, J., dissenting.

The act under which this action is brought is limited in its scope. Prior to its enactment no liability existed against counties for damages caused by defective bridges. The law created a new right of action and imposed a limitation of time in which an action could be brought to enforce it. The passage of the act had the effect to make counties liable to actions for damages for 30 days after the injuries were caused, but this period terminated the liability if no action had been begun.

In an opinion by Sanborn, C. J., in *Madden v. Lancaster County,* 65 Fed. 188, it is said: "But the proviso in the act that suits shall be brought upon the rights of action it creates within 30 days from the occurring of the injuries, respectively, is a condition qualifying the rights of action, and not a mere limitation of the remedy. *Theroux v. Northern P. R. Co.,* 64 Fed. 84; *The Harrisburg,* 119 U. S. 199; *Pittsburg, C. & St. L. R. Co. v. Hine,* 25 Ohio St. 629." This is the rule of this court. *Bryant v. Dakota County,* 53 Neb. 755; *Swaney v. Gage County,* 64 Neb. 627. In the latter case it is said by BARNES, J.: "A suit based on that act which is commenced more than 30 days after the injuries complained of occurred cannot be maintained." The majority opinion holds that the filing of a claim before the board of county commissioners (a proceeding which we have heretofore held to be unnecessary, *Hollingsworth v. Saunders County,* 36 Neb. 141) complies with the requirement of the statute, and is equivalent to the commencement of an action. The words

of the statute in this connection are: "The person sustaining the damage may recover in a *case* against the county, * * * the *action* can be brought, * * * *damages* and *costs* shall be paid * * * provided, however, that such *action* is commenced within thirty (30) days of the time of said injury or damage occurring." Comp. St. 1909, ch. 78, sec. 117. It is clear that the "case" or "action" spoken of in the statute is one in which a judgment for "damages and costs" can be rendered, and that the language imports a proceeding in a court of justice. It is unnecessary to set forth at length the numerous definitions of the words "action" and "case" to be found in standard dictionaries and in legal opinions. In Webster's New International Dictionary an "action" is defined as "a legal proceeding by which one demands or enforces one's right in a court of justice; a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense; usually distinguished from *special proceeding*." And Judge Story defines a "case" as "a suit in law or equity, instituted according to the regular course of judicial proceedings." 2 Story, Constitution (5th ed.) sec. 1646. The definition of these words in 1 Words and Phrases, p. 129, expresses these identical ideas in varied phraseology.

I can find no authority anywhere to sustain the proposition that the needless filing of a claim in a matter where an adverse decision could have no finality as to the right of the claimant against the county is the beginning of an action. The legislature granted the relief upon the condition that an "action" should be begun within 30 days, and I think this court has no right to say that the word action in this statute has other than its ordinary meaning.

In my judgment the petition does not state a cause of action. This was the view taken by the federal court in *Madden v. Lancaster County, supra*, and by this court in the cases cited.

I think the judgment of the district court should be reversed and the cause dismissed.

MARK M. HARDWICK, APPELLANT, V. HATTIE V. SNEDEKER ET AL., APPELLEES.

FILED FEBRUARY 15, 1911. No. 16,198.

1. Taxation: REDEMPTION FROM TAX SALE. An action to foreclose a tax lien is not properly brought until after a sale of the land for taxes and two years allowed for redemption, but this is not jurisdictional, and if an action so brought proceeds to decree of foreclosure and sale, and a deed is duly issued upon confirmation of such sale, the owner of the land may redeem the same within two years after such sale and confirmation, but not later.

2. ———: ———. In such case, the statute which requires notice before taking a tax deed has no application.

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

*Shepherd & Ripley,* for appellant.

*Boyle & Eldred, contra.*

SEDGWICK, J.

The county of Dundy began an action in the district court for that county in January, 1901, against one Louis Sarault, who was then a nonresident of the state, to foreclose its lien for taxes assessed against certain lands of Sarault in that county for the year 1899, and several prior years. A decree of foreclosure was entered and the land sold thereunder. The sale was duly confirmed and deed issued to the purchaser. More than two years after the sale and confirmation Sarault conveyed the land to this plaintiff by quitclaim deed. The plaintiff then tendered the amount of the taxes, interest and costs, and, the tender being refused, he brought this action to redeem. The defendant Hattie V. Snedeker derives her title through the said foreclosure deed. The district court found for the defendant, and entered a decree quieting her title, and plaintiff has appealed.

The constitution provides that in all foreclosures for taxes the owner of the land shall have two years in which to redeem. In *Logan County v. Carnahan*, 66 Neb. 685, 693, it was held that the collection of a land tax by judicial sale without an antecedent sale by the county treasurer is contrary to the provisions of the statute, and upon rehearing it was said by the court that "there exists no authority under the law for a county to institute and maintain a suit for a foreclosure of a tax lien on real estate, except the action be based on an antecedent administrative sale by the county treasurer, the issuance of a tax sale certificate therefor, and the expiration of two years thereafter, during which time the owner of the land may redeem from such administrative sale by paying the principal, interest and costs as provided by statute." But it was also said in that opinion that "this goes only to the regularity of the proceedings by which the authority is exercised, and not to the power itself. * * * A decree rendered which determines the right of the county to maintain such an action, and directs a sale of the property, would not be subject to collateral attack."

In *Logan County v. McKinley-Lanning L. & T. Co.*, 70 Neb. 399, it was held that "where the district court has jurisdiction of the subject of the action and of the parties in a foreclosure proceeding, questions which affect the regularity of the decree are concluded thereby." It was held in *Russell v. McCarthy*, 70 Neb. 514, that a decree of foreclosure rendered in an action in which there had been no administrative sale was erroneous, but not void, and, unless appealed from, divested the owner's title. And in *Clifford v. Thun*, 74 Neb. 831, it was held that "one seeking to redeem from a foreclosure sale based on a tax lien must bring his action therefor within two years from the date of the tax sale." This last holding has been adhered to in subsequent cases, and it is now the settled law of the state that, although an action brought within two years after the taxes upon real estate have become delinquent is prematurely brought, yet a decree of foreclosure

rendered therein is not void, though erroneous, and that the owner of the land may maintain an action to redeem therefrom if brought within two years from the sale and confirmation, but not afterwards. The statute which requires notice before taking a tax deed has no application in such case.

It follows that the decree of the district court in this case is correct, and it is

AFFIRMED.

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CHRISTIAN HANSEN, APPELLANT, V. P. CHRIS HANSEN, APPELLEE.

FILED FEBRUARY 15, 1911. No. 16,290.

1. **Landlord and Tenant.** One who takes land of another and agrees to plant and cultivate the same in crops and deliver to the owner of the land one-third of the crops as rent is a tenant, and not a mere cropper.

2. ———: LEASE: CONSTRUCTION. If a tenant agrees to plant and cultivate the land in corn and deliver one-third of the corn to his landlord for the use of the land, the right to the corn stalks after the corn is removed as between the landlord and tenant is to be determined as a question of fact according to the understanding and agreement of the parties.

3. ———: ———: RIGHTS OF TENANT. If the landlord agrees to accept a share of the grain in full for the use of the land, and the tenant reserves the stalks for his own use, he may sell the right to the use of the stalks to another to be used in the ordinary way among farmers within the term of his tenancy.

APPEAL from the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*W. C. Dorsey,* for appellant.

*L. C. Paulson, contra.*

SEDGWICK, J.

One Hinterman farmed about 50 acres of the plaintiff's land in corn during the season of 1908 under a contract with the plaintiff. After he had gathered the corn, he sold the stalks to the defendant and authorized the defendant to turn his cattle therein. Under this agreement the defendant commenced turning the cattle into the stalks, and the plaintiff brought this action in the district court for Franklin county to enjoin the defendant from pasturing his cattle in the stalks. The action was tried by the court and a decree entered in favor of the defendant, and the plaintiff has appealed.

Plaintiff insists that he was entitled to the stalks after the corn was gathered, and the defendant insists that Hinterman was entitled to them and that he acquired that right by his purchase from Hinterman. There is a considerable discussion in the briefs in regard to whether Hinterman was the tenant of the plaintiff or was merely a cropper. This question perhaps would not be decisive of the case, because a cropper might agree with the owner of the land as to the ownership of the stalks after the corn was gathered, and it is claimed by the plaintiff that there was an agreement as to the ownership of the stalks. If the contract was that Hinterman should have the stalks and two-thirds of the corn for his services that would dispose of the case, but as it seems clear from the evidence of the plaintiff that Hinterman was a tenant, and not a mere cropper, we place our decision upon that ground. The plaintiff testified that in the fall of 1907 he made a contract with Hinterman in regard to farming the ground, and was asked what arrangements he had made in that regard, and answered: "I hired 50 acres out for corn." Again in his cross-examination he testified that Hinterman was to deliver to him "one-third of the corn raised on the land." A tenant rents the land and pays for it either in money or a part of the crops, or the equivalent. A cropper farms the land and is paid for his work

in a part of the crops. In the one case, the tenant pays for the use of the land with a part of the crops. In the other, the crop belongs to the owner of the land and he pays for the labor of cultivating with a part of the crop. The plaintiff having testified that he "hired 50 acres out" to Hinterman and that Hinterman was to pay him for it in a part of the crop that he raised, he has himself established a tenancy.

If the tenant was to pay for the use of the land with a part of the crop, the stalks, being of value, might be considered a part of the crop, and the owner of the land would in that case be entitled to a share of the stalks as well as of the corn. The question in this case is one of fact as to what the agreement was between the parties, whether the tenant was to pay the landlord a part of the crops including the corn, or only a share of the corn. We think the strong preponderance of the evidence is that the agreement was that he was to pay the landlord one-third of the corn only. The rent paid to the landlord was to be delivered to him at some distance from the land, and it does not seem probable from the evidence that it was contemplated that he should deliver a part of the stalks. The plaintiff himself testified that he was to deliver the corn. He also testified that there was a special agreement that he (the plaintiff) should have the stalks; but this is unequivocally denied by Hinterman, and under the circumstances the preponderance of the evidence is with the defendant.

The decree of the district court is therefore right, and is

AFFIRMED.

FAWCETT, J., not sitting.

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CITY OF OMAHA, APPELLEE, V. PHILADELPHIA MORTGAGE & TRUST COMPANY, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,297.

1. **Municipal Corporations: REPAIR OF SIDEWALKS: LIABILITY OF ABUTTING PROPERTY OWNERS.** The act of 1887 (laws 1887, ch. 10, sec.

69; Comp. St. 1901, ch. 12*a*, sec. 109) governing cities of the metropolitan class made it the duty of the owners of buildings fronting upon a street of the city to keep the sidewalks adjacent to the buildings in repair; but such owners were not liable for damages caused by defects in such sidewalks until the city authorities notified them of such defects and required them to repair the same.

2. ———: DEFECTS IN STREETS: LIABILITY OF ABUTTING PROPERTY OWNERS. If the owner of city lots constructs a building thereon adjacent to a street of the city, and in such construction excavates a large space under the street to be used as a room in connection with said building, and so maintains the same for several years, it will be presumed that such excavation was made with the consent of the authorities of the city, and upon the implied condition that such excavation shall be maintained in proper and safe condition for travel along the street and the walks thereon; and the owner of the property will be liable for damages caused by his neglect to so maintain said excavation.

3. ———: ———: ———. A purchaser of such property upon foreclosure sale who takes possession and rents the property and permits the same to remain for a long time in an unsafe condition will be held to have notice of the existence and purpose of the excavation and its condition, and is liable for damages caused thereby.

4. ———: ———: ———. If the city is compelled to pay a judgment for damages because of such neglect of the owner of said property in an action of which the owner has notice with the privilege to defend the same, the city may recover over from the owner of the property.

5. Pleading: SUFFICIENCY. Allegations of the petition stated, and *held* to be sufficient to support the findings and judgment.

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

*William Baird & Sons,* for appellant.

*H. E. Burnam, I. J. Dunn* and *J. A. Rine, contra.*

SEDGWICK, J.

A judgment was recovered against the city of Omaha for damages caused by falling through an opening in the

walk along the property owned by this defendant. Afterwards the city brought this action against the defendant to recover the amount of the same judgment, interest and costs. Upon trial in the district court for Douglas county without a jury, the court found in favor of the plaintiff and entered judgment for the amount claimed. The defendant has appealed.

It appears from the evidence, a large part of which is contained in the stipulation of facts, that 25 or 30 years ago one Peter Goos erected a hotel building on the lots in question, and excavated an opening called an "area" along the side of said building 25 or 30 feet in length and several feet in width under the sidewalk. Afterwards he mortgaged the building to this defendant to secure an indebtedness, and the defendant foreclosed the mortgage, and upon the foreclosure sale purchased the property, and so became the owner thereof. The defendant thereupon leased the property from time to time for hotel purposes, and it was being so occupied by the tenant of this defendant at the time the accident occurred, which was the occasion of the damages recovered in the judgment against the city. It does not appear from the evidence when nor by whom the opening in the walk over the area was made, and the city authorities had not notified the defendant to repair the defect in these openings before the accident occurred.

1. It is first insisted by the defendant that the owner of the property is not liable for defects in the sidewalk adjoining the property without having first been notified by the city of such defects and given opportunity to repair the same. The statute in force at the time of the accident provided that "in case the owner or owners of any such lot, lots or lands abutting on such street or portion thereof, shall fail to construct or repair such sidewalks in the manner and within the time as directed and required by the council in each case after having received due notice to do so, they shall be liable for all damages or injuries occasioned by reason of the defective or danger-

ous condition of any such sidewalks." Comp. St. 1901, ch. 12*a*, sec. 109. It appears, therefore, that under the provisions of the statute as it then existed the owner of property in the city of Omaha was required to keep the walk adjacent to the property in repair, and if damages were suffered by reason of his failure to do so he was liable for such damages, but only upon condition that he had been notified of the defect and required by the city to repair the walk. Therefore, so far as ordinary walks are concerned, the contention of the defendant should be sustained.

2. It appears from the evidence, as before stated, that this area under the sidewalk was constructed with the hotel building, but there is no evidence in the record as to the purpose of the openings in the covering of this area. The defect in these openings was the cause of the accident, and it is contended that, they being in the sidewalk adjoining the hotel building, the defendant would not be liable for neglect to repair the same unless notified by the city and required to so repair them. In this connection the defendant insists that it had no notice or knowledge of the defect in these openings, and is therefore not liable for such damages. There is no evidence in the record that there was any application to the city authorities for permission to construct this area, or that any such permission was given, and it is argued that there cannot therefore be implied any agreement or obligation on the part of the owner of the property to maintain the area and its covering in a proper and a safe condition. We cannot, however, presume that the defendant or its grantor constructed this area without the knowledge and at least implied consent of the city authorities. It must therefore be presumed that the city authorities consented to the construction of this area, and that consent was upon the implied condition that the owner of the property would maintain it in a proper and safe condition. This area was also of such a character and of such dimensions that the defendant must be held to have known of

its existence at all times, and to have known of the implied agreement on the part of the owner of the property, who constructed the area and to whose rights and liabilities it succeeded, that the same should be kept in a proper and safe condition. We think, therefore, the statute then in existence in regard to the maintenance of ordinary sidewalks has no application in this case.

The case of *City of Lincoln v. First Nat. Bank*, 67 Neb. 401, is like this in some of its facts. The bank had bought the property at sheriff's sale on foreclosure of a mortgage which it held thereon. There was an excavation under the walk adjoining the building upon the property, and there were coal holes through the covering of the excavation. Through some defects in the covering of these coal holes, a woman fell through one of them and was injured and recovered a judgment against the city. The city sued the bank to recover the amount of the judgment and costs. The difference between the two cases consists in the following facts: In the Lincoln case, the sheriff's deed upon the foreclosure was dated 32 days and recorded 20 days before the accident. The bank had not taken possession of the property, nor assumed to exercise any control over it, and, in fact, was not aware of the excavation under the walk, nor of the coal holes through the covering of the excavation. In the opinion the case of *Irvine v. Wood*, 51 N. Y. 224, is cited, and it is said that it is there "held to devolve upon both landlord and tenants to see that an excavation under the street was made safe for passers." It was also said in the opinion: "The numerous decisions as to the respective liabilities of lessor and lessee in such cases show that the owner's liability, where it exists, is not as owner, but as creator or continuer of a nuisance." In the case at bar, the defendant had owned, occupied and leased the premises for several years before the accident occurred. The area, which was constructed for a ten-pin alley, constituted a large room under the sidewalk. It is impossible to believe that the defendant did not know of its existence. In fact, it was of such a nature that the law

did not allow the defendant to plead ignorance of its existence. In the absence of any evidence to the contrary, the presumption is, as before stated, that the city consented to the construction of the area, and that the condition was that its covering should be kept in safe and proper condition. It appears, however, from the Lincoln case, *supra,* that if the city had not consented to its construction, and the owner of the property created the excavation without properly protecting it, or so maintained the excavation after it had been created, he would be in no better position than if he had contracted expressly or impliedly to protect the area.

It is, however, contended that there are no facts alleged in the petition showing any contract, express or implied, between the defendant, or its grantor, and the city. The petition is largely drawn upon the incorrect theory that the defendant would be liable for defects in an ordinary sidewalk adjoining his premises, without notice from the city, and without a demand by the city that such defects be repaired. The petition, however, also alleges that the defendant "caused and permitted a public nuisance on said walk as follows, to wit: That on the south side of said Jackson street, and adjoining said property herein described, there was on the 6th day of January, 1903, a slag-stone sidewalk, running from Fourteenth street to Fifteenth street, along the north front of said Thurston hotel; * * * that in said slag-stone sidewalk there had been ever since the construction of said hotel building several holes through the sidewalk; * * * that said opening in said sidewalk was a coal hole which opened into an excavation some eight or ten feet in depth under said sidewalk, which excavation was constructed at the time of the construction of said building in 1888, and was for the benefit and use and accommodation of said building and the owners and occupants thereof; that underneath said sidewalk the ground was entirely removed to the extent of eight or ten feet in depth, and the space underneath said sidewalk constituted a room or areaway

for the use and benefit of the said premises, and was connected with the said hotel building proper; that the coal hole through the sidewalk complained of was constructed and maintained for the use and benefit of said premises, the owners and occupants thereof; * * * that, to render said sidewalk safe at the point where said coal hole was constructed in the walk, it was necessary to place an iron cover over the opening, which fitted securely into the sidewalk and on a level with the walk, and to fasten said covering in such a way that it could not and would not be removed from said opening, leaving said opening exposed, except when said coal hole was being used for some purpose in connection with the hotel, and properly guarded during the time," and it was the duty of the defendants to "maintain in a safe condition * * * said coal hole leading to the excavation underneath the said sidewalk; but, disregarding their duties therein, they permitted said coal hole for a long time prior to said accident to become and remain in an unsafe and dangerous condition, in that there was no proper covering over said coal hole, and the cover, such as it was, was not fastened, and was likely to be blown off or removed therefrom by persons passing along the sidewalk." The answer to these allegations was that the holes through the covering of the area were made "long prior to the time when this defendant became the owner of said premises, with the knowledge and consent of the plaintiff, and without any knowledge thereof by this defendant, and that said holes were covered over prior to the time when this defendant became owner of said premises by or with the knowledge and acquiescence of the plaintiff, and were not in use at the time this defendant became the owner of said premises, or at any time thereafter." These allegations of the petition sufficiently present the issue as to the duty of the defendant to maintain proper and safe covering of this area.

The trial court made a general finding in favor of the city and against the defendant. It must be presumed that the court found that, in maintaining this area as the de-

fendant did after the purchase of the property, it did so with the implied agreement to maintain it in a proper and safe condition. In this view of the case, the judgment of the trial court is sustained by the evidence, and is therefore

AFFIRMED.

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BANKING HOUSE OF A. W. CLARKE, APPELLEE, V. JOHN M. WARD ET AL., APPELLANTS.

FILED FEBRUARY 15, 1911. No. 16,303.

1. **Bills and Notes: PLEADING: SUFFICIENCY.** The petition alleged that while a general banking business was owned and conducted by one Clarke, in the name of "Banking House of A. W. Clarke," and was not incorporated, notes and securities were taken from defendant for money loaned him, payable to "Banking House of A. W. Clarke," and that afterwards the banking business was incorporated in the same name; that the corporation succeeded to the rights of the original payee, and that the amount of said notes and interest thereon is due to the plaintiff from the defendant upon said securities. *Held*, That this is a sufficient allegation of ownership by plaintiff.

2. ———: EVIDENCE OF OWNERSHIP. Evidence that notes and securities were taken for money loaned in the name of "Banking House of A. W. Clarke," which was then the business name of an individual who owned and was conducting a general banking business, and that afterwards the plaintiff was incorporated in the same name, "Banking House of A. W. Clarke," and succeeded to all the rights and interests of said business, together with possession of the papers which are offered in evidence, is sufficient *prima facie* evidence of ownership of the notes and securities.

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

*Wells & Rosewater*, for appellants.

*H. Z. Wedgewood, contra.*

SEDGWICK, J.

One B. M. Webster contracted to sell a certain tract of land in Lincoln county to these defendants, John M. Ward and Albert G. Hamilton, and executed a written contract of sale which provided for payments to be made by the said Ward and Hamilton, and that, upon such payments being made as agreed, the said Webster should convey the said premises to the said grantees with good and sufficient warranty deed. Afterwards, in 1907, the defendant Hamilton sold and assigned his interest in the said contract to the defendant Ward, and the defendant Ward borrowed money of the Banking House of A. W. Clarke, of Papillion, and gave his several promissory notes therefor and assigned the said contract as security. At that time the "Banking House of A. W. Clarke" was not incorporated, but was owned and conducted by A. W. Clarke personally in that name. Afterwards the business was incorporated in the same name, and the said corporation is the plaintiff in this action. This action was brought to recover the amount due on said notes and foreclose the equity of redemption of the defendant in the said contract. The Packers National Bank of South Omaha intervened in the action, and alleged that it was the owner of said contract by assignment of the said defendant Ward, and as such was allowed to defend the same. The trial court found in favor of the plaintiff, and the defendants John M. Ward and the Packers National Bank have appealed.

The defendants insist that the allegations of the petition are not sufficient to support the decree. This objection is based upon the idea that the petition does not sufficiently allege the ownership by the plaintiff corporation of the notes and securities. The facts above stated are alleged in the petition, and that "on or about the 12th day of June, 1907, the defendants made an assignment in writing to the said Banking House of A. W. Clarke, to the rights of which the plaintiff has succeeded, of said land contract and their interest in the subject matter

thereof; all of which is more fully shown by a copy of said contract of assignment, marked 'Exhibit A,' and attached to and made a part of this petition," and that the amount of said notes and interest thereon, according to their terms, is due the plaintiff from the defendant John M. Ward upon the said securities. The assignee named in the assignment was "Banking House of A. W. Clarke," which is the corporate name of the plaintiff. At the time this assignment was made the banking business was not incorporated, and it is argued therefrom that the notes and securities do not belong to the present corporation. It is manifest, however, that the allegations of the petition are sufficient allegations of ownership, there having been no attempt to require a more specific allegation.

The evidence upon this point was objected to. It supports the allegation of the petition. A witness was called who testified that he had been familiar with this banking business for about ten years, and that the business formerly was conducted in the same name, "Banking House of A. W. Clarke," and that, when the bank was incorporated, it took over and succeeded to the business formerly conducted in that name. The plaintiff also introduced the notes and assignment, in all of which the payee is named, "Banking House of A. W Clarke," and without doubt the possession and presentment in court of these notes under these circumstances is sufficient *prima facie* evidence of ownership. The original contract for the sale of this land contained the provision: "That no assignment of the premises shall be valid unless the same shall be indorsed hereon, or permanently attached hereto, and countersigned by the first party." It is objected that the assignment to this plaintiff was not indorsed upon the contract, and that the consent of Mr. Webster to the assignment was never obtained. This provision of the contract was for the benefit of the grantor, and could not prevent the grantee, Ward, from transferring his interest in the contract so as to make his assignee the real party in interest to enforce the same. It appears that final pay-

ment to the grantor Webster has not been made, and the decree of the court orders that the land be sold to satisfy the claim of the plaintiff against Ward. This sale, however, is to be made subject to the interest of Webster in the land, and these defendants are not in position to object to the form of the decree in that respect. Mr. Webster, not being a party to the suit, will not be bound by any proceedings of that sort, whether regular or irregular.

The decree of the district court is right, and is

AFFIRMED.

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J. D. STIRES V. FIRST NATIONAL BANK OF COLUMBUS, APPELLANT; COLUMBUS STATE BANK, APPELLEE AND CROSS-APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,792.

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

*Albert & Wagner,* for appellant.

*A. M. Post* and *J. D. Stires, contra.*

PER CURIAM.

The two controlling facts in this case will be found fully stated in our two opinions on the former appeal, 83 Neb. 193; 85 Neb. 800. Upon the latter hearing the case was remanded with specific directions as to the distribution of the funds in controversy. This left nothing for the district court to do but to enter a decree in accordance with the mandate of this court. *Kerr v. McCreary,* 86 Neb. 786; *Farmers & Merchants Bank v. German Nat. Bank,* 59 Neb. 229. An examination of the record shows that the district court by its decree has distributed the funds in obedience to our mandate.

The judgment of the district court should therefore be affirmed, the appellant First National Bank of Columbus and cross-appellant Columbus State Bank each to pay its own costs on this appeal; and it is so ordered.

AFFIRMED.

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FERDINAND ZIMMERER ET AL., APPELLANTS, V. HARLEY L. STUART ET AL., APPELLEES.

FILED FEBRUARY 28, 1911. No. 16,220.

1. **Municipal Corporations:** ORDINANCES: REPEAL. On the 9th day of December, 1897, the mayor and council of the city of L. passed an ordinance conferring upon one Z. the authority to erect and maintain a telephone system in said city without limitation of the time of the duration of the right, except that it was provided that Z. should "erect and maintain a suitable central office, with proper switchboards and apparatus for a complete telephone system in said city for the period of two years." On the 13th day of March, 1900, another ordinance was passed, at and upon the request of Z., granting the exclusive right to occupy the streets and public grounds of the city with said system for the period of 10 years. By this later ordinance it was provided that the rights secured to Z. under the former one were reserved and confirmed in him. The last section repealed all ordinances in conflict with the later one. *Held*, That with the exception of ratifying and validating the occupation of the streets and public grounds of the city by the poles and wires during the time in excess of the two years, the former ordinance was repealed, and the rights of the parties were to be measured by the terms of the later and repealing ordinance.

2. ———: ———: VALIDITY. "When a city ordinance contains valid and void provisions, the valid portion will be upheld if it is a complete law in itself, capable of enforcement, and is not dependent upon that which is invalid." *In re Langston*, 55 Neb. 310. Therefore, where the ordinance granted an "exclusive" right to occupy the streets, the word "exclusive," if invalid, could be eliminated and the remainder of the ordinance stand, providing the word did not constitute an inducement to the passage of the ordinance.

3. **Descent and Distribution:** CHARACTER OF ESTATE. As a general rule

the character of the estate at the death of the intestate, as impressed upon it by his act, determines the course of its descent.

4. ———: ———. By imposing a limitation of 10 years as to the time within which the poles and wires of a telephone system might occupy the streets and public grounds of the city, the reservation of the right of the city to cause the poles and wires to be removed during the term, the taxing of the property as personalty by the city officers, the execution of a chattel mortgage upon the system by the owner to secure a debt, and the owner never having attached the system to any real estate owned by him, all the parties to the contract are *held* to have treated the property as personal, and the act of the owner to have fastened that character upon it and determined the course of its descent upon his decease.

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

*Rich, O'Neill & Gilbert* and *J. H. Linderman,* for appellants.

*E. A. Cook, E. M. Morsman, Jr.,* and *Warrington & Stewart, contra.*

REESE, C. J.

On the 9th day of December, 1897, the mayor and council of the city of Lexington passed an ordinance, of which the following is a copy:

"ORDINANCE NO. 137.

"An ordinance granting the use of the streets of the city of Lexington to George Zimmerer for the purpose of erecting poles and placing wires thereon for telephone purposes, and authorizing him to erect and maintain a telephone system in said city and regulating the same, and providing a penalty for injuring or destroying the same.

"*Be it enacted by the mayor and council of the city of Lexington, Nebraska:*

"Section 1. That George Zimmerer is hereby authorized to erect and maintain a telephone system in the city of

Lexington, and is hereby granted the privilege to erect poles in the streets of said city and string wires thereon for telephone purposes; provided that none of said poles shall be erected more than one foot from the sidewalk, and shall be placed in the ground at least five feet, and shall be made substantial, and no wire shall be strung less than 18 feet from the ground; provided also that said poles shall not be placed so as to interfere with the electric light poles and wires, nor with the water mains and hydrants of said city.

"Section 2. That said George Zimmerer shall erect and maintain a suitable central office, with proper switchboards and apparatus for a complete telephone system in said city for a period of two years.

"Section 3. That the charges for the use of the telephones in said system shall not exceed the sum of $2 per month for stores, offices and other public places, and $1.50 for residences, and shall not exceed the sum of $1.00 per month where the patron owns his own telephone.

"Section 4. That it shall be unlawful for any person to cut down, dig up, or destroy any poles, or to cut, break, or destroy any wires, or injure any instrument belonging to and used in said system. That any person who violates the provisions of this section shall, on conviction thereof, be fined in any sum not exceeding $100 and shall be committed to jail until such fine and costs are paid.

"Section 5. That if at any time it becomes necessary for the city to have any of the poles or wires in said system removed, or in case said poles or wires interfere with the removal of any building in said city, the said George Zimmerer shall at once upon notice remove said poles or wires until the necessity for their removal no longer exists.

"Section 6. That all ordinances or parts of ordinances in conflict herewith are hereby repealed."

About the same time the said Zimmerer entered into contracts with proposed patrons of his system by which he agreed to furnish, and they agreed to take, telephones for the term of two years. Acting under the provisions of

the ordinance, Zimmerer installed a limited number of telephones, placing a small switchboard in a rented room, and setting the poles in the streets. The development of the system was evidently retarded for lack of funds, Zimmerer and his wife having charge of the operation of the system, no others, apparently, being interested. On the 25th day of August, 1899, Zimmerer borrowed the sum of $1,750 from the first National Bank of Lexington, and to secure the payment of his note given for the payment of the same executed and delivered to the bank a chattel mortgage on the whole system, setting forth in detail the telephones, lines, poles, switchboards, etc., closing with the recital that it was "understood that this mortgage covers all and every kind of property connected with the telephone system of said mortgagor." On the 13th day of March, 1900, the mayor and council of the city of Lexington duly enacted and passed another ordinance, of which the following is a copy:

"ORDINANCE NO. ——.

"An ordinance granting the exclusive use of the streets and alleys of the city of Lexington, Nebraska, to George Zimmerer, his successors or assigns, for the period of ten years for the purpose of erecting poles and placing wires thereon for local telephone purposes, and authorizing the erection and maintenance of a telephone system and fixing the rate of charges in said city, regulating the same, and providing a penalty for injuring and destroying the same, and providing conditions for the termination of said franchise.

"*Be it ordained by the mayor and council of the city of Lexington, Nebraska*:

"Section 1. That George Zimmerer, his successors or assigns, is hereby granted the exclusive right and privilege for a period of ten years from the date of the passage, approval and publication of this ordinance, to establish and maintain a local telephone system in the city of Lexington, Nebraska, and for the purpose the said George Zimmerer, his successors or assigns, is hereby granted the

exclusive right and privilege to erect and maintain poles and wires and the appurtenances thereto necessary, through, upon and over the streets, alleys and public grounds of said city of Lexington; provided that said George Zimmerer shall at all times, when requested by the proper authorities of said city, permit the poles and fixtures to be used for the purpose of placing and maintaining thereon, free of charge, any wires which may be necessary for the use of the police or fire departments of the city of Lexington, Nebraska; and further provided that none of said poles shall be removed more than one foot from the sidewalk and shall be placed in the ground at least five feet and shall be made substantial, and no wire shall be strung less than 20 feet from the ground; and provided further that said poles shall not be placed upon and interfere with the electric (light) poles and wires, nor with the water mains and hydrants in said city.

"Section 2. That said George Zimmerer, his successors and assigns, shall erect and maintain a suitable central office, with proper switchboards and apparatus for a public telephone system in the said city during the term of the grant or franchise, and said city shall also during said term be furnished and kept in repair two telephones free of charge during the time aforesaid.

"Section 3. That the charges for the use of the telephones in said system shall not exceed the sum of $2 per month for stores, offices and other public places, and $1.50 for residences per month.

"Section 4. That it shall be unlawful for any person to cut down, dig up or destroy any poles, or to cut, break or destroy any wire, or injure any instrument belonging to and used in said system. That any person violating the provisions of this section shall, on conviction thereof, be fined in any sum not exceeding $100 and shall be committed to jail until the fines and costs are paid.

"Section 5. That the rights and franchise herein granted are upon the express condition that the said George Zimmerer, his heirs, executors, administrators and

assigns, shall at all times within the period of this franchise maintain a complete and working telephone system in said city and provide telephone connections for the inhabitants of said city at the rates herein stated, and in case of any failure of said George Zimmerer, his heirs, executors, administrators or assigns, to comply with said conditions, the mayor and council of said city of Lexington may, by resolution passed, after 30 days' notice to the said George Zimmerer, his heirs, executors, administrators and assigns, or resident agent, declare the franchise hereby granted forfeited, and all rights of said George Zimmerer, his heirs, executors, administrators and assigns, shall thereby be determined and terminated.

"Section 6. That if at any time it becomes necessary for the said city to have some (any) of the poles or wires in said system removed, or in case the said poles or wires interfere with the removal of any buildings in said city, the said George Zimmerer shall, within 48 hours after notice in writing by the proper officers of said city, remove such poles or wires until the necessity for their removal shall no longer exist.

"Section 7. That all rights secured by or accruing to said George Zimmerer under and by virtue of ordinance No. 137 of said city of Lexington, Nebraska, are hereby reserved and confirmed in the said George Zimmerer.

"Section 8. That all ordinances or parts of ordinances in conflict herewith are hereby repealed."

This ordinance was passed at the request of Zimmerer, and he accepted and agreed to all its provisions. He and his wife continued to extend and operate the telephone system until the 6th day of September, 1900, when he died, leaving no issue. Upon his death, his widow took personal charge of the system, paid the debt secured by the chattel mortgage, and extended the lines and increased the efficiency of the telephone plant, and so continued until th 11th day of June, 1903, when she intermarried with Harley L. Stuart, defendant in this action. After their marriage defendant and his wife continued to extend

and develop the system, each contributing their time, labor and money, until the 24th day of December, 1907, when she died testate, leaving surviving her her husband and an infant daughter. Her will was executed October 13, 1905, prior to the birth of the daughter. By the terms of the will she devised and bequeathed all her real and personal property to her husband, defendant herein. The will was duly admitted to probate on the 20th day of January, 1908. The record is silent as to the date of the commencement of this action. On the 22d day of August, 1908, Ferdinand Zimmerer, the father of George Zimmerer, for the consideration of "one dollar and natural affection" executed a conveyance to his wife, who was the mother of George, deceased, by which he sought to transfer to her an undivided half interest in the telephone system, subject to an interest contracted for by other parties, the extent of which does not appear. On the 24th day of August, 1908, the amended petition was filed.

From the averments of the pleadings, the stipulations of the parties entered into upon the trial, and the evidence adduced thereon, the issue presented by plaintiffs is that the franchise and telephone system is and was, at the time of the death of George Zimmerer, real estate—an hereditament—and therefore descended to his father, subject only to the life estate of the surviving widow, under the law of descent of real property as it then stood, and upon the termination of her life his title became absolute. The action is to quiet title in him and his wife, and for an accounting of profits.

The contention of defendants is that the property should be treated as personalty, and, under the law as it then existed, vested in the widow of George Zimmerer, subject to the payment of debts, etc.; that, she being the owner, her will vested the title in her surviving husband, subject to the rights of the infant child, if any. We then have the one question presented: Did the property descend to the father of the deceased, or was it personalty and subject to distribution under the law then existing as personal

property? We deem it proper to note here that there is no question in litigation in which the rights of the city of Lexington are in any degree involved. Indeed, under the provisions of the later ordinance, it may be that the right to occupy the streets and public grounds has terminated, but that question is not before us. The cause was tried to the district court, and a finding and decree were entered dismissing plaintiffs' petition, and from which they appeal.

It is strongly urged that there was no limit of time of the duration of the franchise granted by the former ordinance, and therefore the right to occupy the streets of the city was a perpetual one, and that thereby the provisions of the seventh section of the later ordinance continued that right in perpetuity. The provisions of the former ordinance are in some respects vague and uncertain. It is within common knowledge that a complete telephone system cannot be successfully maintained without "a suitable central office with proper switchboards and apparatus," as required by the second section of the earlier ordinance, and from this it is argued that the requirement of that section that the switchboards and apparatus shall be maintained "for a period of two years," coupled with the fact that the contracts with the subscribing patrons were limited to that time, demonstrates that it was not the intention of either the city or Zimmerer that the right should continue for any longer period, and therefore the franchise was not a perpetual one. It is also contended, with the citation of authority, that the city had not the right or power to grant a perpetual franchise. We do not deem these questions of controlling importance, and they are undecided. While it may be that a right granted by an ordinance, and a contract entered into therein with a party to it, cannot be abrogated and destroyed by a subsequent ordinance, yet if the second ordinance was passed upon the request and application of the party and its terms and conditions are fully accepted and ratified by him, as stipulated upon the trial as having been

accepted "together with all its terms and provisions," we know of no reason why the second ordinance may not be valid and binding upon the parties to it. This second ordinance granted an exclusive right to occupy the streets, which the first did not. It also extended the term of the franchise to ten years from two years, as was doubtless understood to be the duration of the time allowed by the first. It also provided for the free use of two telephones by the city, which was not contained in the former one. It is true that by the seventh section of the later ordinance the rights accrued to Zimmerer under the former one were reserved and confirmed in him, but this could only apply to such as were not abrogated by the second ordinance, and it is very clear that one of the purposes of the second ordinance was to make definite and certain the time of the duration of the rights granted. In other words, the occupation of the streets and public grounds within the city were legalized and rendered valid, as the two-year term had before that time expired, and, if that was the limitation, said occupation had been without right during the excess. We are therefore limited to the provisions of the second ordinance and the conduct of the parties to it for the purposes of a decision of this cause, as the case turns upon whether the franchise and plant was real or personal property. If real property, it descended to the heir of Zimmerer, who was his father. Comp. St. 1899, ch. 23, sec. 30, subd. 2. It is conceded by plaintiffs that, "if the property in question in this action is 'personal estate,' it went to the widow, and the plaintiffs in this action have no interest therein," under the provision at the close of section 176 of the same chapter that "the widow, if any, shall be entitled to receive the same share of such residue as a child of the intestate would be entitled to," which would be the whole. So held in *Hinds v. Hinds*, 56 Neb. 545. If under this provision the property belonged to the widow, her will conferred it upon defendant, her later husband, and the decree of the district court should be sustained.

On the trial it was stipulated that "prior to the 6th day of August, 1907, there was duly passed and approved, and duly published within the time and in the manner required by law, an ordinance, which after its passage, approval and publication was accepted by Eva Stuart (the remarried widow of Zimmerer), and which said ordinance is marked defendants' exhibit 1, and is hereby offered and admitted in evidence." We have searched the record in vain for a copy of this ordinance, but it does not appear among the files anywhere. What it contains we cannot even conjecture. A copy should have been preserved in the bill of exceptions. It was probably considered by the court, and may have furnished an important aid in arriving at the court's decision.

It is contended by plaintiffs that the second ordinance of March 13, 1900, was absolutely void, for the reason that it granted an exclusive right to occupy the streets and other public grounds of the city of Lexington. It may be conceded that the grant of the exclusive privilege was void, but that would not necessarily render the whole ordinance invalid. In *In re Langston,* 55 Neb. 310, it was held that, "when a city ordinance contains valid and void provisions, the valid portion will be upheld if it is a complete law in itself, capable of enforcement, and is not dependent upon that which is invalid." We may therefore eliminate the word "exclusive," and a valid and perfect ordinance will yet remain. It must seem very clear that the use of that word formed no inducement to the mayor or members of the council to pass the ordinance. We therefore hold that the ordinance was not void, that it fixed the length of time the right of Zimmerer to occupy the streets should run, and that, after its passage and approval and the acceptance of and agreement to its provisions by him, his rights were to be measured by it.

The question then arises as to the character or quality of the property held by Zimmerer, whether real or personal—an hereditament which, upon his death, descended to his heirs, or personalty which went into the hands of

an administrator for distribution as personal property, without considering the rights of his wife during his lifetime. We think it can hardly be said that the plant constituted a permanent fixture attached to his real estate, for he had no such property to which it could attach. In 14 Cyc. 17, it is said: "As in some cases property descends to different persons according as it may be real estate or personal property, it frequently becomes necessary to determine its character for the purposes of descent and distribution. As a general rule, it may be stated that the character of the estate at the death of the intestate, as impressed upon it by his act, determines the course of its descent, so that when the heir and next of kin are different persons and have adverse interests there can be no election." *Jones v. Kirkpatrick*, 2 Tenn. Ch. 693; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286; *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323. There is a sharp contention between the parties as to the legal results of placing poles and wires upon the streets when permitted to do so by ordinance granting the right; the plaintiffs claiming that, as matter of law, the property becomes real estate and susceptible of being inherited, while upon the part of defendants it is claimed that this result does not necessarily follow. Elaborate and exhaustive briefs are filed and many authorities are cited.

We are persuaded that the case must turn upon the ordinance and the conduct of the parties to it. As we have seen, the right to occupy the streets and public grounds of the city is limited to a term of 10 years. Assuming that the contract created by the passage of the ordinance and its acceptance by Zimmerer is faithfully carried out, the city could order the poles and wires removed at the end of the term and the title thereto would remain in Zimmerer. This would also be the case should he remove them without an order from the city. It is provided that, in case of any failure on his part to comply with the conditions imposed, the city may, after 30 days' notice, declare the franchise forfeited and his rights thereto shall

be terminated, that if at any time it becomes necessary for the city to have the poles and wires removed, or in case they interfere with the removal of any building, Zimmerer shall remove them upon notice so to do, and they shall not be replaced unless the necessity for their removal shall no longer exist. This places the poles and wires within the city subject to and within the control of the city. It is shown by the evidence that the city taxed the plant as personal property, and that on the 25th day of August, 1899, Zimmerer executed a chattel mortgage upon the whole plant to secure his note for the sum of $1,750. At no time during his life did he have the system, or any part of it, attached to any real estate the title to which was held by him. We are persuaded by these facts that not only Zimmerer himself, but the city council and officers, considered the character of the property that of personalty and treated it accordingly. This being true, and there being no act of Zimmerer shown by which he held and treated it otherwise, the character so given it would continue after his decease, and the title would vest in his administrator for distribution to his widow, he having no child nor children. It might be well to here observe that the equities of the case are largely with the defendants. There is no suggestion that plaintiffs ever contributed anything toward the installation or development of the property. From its inception until the death of Zimmerer his wife devoted much of her time and energies toward the upbuilding of the plant. At the time of his death it was, comparatively, a small affair. His widow, with her own funds, paid off the debt secured by the chattel mortgage, above referred to, and extended the system both inside and outside of the city, connecting the same with the original plant, placing an entirely new switchboard and operating devices in the central office, and after her marriage to defendant they jointly extended the lines both within and without the city, and finally, doubtless recognizing the labor and investment of her husband in the upbuilding of

the system, she, by her will, conferred the property upon him, and it now belongs to him and their child.

The decree of the district court is right, and it is

AFFIRMED.

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JULIUS HELPHAND, APPELLANT, V. INDEPENDENT TELEPHONE COMPANY OF OMAHA ET AL., APPELLEES.

FILED FEBRUARY 28, 1911. No. 16,304.

Waters: Surface Waters: Damage to Goods: Contributory Negligence. Where damage is caused by surface water negligently collected in a ditch or trench dug through a public alley, and thence allowed to soak through a sewer connection, previously constructed, into a basement of an adjacent building, the fact that the owner or occupant of the building in making his sewer connection failed to tamp the earth replaced therein sufficiently to render it impervious to water does not constitute contributory negligence.

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

*H. C. Brome* and *Clinton Brome,* for appellant.

*B. S. Baker, contra.*

BARNES, J.

Action for damages to a stock of goods by surface water alleged to have been negligently collected in a ditch dug by defendants, and thence thrown into the basement of a building occupied by the plaintiff.

It appears that plaintiff was the owner of a stock of "gents" furnishing goods, a part of which were stored in the basement of a building situated in the city of Omaha and occupied by him; that in the month of August, 1907, defendants, in constructing certain telephone lines in that city, dug a ditch or trench to be used as a conduit for its

wires through a public alley adjacent and in close proximity to the plaintiff's building, and left it in such a condition that the heavy rains which fell in that season of the year were collected therein, and thence escaped into the basement and damaged plaintiff's goods. There was no dispute as to the foregoing facts.

Defendants, to defeat a recovery, claimed that when they were digging the ditch in question their workmen discovered that at some prior time a sewer connection extending from the basement of plaintiff's building across the alley had been made, either by the plaintiff or his grantor; that the earth replaced in the sewer trench had not been sufficiently tamped to render it impervious to water, and, by reason thereof, the surface water collected in the ditch soaked through the sewer trench into the plaintiff's basement and caused the damage of which he complains. It was therefore contended that the plaintiff was guilty of contributory negligence.

It appears that the trial court, after correctly instructing the jury as to the defendants' legal duties and liabilities, by another instruction, submitted the question of contributory negligence to the jury. The giving of that instruction is assigned as error, which plaintiff strenuously contends entitled him to a new trial. The argument of the defendants in support of the instruction is that both parties had an equal right to the use of the public alley, in which their conduit was being constructed, and therefore the plaintiff owed them the duty to so construct the sewer connection as to render it impervious to the water which they collected and allowed to flow into their ditch, and by failing to do so he was guilty of contributory negligence. Counsel has cited no authorities to support this argument, and we doubt if any can be found by which it can be sustained. On the other hand, the plaintiff asserts that the evidence shows conclusively that, when the earth was replaced in the sewer excavation and the paving replaced thereon, the alley was left in a safe, suitable and proper condition for the public use; that no surface water

had thereafter penetrated the basement of his building, and he therefore insists that having done all that was required of him, both for the protection of the public and his own property, he owed no additional duty to the defendants and could not be said to have been guilty of contributory negligence.

This contention seems to be well founded. It appears that when the sewer connection was made neither the plaintiff nor his grantor owed any duty to the defendants, and when defendants entered upon the construction of their conduit it was their duty to so construct the ditch as not to injure the property of the plaintiff who was an abutting lot owner.

In the case of *Cook v. Champlain Transportation Co.*, 1 Denio (N. Y.) 91, it was said: "Where one, in the lawful use of his own property, exposes it to accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons." The rule is to so use one's own as not to injure others, and not, as the defendants contend, to use your own so that another shall not injure your property. In other words, one cannot lawfully use his own property, or exercise his rights, in such a manner as to increase the risk or danger of injury to another's property. In *Miles v. Postal Telegraph Cable Co.*, 55 S. Car. 403, it was said: "On the contrary, it behooves a telegraph company, in its legal use of a way or road, or even a highway or post road, to guard such use so that no injury shall result to the property of its owner which may be located opposite such telegraph lines, through its negligence or want of due care." Speaking of the rule of contributory negligence, it is said in 29 Cyc. 516: "This rule is subject to the exception that, as a person is entitled to use his own premises for any lawful purpose, his failure to protect it from the negligence of another will not be contributory negligence." The text above quoted is well supported by the following authorities: *Werner v. Cincinnati*, 23 Ohio C. C. Rep. 475; *Yik Hon v. Spring Valley Water*

*Works*, 65 Cal. 619; *Martin v. North Star Iron Works*, 31 Minn. 407; *Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454; and many others.

We are therefore of opinion that the question of contributory negligence does not arise in this case, and the trial court erred in submitting that question to the jury by the instruction of which the plaintiff complains.

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

REVERSED.

SEDGWICK, J., dissenting.

It is said in the majority opinion that "the trial court, after correctly instructing the jury as to the defendants' legal duties and liabilities, by another instruction, submitted the question of contributory negligence to the jury," and that this was erroneous, requiring a reversal. If, after correctly instructing as to defendants' legal duties and liabilities, it is erroneous to submit the question of contributory negligence to the jury, it must be that no matter how negligent the plaintiff may have been in constructing his part of the trench which caused the damage, and however careful and diligent the defendants have been in constructing their part and in seeking to prevent the ordinary effects of plaintiff's own negligence, the defendants are still liable for damages. This cannot be the law. The defendants argued that the plaintiff or his grantor in making the sewer connection owed the duty to the defendants, as well as others, to properly construct the same so as to prevent water from running into his (the plaintiff's) own basement. This argument is a little misleading. The plaintiff owed the duty to the defendants and others to construct the sewer connection so as not to injure the defendants or others who rightfully used the alley, but upon the point involved in this case the duty which the plaintiff owed was not so much to the defendants as it was to himself. He owed a duty to himself to make his sewer connection so that water from the alley would not flood

his basement. Suppose that both trenches had been dug at the same time, that the plaintiff had dug the sewer trench and the defendants the trench for the telephone cable, and both trenches had been negligently dug and negligently filled, would it be true that if the jury should find that, if the plaintiff had filled his part of the trench properly there would have been no damage, still the plaintiff could have recovered? Of course, if the defendants in digging their trench and filling it found that the plaintiff's sewer trench was imperfectly filled, and that damage was liable to ensue on that account, then the defendants should have been the more careful to avoid damage, since the sewer trench had been made a long time before, and the plaintiff might probably not be aware of its condition. If the defendants disregarded the danger of damages that might be caused from the conditions which they found in making their trench, they might still be liable for damages notwithstanding the imperfect conditions of the plaintiff's trench. But this point was fully and carefully guarded by the court in its instruction No. 5. The court instructed the jury to the effect that, when the defendants found that the plaintiff's part of the trench was not properly constructed, it would be the duty of the defendants to use correspondingly greater precaution to prevent damage to plaintiff's property, and that if in constructing their part of the trench the defendants "came upon a previously constructed sewer ditch leading to the basement of said building, the exposed condition of which was of such a nature as it was known to defendants, or should have been known to them in the exercise of ordinary care, that there was danger that surface water flowing into or upon defendants' trench would the more readily flow into and through said sewer trench and into plaintiff's building, then defendants would be required to exercise such a degree of care to prevent such accident as would be commensurate with the increased danger and circumstances surrounding the situation."

A similar instruction was requested by the defendants,

and the correct theory upon which the case was tried appears to be that if the plaintiff negligently constructed his part of the trenches in question, so that there would have been no danger if he had properly constructed the same, and the defendants, when they discovered the faulty condition of the plaintiff's trench, used such reasonable and proper precautions as an ordinarily prudent man would use to prevent the defects in the plaintiff's own trench from causing him damage, the defendants would not be liable. The questions tried were: First. Were the defendants negligent in constructing their part of the trench? Second. Did the plaintiff negligently construct his trench? Third. If the plaintiff's trench was negligently constructed, did the defendants, when that fact was discovered, use all reasonable precautions to prevent damage as the result of the plaintiff's own negligence? The last two propositions were determined in favor of the defendants by the jury upon "correct instruction as to the defendants' legal duties and liabilities," as said in the majority opinion, and, if so, their verdict ought to settle the matter.

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## UNION PACIFIC RAILROAD COMPANY v. STATE OF NEBRASKA.

FILED FEBRUARY 28, 1911. No. 16,307.

1. **Indictment: DUPLICITY.** Where a statute makes punishable the doing of one thing or another, thus specifying a considerable number of things, then by proper and ordinary construction a person who in one transaction does all violates the statute but once and incurs but one penalty, and an indictment or information on such a statute may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute has "or," and it will not be double, or subject to an attack for duplicity.

2. **Criminal Law: VENUE: EVIDENCE.** The venue in a criminal prosecution may be proved by facts and circumstances; but, where no direct evidence is produced for that purpose, the facts and circumstances relied on must be such as to presumptively establish that fact beyond a reasonable doubt.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

*N. H. Loomis, Edson Rich, E. F. Pettis* and *E. H. Crocker,* for plaintiff in error.

*William T. Thompson, Attorney General,* and *George W. Ayres, contra.*

BARNES, J.

The Union Pacific Railroad Company was convicted in the district court for Lancaster county of a violation of the provisions of section 7, art. IX, ch. 72, Comp. St. 1909, commonly called the "anti-pass law," and was adjudged to pay a fine of $100 and the costs of prosecution. To reverse that judgment the defendant has brought the case here by a petition in error.

Defendant's first contention is that the district court erred in overruling its motion to require the state to elect upon which charge contained in the information it would proceed. In the charging part of the information it is stated that "the said Union Pacific Railroad Company did then and there unlawfully and purposely issue and give to one Francis A. Graham a free pass." And it is therefore argued that the information charges two distinct and separate offenses. It is sufficient to say that the information contains but one count, which charges a single violation of the section of the statutes above mentioned; and it is therefore evident that the prosecutor availed himself of the rule that, where a statute makes punishable the doing of one thing or another, thus specifying a considerable number of things, then by proper and ordinary construction a person who in one transaction does all violates the statute but once and incurs only one penalty. It follows that "the indictment on such a statute may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunc-

tion 'and' where the statute has 'for,' and it will not be double," or subject to an attack for duplicity. 1 Bishop, New Criminal Procedure (4th ed.) sec. 436. This rule is decisive of the question, and we are of opinion that the defendant's motion was properly overruled.

Defendant's second contention is that the state produced no evidence in support of the charge that the offense was committed in Lancaster county; and it is urged that, for the failure of the prosecutor to prove the venue, the judgment of the district court should be reversed. It appears that the cause was tried on a stipulation of facts, and no oral evidence was produced by either party. An examination of the bill of exceptions discloses that the place where the pass in question was issued and delivered is nowhere mentioned in the stipulation, and that the state produced no direct evidence upon that question. It is contended, however, that the venue, like any other fact, may be established by the circumstances, or by circumstantial evidence. This rule is not questioned by the defendant, and therefore it remains for us to determine whether the facts and circumstances shown by the record are sufficient to establish by inference, or by legitimate presumptions, beyond a reasonable doubt, the fact that the crime was committed in Lancaster county.

We find that Doctor Graham, to whom the annual pass in question was issued, is described in the stipulation as "Doctor F. A. Graham of Lincoln," and it is stated in the contract, which is relied on as a defense, that he was appointed surgeon at Lincoln, Nebraska, for the Union Pacific hospital fund, and was to perform the duties of district surgeon for the Union Pacific hospital fund at Lincoln, Nebraska. The contract is signed by Doctor Graham as district surgeon, and from those facts alone we are asked to presume that the pass in question was issued and delivered to him in Lancaster county, Nebraska. To do this requires us to go a step further in the way of presumption than has been done in any adjudicated case to which our attention has been directed. On the other hand,

it appears by the contract and stipulation that for the years 1906 and 1907 the doctor had been acting under the contract, and had been supplied with an annual pass for each of those years, upon which he could travel free of charge over the defendant's lines of railroad to and from any place in this state. Therefore, we may reasonably presume that he went to the city of Omaha, in Douglas county, the place where the defendant maintains its general offices and transacts all of its general business, to renew his contract and receive his annual pass.

Again, it may be stated that it clearly appears from the record that the matter of venue was entirely overlooked by both the prosecutor and the trial court, for the instructions do not embrace that question in any form whatsoever. The court, in charging the jury as to the facts which the state was required to prove in order to authorize a conviction, failed to state that the prosecution must establish the fact that the transaction complained of took place in Lancaster county, Nebraska, as charged in the information. Considering the condition of the record upon that point, it seems reasonably certain that, if that question had been properly submitted to the jury, they would not have convicted the defendant. While, as above stated, the venue may be established by circumstantial evidence, still the circumstances must be such as to prove that fact beyond a reasonable doubt. We think the evidence was insufficient to meet that requirement, and therefore does not sustain the verdict.

Other questions are discussed in the brief of counsel for the defendant which will not be considered at this time, but we may say in passing that we see no reason to depart from the rule announced in *State v. Martyn,* 82 Neb. 225. It may not be out of place to suggest that counsel are mistaken in their view that defendant was tried on a charge of violating the anti-pass law, and was found guilty of an unlawful discrimination, and it may also be said that the anti-discrimination act was referred to in *State v. Martyn, supra,* for the sole purpose of showing that the contract

which the defendant insists has been violated by the terms of the anti-pass law was abrogated by that act and must be declared void as against public policy. Therefore, it is no defense to the charge contained in the information.

For the sole reason that the state failed to prove the venue in this case, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

SEDGWICK, J., dissenting.

It is said in the majority opinion that the fact that the trial was had in the county where the alleged crime was committed must be proved beyond a reasonable doubt. This was the ancient rule, and it is still, no doubt, adhered to in some jurisdictions. It does not seem to be based upon reason. The presumption that a defendant is innocent, and the rule that his guilt must be proved beyond a reasonable doubt before he can be degraded and punished, have basis in humanitarian consideration as well as in law, but the place of trial is no part of the defendant's case, and does not in fact affect the question of his guilt or innocence. It seems to me that the courts are gradually rejecting the doctrine that the venue must be proved beyond a reasonable doubt, and in many of the states it is sufficient if it is proved by a preponderance of the evidence. There need be no direct evidence upon this point. The fact may be inferred from the circumstances. *Cox v. State,* 28 Tex. App. 92; *Richardson v. Commonwealth,* 80 Va. 124; *Andrews v. State,* 21 Fla. 598; *State v. Dent,* 6 S. Car. 383; *State v. Burns,* 48 Mo. 438; *People v. Manning,* 48 Cal. 335; *Croy v. State,* 32 Ind. 384. If it is true, as stated in *State v. Crinklaw,* 40 Neb. 759, that the object of the law in giving the defendant the right of trial in the county where the crime is alleged to have been committed is to afford the defendant "the benefit of his good character," that reason does not obtain in this case, for the defendant is located in both counties and is no doubt equally well known in both. It is held in *State v. Crink-*

*law, supra,* that "the constitutional right to a trial before a jury of the county or district where the crime is alleged to have been committed is a mere personal privilege of the accused, and not conferred upon him from any considerations of public policy. It follows that such right may be waived by the accused, and in practice will be held to be waived by an application for a change of venue under the provisions of the criminal code." This seems to be good doctrine. If this action had been begun in another county, the defendant might upon his application have transferred it to Lancaster county where in fact it was tried. If he could have transferred it to Lancaster county and the case could properly be tried there, why might he not remain quiet if the state should attempt to remove it to Lancaster county, and thereby consent to such removal and waive the right to a trial in some other county where the alleged crime is supposed to have been committed? Again, if we concede that the defendant might have insisted upon a trial in Douglas county, it still might have preferred that the trial should take place in Lancaster county, and after the state begins the prosecution in Lancaster county, as the defendant did desire, why may it not by remaining quiet consent that the trial should be had in the county of its choice, and so waive the privilege of insisting upon a trial in another county? It seems to me that the rule that a defendant may waive the right to insist upon a trial in any particular county, and that if he goes to trial without objection he does so, is in accord with reason and modern conditions, and that the rule that the venue may be proved by a preponderance of the evidence. and may be inferred, as any other fact may, from the circumstances and conditions of the trial, is also. This is held in *Kennison v. State,* 83 Neb. 391. In that case the defendant applied for change of venue. The statute provides that, when such an application is granted, the venue shall be changed to an adjoining county. The court granted the change, but sent the case to a county not adjoining. There was no authority for this in the language of the statute. The defendant

made no objection to the place of trial until after the trial was finished, and it was held that he had waived his privilege of trial in an adjoining county. The opinion indicates that the rule as to waiver of a "mere personal privilege" is the same whether this privilege is allowed by statute or by the constitution.

This case was tried wholly upon a stipulation of facts. A construction of the recent statute in regard to the giving of passes by railroad companies was desired and other matters were assumed in the stipulation. The defendant never directly challenged the attention of the court to the question as to whether the case was being tried in the proper county. It asked for an instruction because the evidence was not sufficient to support a conviction, but there is nothing to indicate that this request was predicated upon the question of venue. It appears rather that the facts in regard to the contract between the defendant and the party to whom the pass was given, and the facts in regard to the services to be rendered by the defendant, were presented and discussed under this objection. After the verdict the defendant again suggested that the evidence was insufficient, but there is nothing to indicate that any of the parties had in mind any objection to the place of trial, and even in the assignments in this court the question of the place of trial is not specifically mentioned. Evidently the defendant is seeking a technical reversal predicated upon a supposed oversight. Such reversals are not favored and are continually becoming less frequent. It is recited in the contract, which is made a part of the stipulation of facts, that Dr. Graham, to whom the pass was given, was appointed in connection with the giving of the pass "as district surgeon at Lincoln, Nebraska," and that he was "of Lincoln, Nebraska," and that "the Union Pacific Railroad Company delivered to the said Dr. F. A. Graham" the pass in question, and that the pass was "over the line of the Union Pacific Railroad Company in Nebraska." The information charged that the pass was issued and given to Dr. Graham in Lancaster county, Ne-

braska, and it seems to me that the recitals in the stipulation that Graham resided in Lincoln, and that he was to perform his services in Lincoln, and that the defendant delivered the pass to Graham, without any qualification or restriction, amounts to admission that the pass was delivered as charged in the information. There is nothing in the stipulation of facts that is inconsistent with that view, and nothing that in any way tends to raise any issue with the allegations of the information as to the place of delivery.

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HERBERT F. BUNDY, APPELLANT, V. SAMUEL C. WILLS ET AL., APPELLEES.

FILED FEBRUARY 28, 1911. No. 16,313.

1. **Taxation:** JUDICIAL SALE: REDEMPTION. "Where a county, before an 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." *Smith v. Carnahan*, 83 Neb. 667.

2. ———: ———: ———: LIMITATIONS. "If the purchaser refuses to allow redemption to be made on legal terms, a cause of action for that purpose arises in favor of the owner or party interested, which may be brought and prosecuted at any time before being barred by the general statute of limitations." *Douglas v. Hayes County*, 82 Neb. 577.

3. ———: ———: ———: TENDER. Where the offer to redeem is accompanied by a check as payment of the redemption money, objection that the check is not legal tender is waived unless made at that time. A formal tender of money is not required where it is disclosed that if it had been so made it would have been fruitless.

4. ———: ———: ———: ———: WAIVER. Where a tender is refused without objection to the sufficiency of the amount, but upon other grounds, objection to the amount of the tender will be considered waived.

5. ———: ———: RIGHT OF REDEMPTION. Evidence found sufficient to show that plaintiff had such an interest in the real estate in question as gave him the right of redemption.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed with directions.*

*Hoagland & Hoagland,* for appellant.

*Wilcox & Halligan, contra.*

BARNES, J.

Action in the district court to set aside a deed issued to the defendant Ella Wills in a tax foreclosure proceeding, and to redeem the southeast quarter of section 8, township 9 north, of range 29, in Lincoln county, Nebraska, from a lien for taxes assessed thereon. The defendants had the judgment, and the plaintiff has appealed.

It appears that the plaintiff, Herbert F. Bundy, obtained title to the land in question on June 13, 1893, by a patent from the United States; that thereafter he leased the land to the defendant Samuel C. Wills, who became his tenant in possession; that on the 10th day of December, 1900, the county of Lincoln, without an administrative sale, commenced a foreclosure of a tax lien upon this land, and made Herbert F. Bundy and others defendants therein. Personal service of summons was had upon the defendant, Samuel C. Wills, who, as above stated, was in possession, and service by publication was made upon Herbert F. Bundy, the owner, who at that time was a resident of this state. The other defendants were also served by publication. A decree of foreclosure was entered in that case, and such further proceedings were had that the land was sold thereunder on March 1, 1902, to the defendant Ella Wills, who is the wife of the defendant Samuel C. Wills, for $150. This sum was applied to the payment of the taxes and the costs. It further appears that the sale was confirmed on the 3d day of March, 1902, and a sheriff's deed was issued to the purchaser, which was duly recorded.

During the pendency of the foreclosure proceedings, and for a considerable time thereafter, the defendant Samuel C. Wills corresponded with the plaintiff, and by letter informed him that the land had been sold for the taxes to the county, and that the county attorney had informed him that if he would take it off the county's hands he might have it. He also said: "If you want to redeem the place we will have no trouble about that. All I ask is that you pay me what I have in it, that is the taxes and costs and interest, any time within a couple of years, together with what expense I am at in the way of improvements, and you can have it back, as I did not buy it to injure you or any one else, but I did not want the county to sell it to some one else whom we would not want here." Subsequently, and on the 29th day of January, 1904, Wills wrote to Bundy and sent him a statement of the money he had paid and of the subsequent taxes. On the 27th day of February, 1904, the plaintiff, through his attorneys, Hoagland & Hoagland, tendered $202.70 to the defendant, Ella Wills, by way of a check, which was sent her by letter. This letter the defendants retained, but placed the check in an envelope unaccompanied by letter or statement of any kind, directed the envelope to Hoagland & Hoagland, placed it in the mails, and it was received by them. The plaintiff thereupon commenced a suit in the federal court to set aside the deed and redeem from the lien of the taxes, which was dismissed on jurisdictional grounds, and thereafter, on the 27th day of February, 1908, this action was commenced. The defendants answered plaintiff's petition, and claimed title under the foreclosure proceedings; denied the tender; and pleaded the statute of limitations. The reply was a general denial, and the result of the trial was the judgment from which this appeal is prosecuted.

Plaintiff's first contention is that his attempt to redeem by sending the check above mentioned to the defendants was made in time and while that right existed, and that he could thereafter maintain his action for that purpose, if commenced any time within four years from that date.

This is denied by the defendants, who assert that plaintiff was possessed of no such right, and that this action is barred by the statute of limitations. Like questions were before us in *Douglas v. Hayes County,* 82 Neb. 577. In that case it was said: "In redeeming from a judicial sale of land made for delinquent taxes, the purchaser is entitled to receive the amount bid at the sale with interest. Redemption from such sale must be made or offered within two years from the sale. If the purchaser refuses to allow redemption to be made, the party wishing to redeem should tender the purchaser the amount necessary therefor, unless the purchaser by his conduct waives a formal tender * * * If the purchaser refuses to allow redemption to be made on legal terms, a cause of action for that purpose arises in favor of the owner or party interested, which may be brought and prosecuted at any time before being barred by the general statute of limitations." In *Smith v. Carnahan,* 83 Neb. 667, it was said: "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. Where a county, before an 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." In *Barker v. Hume,* 84 Neb. 235, it was held that, where the purchaser at a void tax sale forecloses his lien, the sale thereunder is a judicial sale, and not final until confirmation, and the two years given to redeem dates from such confirmation. It appears without question that the judicial sale of the plaintiff's land for taxes was confirmed on the 3d day of March, 1902, and his attempt to redeem was made on the 27th day of February, 1904. Therefore his offer to redeem was made within two years, and in time to preserve the

constitutional right. In *Kelly v. Gwatkin,* 60 S. E. 749 (108 Va. 6), it was said: "Where the redemptioner has in proper time made a sufficient offer to redeem from a tax sale, which the purchaser has rejected on grounds distinct from nonproduction of the money, equity will entertain a bill to cancel the tax deed without formal tender of dues, enforcing the right of redemption only on terms of payment of the requisite amount."

Defendants now contend that plaintiff's attempt to redeem was ineffectual, because the check sent to them was not a legal tender. Under ordinary circumstances this contention should prevail. But where, as in this case, there was no objection that the tender was made by check instead of cash, such tender should be held to be sufficient. The objection that payment by check is not a legal tender is waived, if not made at the time the check is offered. In *Graham v. Frazier,* 49 Neb. 90, it was said: "A formal tender of money is never required where it is disclosed, if it had been made, it would have been fruitless." In *Filley v. Walker,* 28 Neb. 506, there was a tender of payment by check for the price of 117 head of cattle purchased, but undelivered to the plaintiff. The defendant replied that plaintiff need not draw the check, that he would not receive it unless there was included therein the amount of certain losses claimed on eight car-loads of cattle. It was said: "This is believed to have been a sufficient tender of the price, or, in other words, superseded a technical tender of either legal or current money for the 117 cattle."

It is further contended that the tender was insufficient in amount. It appears that the plaintiff and defendants were mutually of the opinion at the time the check was sent to the defendant, Ella Wills, that the rate of interest which a purchaser at tax foreclosure sale was entitled to receive was 10 per cent. The amount of the check was based on that understanding and embraced interest at that rate. It was subsequently determined by this court that the purchaser at a tax foreclosure sale is entitled to the

amount paid with interest thereon at the rate of 12 per cent. per annum. It thus appears that the amount tendered was about $6 less than the defendants were entitled to receive. But, as no objection was made to the check on that ground, defendants' contention is without merit. Where tender is made, and there is a failure to object to the insufficiency of the amount of the tender at the time it is made, such failure is a waiver of this objection, and the sufficiency of the amount cannot afterwards be questioned. In *Hill v. Carter,* 59 N. W. 413 (101 Mich. 158) it was said: "Where a tender is refused without objection to the sufficiency of the amount, but on other grounds, the amount cannot afterwards be questioned." This rule is supported by *Guengerich v. Smith,* 36 Ia. 587; *Sheriff v. Hull,* 37 Ia. 174; *Smith v. Kincaid,* 29 Tenn. 72; *Oakland Bank of Savings v. Applegarth,* 67 Cal. 86; *Ricker v. Blanchard & Bro.,* 45 N. H. 39; *People's Furniture & Carpet Co. v. Crosby,* 57 Neb. 282, 77 Am. St. Rep. 504. It seems clear from the pleadings and the evidence in this case that defendants' refusal to accept the check in question was never based on the ground of insufficiency as to amount, or that it was not a legal tender, for they claimed then as now that plaintiff's right to redeem was barred by the statute of limitations. As shown by the foregoing authorities, this contention cannot be sustained, and, so far as those questions are concerned, the plaintiff has established his right to redeem.

It is also contended that at the time the plaintiff attempted to redeem he was not the owner of the land in question, and had no such interest therein as would give him that right. The plaintiff's evidence was sufficient to show that he had such an interest in the land at all times as would entitle him to redeem the same from tax sale. The defendants introduced no testimony upon that point, and therefore this objection was without merit.

Finally, the plaintiff has attacked the validity of the foreclosure decree and the proceedings had thereunder resulting in the sale of his land to the defendant, Ella

Wills, for many reasons; but, in view of the foregoing, it is unnecessary to consider them.

It follows that the judgment of the district court should be, and it is, reversed, and the cause is remanded to that court, with instructions to take an accounting of the amount due to the defendants on account of the tax sale in question, including subsequent taxes, interest and costs, together with their permanent improvements, if any, to ascertain the value of rents and profits from and after the issuance of the sheriff's deed to the defendant, Ella Wills, and offset the same against the amount found due to the defendants, and thereupon to render a decree permitting the plaintiff to redeem; and, upon the payment of the amount so found due to the clerk of the district court for the use of the defendants, the decree for redemption be made absolute.

JUDGMENT ACCORDINGLY.

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ALPHIA M. SHEVALIER, APPELLANT, V. THOMAS J. DOYLE, APPELLEE.

FILED FEBRUARY 28, 1911. No. 16,323.

1. **Attorney and Client:** DISCHARGE OF ATTORNEY: RIGHT TO COMPENSATION. A client may discharge his attorney at any time; but, where he does so without just cause, the law gives the attorney an action for damages therefor; and, where the attorney accepts his discharge, the express contract of employment, if there be one, may be declared to be abrogated. In such case, an implied contract arises to which the attorney may resort for the recovery of the reasonable value of his services.

2. ———: ACTION FOR COMPENSATION: SUFFICIENCY OF PLEADING. Where the pleading in such a case contains a statement of the services performed and an allegation of the reasonable value thereof, it will, after judgment, be held sufficient to sustain a recovery based upon a *quantum meruit*.

3. CONTRACTS: LEGALITY. A contract based on considerations, a part

of which may be illegal, and a part legal and valid in all respects, will, if separable, be enforced as to its legal provision.

4. Evidence examined, and the sum due the prevailing party found to be the amount awarded him by the district court.

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

*Charles O. Whedon,* for appellant.

*G. L. De Lacy, contra.*

BARNES, J.

Alphia M. Shevalier brought this action in the district court for Lancaster county to obtain the cancelation of a real estate mortgage executed by her to the defendant, Thomas J. Doyle, to secure, among other things, the payment of attorney's fees. The defendant had the judgment, and the plaintiff has appealed.

It appears that on the 12th day of June, 1908, the plaintiff was arrested on a charge of grand larceny, and employed the appellee to conduct her defense; that when she was taken before the examining magistrate she procured continuances from time to time until the 10th day of July following, at which time the mortgage in question was executed and delivered to the defendant in this action. One of the conditions contained in the mortgage reads as follows: "The purpose of this conveyance is to indemnify the said Doyle against damage or loss by reason of having become surety for the appearance of the said Alphia Shevalier in the district court of Lancaster county, Nebraska, at the next term thereof, to answer the charge of felony, and also to secure the payment of attorney's fees for defending her against said charge. * * * These presents are upon the express condition that if the said Alphia Shevalier, her heirs, executors, or administrators, shall pay or cause to be paid to the said Thomas J. Doyle $500, and faithfully keep the conditions of said

appearance bond according to the tenor and effect of the same, bearing even date, then these presents to be void, otherwise to be and remain in full force."

It further appears that in the early part of the month of August, 1908, the plaintiff was arrested on a charge of perjury, and employed Mr. Doyle to defend her in that suit. There is testimony in the record which tends to show that his fee in that case was to be $500, and that the mortgage in question was to stand as security for the payment thereof. This evidence is contradicted by the plaintiff, and therefore it may be said that the testimony is conflicting upon that point. The defendant performed his part of the agreement by furnishing bail for the plaintiff in both of the cases above mentioned, and thus procured her release from custody. It also appears that the defendant served the plaintiff faithfully by appearing for her in all of the proceedings before the examining magistrate in both cases, and entered upon the work of preparing her defense against both charges in the district court, and it is nowhere suggested that he failed to faithfully and skillfully perform his full duty in that behalf. At a later date, however, and some time about the 1st of September following, the plaintiff caused the defendant to be informed that she had employed other counsel, and that his services were no longer required. After that time, however, the defendant appeared for her in the district court and filed a motion to quash the information in the perjury case, but when the name of the attorney who succeeded him had been properly entered of record, as counsel for the plaintiff, the defendant accepted his discharge and withdrew from both cases. Thereupon the plaintiff tendered him the sum of $50 as full payment for his services, and demanded a release of the mortgage in question. The tender was refused, and this action was brought to cancel that instrument.

Defendant's answer set forth the foregoing facts by way of a cross-petition, which also contained an allegation that a retainer in the two cases above mentioned and the serv-

ices rendered by him to and for the plaintiff were reasonably worth the sum of $1,000, and concluded with a prayer for an accounting to determine the amount due him therefor; that a reasonable time be fixed for the payment of that sum; that the mortgage in question be foreclosed, and in default of such payment by the plaintiff that the premises described therein be sold and the proceeds applied to the payment of the sum so found due. Issues were joined by a reply, and upon the conclusion of the trial the court found the facts generally for the defendant and against the plaintiff, fixed the amount due to the defendant at the sum of $500, and decreed a foreclosure of the mortgage as prayed.

The plaintiff now contends that the defendant's cross-bill was based solely upon a special contract, and therefore he could not recover upon a *quantum meruit,* and in support of that contention cites *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339. In that case, however, it appears that the pleadings contained no allegation which would sustain a recovery upon a *quantum meruit;* while in the case at bar the defendant's cross-bill contains an averment of the reasonable value of the services performed by him under the contract before the same was abrogated or annulled by the plaintiff. While this averment may not be as full and complete in all respects as the ordinary plea of *quantum meruit,* still, in view of the rule that after judgment a pleading will be liberally construed, we are of opinion that the averments of the cross-petition are sufficient to sustain the judgment of the trial court.

The plaintiff also contends that the defendant not having performed his contract by defending her in the district court is not entitled to any compensation, and judgment should have been rendered in her favor. In view of the fact that plaintiff tendered the defendant $50 for his services as a part of her demand for a release of the mortgage in question, this contention is not entitled to receive serious consideration.

On the other hand, the defendant insists that the meas-

ure of damages for the plaintiff's breach of the contract of employment is the full contract price. We think that neither of the parties has invoked the rule which should be applied in such cases. It is doubtless true that a client has a right to discharge his attorney at any time; but, if he does so without just cause, the law gives the attorney an action for damages therefor; and, where the attorney accepts his discharge, the express contract is abrogated. In such a case, an implied contract arises to which the attorney may resort and recover a fair fee, or, in other words, the reasonable value for his services. 4 Cyc. 993; *Evans v. Bell*, 6 Dana (Ky.) *479; *Cowles v. Thompson*, 31 Neb. 479; *Dailey v. Devlin*, 21 N. Y. App. Div. 62, 47 N. Y. Supp. 296; *Campbell v. Goodman*, 23 Pa. Co. Ct. 609; *Planters Bank v. Hornberger*, 4 Cold. (Tenn.) 531; *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273.

When the plaintiff discharged the defendant, it appears to have been done without any just cause whatsoever. He accepted the situation with the dignity becoming a reputable attorney, and his conduct in all respects accords with the best ethics of the profession. The plaintiff's testimony clearly shows that her tender of $50 was inadequate and insufficient, and therefore she was not entitled to have her mortgage either released or canceled.

Finally, counsel for the plaintiff contends that the mortgage was given in part for an illegal consideration, and was therefore void and cannot be enforced. Without passing upon the question as to whether that part of the contract which required the defendant to sign plaintiff's recognizance for her appearance in the district court for Lancaster county was illegal and void, it is sufficient to say that so much of the consideration as relates to the agreement for the payment of counsel fees is valid and is separable from the other portion of the agreement, and therefore it may be enforced in this action. *Parish v. Stone*, 31 Mass. 198; *Sims v. Alabama Brewing Co.*, 132 Ala. 311, 31 So. 35; *Richardson v. Scott's Bluff County*, 59 Neb. 400; *Stroemer v. Van Orsdel*, 74 Neb. 132, 143.

As to the amount of defendant's recovery, we think the evidence sustains the judgment, and convinces us that the services performed by the defendant for plaintiff's benefit, including a reasonable retainer fee in both of the criminal cases, were reasonably worth the sum of $500. The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

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## THOMAS JOHNSON V. STATE OF NEBRASKA.

FILED FEBRUARY 28, 1911. No. 16,699.

1. **Criminal Law: JURORS: COMPETENCY.** Where, upon the *voir dire* examination of a juryman, it is shown that he is a fair and conscientious man, and is in all other respects competent to serve as a juror, the mere fact that he has a feeling that the white race is superior to the colored race, of which the defendant is one, does not render him incompetent.

2. ———: ———: ———. On the trial of a defendant charged with the crime of murder in the first degree the positive statement of a juror that "he would not, under any circumstances, join in a verdict of guilty with the death penalty," renders him incompetent, and it is not error for the trial court to excuse him for cause.

3. ———: CHALLENGE TO JURORS: DISCRETION OF COURT. On the trial of one charged with a criminal offense, it is the duty of the court, in the exercise of a sound discretion, to arrange the order of peremptory challenges, and the fact that the state is accorded the last challenge affords no ground for a new trial.

4. ———: WITNESSES: IMPEACHMENT: VOLUNTARY STATEMENTS. A voluntary statement, not in the nature of a confession, made to the prosecuting attorney and by him reduced to writing and signed by the defendant in the presence of disinterested parties, giving an account of his movements at and immediately after the time when the crime with which he stands charged was committed, may be introduced in evidence to contradict his subsequent statements in regard to that matter.

5. ———: NONEXPERT EVIDENCE: QUESTION FOR JURY. It is not error

to permit a nonexpert witness who saw the defendant and made an examination of his garments on the next day after the murder was committed, with which the defendant was charged, to testify that he found blood stains upon the defendant's shirt sleeve and upon his coat; that the coat was still damp at that time as though an attempt had been made to wash out such blood stains. The weight and probative force of such evidence is a matter for the determination of the jury.

6. ———: INSTRUCTIONS. Instructions complained of, examined and set forth in the opinion, and *held* to have been properly given.

7. ———: ———. Where the trial court, upon his own motion, has properly instructed the jury on a matter of defense, he is not required to repeat the instruction in another form at the defendant's request.

8. ———: NEW TRIAL: COMPETENCY OF JURORS. The defendant, as one of the grounds set forth in his motion for a new trial, alleged that the jury had been rendered incompetent to try him by reading certain newspaper articles published in the Omaha daily papers. That question was determined by the district court upon affidavit evidence and the oral testimony of the jurors themselves. Upon an examination of the record, *held* that the ruling of the district court was sustained by sufficient evidence.

9. ———: VERDICT: SUFFICIENCY OF EVIDENCE. The jury in a criminal case are the sole judges of the effect and probative force of the evidence, and, where it appears from the record that there was competent evidence to sustain every material charge contained in the information, it cannot be said by a reviewing court that the evidence is insufficient to sustain their verdict.

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

*J. L. Kaley* and *H. G. Meyer,* for plaintiff in error.

*Arthur F. Mullen, Attorney General,* and *George W. Ayres, contra.*

BARNES, J.

Thomas Johnson was charged in the district court for Douglas county with the killing of one Henry R. Frankland, while perpetrating or attempting to perpetrate a robbery. In short, the information sufficiently charged a

violation of the provisions of section 3 of the criminal code. To this information the defendant entered a plea of not guilty, and a trial resulted in his conviction. By their verdict the jury fixed the death penalty as his punishment, and he has brought the case here for review by a petition in error.

1. Defendant contends that the district court erred in overruling his objections to certain of the jurors. Defendant was a colored man, and it appears that one George Mangold was called as a juror, and on his *voir dire* examination stated, in substance, that he had a feeling of prejudice against the colored race. But, on further inquiry, it fully appeared that he had no prejudice against the defendant, and his so-called prejudice against the race was simply a feeling or belief that the colored race was inferior to the white race, and that such feeling or belief would in no manner affect his verdict. The defendant's challenge for cause was overruled, for which he now assigns error. The only argument advanced by counsel for the defendant in support of this assignment is a statement contained in his brief that "this court must see that this juror was absolutely prejudiced and biased against the defendant, and was an incompetent juror to sit in the case." This statement is neither persuasive nor convincing. Without doubt many white men have the same feeling as did juror Mangold, but this alone has never been considered sufficient to disqualify them from acting as jurors in cases where colored men have been tried for criminal offenses. The record discloses that the juror was a fair and conscientious man, and possessed all of the necessary qualifications; that he was competent there is no doubt. It also appears that defendant waived a number of his peremptory challenges, and had ample opportunity to excuse this juror if he had desired to do so, therefore the challenge for cause was properly overruled. It is also contended that one Dumont was improperly excused from jury service in this case. But it appears from an examination of the record that he testified "that he would not,

under any circumstances, join in a verdict with the death penalty." This was a sufficient reason for sustaining the state's challenge for cause. Criminal code, sec. 467; *St. Louis v. State,* 8 Neb. 405; *Bradshaw v. State,* 17 Neb. 147; *Johnson v. State,* 34 Neb. 257; *Rhea v. State,* 63 Neb. 461. Complaint is also made because the district court, in arranging the order of peremptory challenges, accorded the prosecuting attorney the right of the last challenge. It is claimed that, after the state exercised this challenge, J. J. Lynch and W. A. Rourke were called into the jury-box for examination, and that they were most objectionable jurors for the defense. It is argued that juror Lynch was acquainted with most of the witnesses, and belonged to the same society that they and the prosecuting attorney belonged to; that he had talked with a number of people about the case, and had read newspaper comments, and it was error for the court to retain him upon the jury. The record is a sufficient refutation of those statements. It discloses that neither of these jurors knew anything about the case at all. Rourke testified that he had never heard of it until he was called into the jury-box for examination; while Lynch testified that he had heard very little about it; that he had neither formed nor expressed any opinion as to the guilt or innocence of the defendant; and he appeared, in all respects, to be a competent juror.

2. It is further contended that the court erred in admitting in evidence exhibit 10. This exhibit appears to be a statement made by the defendant to the county attorney, which was by him reduced to writing, and was signed by the defendant in the presence of two disinterested persons. It is argued that the defendant was thus compelled to testify against himself; that the statement had been obtained from the defendant against his will and by coercion on the part of the officers, in whose custody he was at the time it was made. The record does not bear out the statement of counsel. The exhibit in question does not purport to be a confession, but was a voluntary statement of the defendant as to where he went and what he did at

and immediately after the time the murder was committed, and it was introduced for the sole purpose of contradicting his later statements upon that question. We are of opinion that the court did not err in admitting the exhibit in evidence. *Taylor v. State,* 37 Neb. 788.

3. It appears that upon the trial one Captain Moyston, who saw the defendant and made an examination of his garments on the next day after the murder was committed, was permitted to testify that he found what he thought were blood stains upon the defendant's shirt sleeves and upon his coat; that the coat was still damp at that time as though an attempt had been made to wash out such blood stains. It is insisted that this was reversible error, and in support of his contention the defendant cites *State v. Alton,* 105 Minn. 110. That decision does not justify the defendant's claim. It was there said: "The single fact that a stain upon defendant's shirt sleeve was blood, it not being shown to be human blood, and it appearing that it may have been deposited there for six months or a year, was too remote and of no probative force in establishing the identity of defendant as the guilty party." In the case at bar the defendant was apprehended, was placed under arrest, and his garments examined on the day immediately following the evening when the crime was committed. It is sufficiently shown that Frankland was murdered at or about 9 o'clock on the evening of the 13th day of October, 1909; that the defendant was immediately suspected because of his having been seen in the company of the deceased at just about that time; that he was arrested and his clothing examined about noon on the following day. We are therefore of opinion that the testimony was competent, and that it was for the jury to say how much weight, if any, should be given to it.

4. Complaint is made of a number of the instructions given to the jury. It is contended that the court erred in giving the fourth instruction, which treats of the question of reasonable doubt. That instruction reads as follows: "You are instructed that by the words 'reasonable doubt'

used in this charge, is meant an actual, substantial doubt of guilt arising in your minds from the evidence or want of evidence in the case. If, after a careful and impartial consideration of all the evidence, the jury have an abiding conviction of the guilt of the defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt." The language and substance of this instruction was approved in *Wheeler v. State*, 79 Neb. 491, and *Maxfield v. State*, 54 Neb. 44. As was said in *Wheeler v. State, supra:* "Such an instruction is more favorable to the defendant than to the state."

Instruction number 6, given by the district court on his own motion, is assailed as erroneous. By that instruction the court informed the jury, in substance, that every sane person is presumed to intend the natural and probable consequences of his voluntary acts; that if they found the defendant did the cutting and did it purposely then he did it intentionally; that intent was an essential element in the case, and was required to be established by the evidence the same as any other material element beyond a reasonable doubt. They were also informed that a knife is a deadly weapon, and were told that, if the defendant did strike at the body of the deceased, Henry R. Frankland, with such a weapon, then the presumption would be that the defendant intended the natural and probable consequences of his act. The particular complaints lodged against this instruction are that the jury were informed that, if the cutting was done purposely, then they were at liberty to find that it was intentionally done, and that a knife was a deadly weapon.

Viewing these instructions in the light of the evidence, we are of opinion that they were correct, and that the defendant's criticisms are without merit.

5. Instruction 12 is strenuously assailed because the jury were told, in substance, that they were not required to believe the testimony of the defendant absolutely, and that they had a right to consider the interest of the de-

fendant in the prosecution. The instruction reads as follows: "You are instructed that you have no right to disregard the testimony of the defendant on the ground alone that he is defendant and stands charged with the commission of a crime, nor are you required to receive the testimony of the defendant as true, but you are to fully and fairly consider whether it is true, and for this purpose you have a right to consider the interest of the defendant in this prosecution. The law presumes the defendant to be innocent until he is proven guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf, and you should fairly and impartially consider his testimony together with all the other evidence in the case." The substance of this instruction has been approved by this court in *Philamalee v. State*, 58 Neb. 320; *Richards v. State*, 36 Neb. 17; *Housh v. State*, 43 Neb. 163; *Johnson v. State*, 34 Neb. 257; *Davis v. State*, 31 Neb. 247. It was therefore properly given.

6. Defendant complains of the refusal of the district court to give the jury the fourth instruction requested by him. This instruction related to the question of an alibi. An examination of the record discloses that, while the instruction requested was refused, the court did instruct the jury upon that question as follows: "There is evidence in this case tending to show an alibi; that is, that at the time the crime with which the defendant stands charged was committed, the defendant was at such a distant and different place that he could not have participated in its commission. You will carefully consider the testimony on the subject of an alibi with all of the other evidence in the case, and from that, if you are not satisfied beyond a reasonable doubt of the defendant's presence at the commission of the crime charged herein, then you should find the defendant not guilty." This instruction is certainly a correct statement of the law and was all that was necessary upon that question.

7. The record discloses that after his conviction the defendant filed a motion for a new trial, and alleged therein

that the jury were incompetent to try him, for the reason that before they were confined by the court, and while they were still allowed to separate, after the commencement of the trial, certain articles published by the newspapers in the city of Omaha prejudicial to the rights of the defendant were read by them. This question was tried by the district court upon affidavit evidence and the oral statements of the jurors, and was resolved against the defendant. It is quite apparent that the record is sufficient to sustain the judgment of the trial court upon this point, and therefore this assignment affords no ground for a new trial.

8. It is strenuously contended that the evidence is not sufficient to sustain the verdict. Without attempting to quote the testimony contained in the voluminous bill of exceptions brought to this court, it is sufficient to say that the deceased and the defendant were together at the Union station in Omaha, Nebraska, on the evening of the 13th day of October, 1909; they were seen by a number of persons in each other's company for an hour or more immediately preceding the commission of the crime; they were endeavoring to obtain passage to Chicago without paying full fare therefor; that during that time they visited a saloon situated on the west side of the viaduct nearly opposite the Union station; there they drank together, the deceased paying for the drinks and receiving $9.75 in change, which the bartender stated the deceased put into his right-hand trousers pocket. This was evidently seen by the defendant; that not more than 15 minutes before the deceased was found under the viaduct in a dying condition they interviewed a Pullman car porter on a train that was made up and about to depart for the East; that, failing to obtain passage, they left the train and departed in the direction of the place where the murder was committed, and which was probably not more than 100 feet from where they were last seen together; that the place where the deceased was assaulted was under the Tenth street viaduct, and within 200 feet of the south door of

the passenger station, where it was dark, and where such a crime could have been committed unseen by any one, unless he should be in that immediate vicinity; that, when found, the deceased revived sufficiently to exclaim that he had been cut with a razor and robbed. His throat was badly mutilated and cut by some sharp instrument, probably a knife or razor, and he had a lump upon his head as though he had been struck with some blunt instrument. It also appears that the same evening, and within a short time thereafter, defendant had possession of the watch and chain which had been owned, and was that day carried by, the deceased. The evidence shows that the change which the bartender had paid to the deceased at the time the defendant drank with him had been removed from his person. It further appears that the defendant sold the watch to a pawnbroker in the city of Omaha during the forenoon of the next day; that, when arrested, there was found upon his clothing what seemed to be blood stains; that immediately after he left the Union Pacific depot on the night in question the defendant went to an assignation house kept for the accommodation of colored people; that it was there observed that he was attempting to remove some stain from his coat, which he accounted for as soup which he had spilled upon his garment; that he stayed all night at this resort with one of its inmates, and when he left in the morning stole the money that he had given her for his entertainment; that when arrested he claimed that he had bought the watch in question in Lincoln, Nebraska, some three or four months before that time; that he afterwards stated that he purchased it of a colored man on one of the streets of Omaha, about half past 9 o'clock on the night the murder was committed; that he did not know the colored man's name from whom he purchased it, but claimed to have paid $4.50 for the watch and chain. It was shown by the defendant's own statement that at one time he had pleaded guilty to a charge of grand larceny, and had served a term of 18 months in the Nebraska state penitentiary therefor. The record also shows that

the defendant made many different and contradictory statements in regard to himself and his whereabouts on the day before, and the evening when, the crime was committed; that he had no regard for the truth, and was evidently a man of no moral sensibility whatever. Indeed, there was no lack of evidence against him upon any material element of the charge contained in the information.

Without further statement of the facts, it seems clear to us that there was sufficient evidence to warrant the jury in convicting the defendant of the crime charged against him, and a careful examination of the record satisfies us that it contains no reversible error. The judgment of the district court is therefore affirmed, and the 19th day of May, 1911, is hereby fixed for carrying into execution the judgment and sentence of the district court.

AFFIRMED.

REESE, C. J., dissenting.

I have read the evidence in this case on the part of the state and the testimony offered by the defense. As a general thing the accused sustained himself remarkably well under a severe and, to say the least, a zealous cross-examination. True, there are some contradictions in his testimony, but the adroit way in which the questions were, in some instances, propounded would, with almost any witness, when we consider the length and scope of the cross-examination, tend to produce mistakes and apparent contradictions. But I lay aside all evidence offered by the defense, and consider that for the prosecution alone. I freely admit the evidence impresses me more or less strongly with the belief that the accused is guilty of the murder of Frankland. But, as the case is here upon the contention that the verdict of the jury is not sustained by sufficient evidence, it is our duty to examine that evidence and decide if it is sufficient to justify the taking of a human life. The evidence by which it is sought to connect the accused with the killing of Frankland is all circumstantial. There is no direct proof anywhere in the

record that he committed the deed. He was seen in company with Frankland, publicly, a short time before the body of Frankland was discovered. He was in possession of Frankland's watch a very short time after the assault was made. He made no effort to secrete the watch, exhibited it openly, sold it, and voluntarily informed the police officers where it had been sold, and took them to the place where the sale had occurred. The clothing and knife upon which it is claimed blood stains were found were in the possession of the prosecution during the whole time intervening between noon of the next day after the murder and the date of the trial, and no effort was made to have the alleged blood stains submitted to a microscopical examination or to any other scientific test, and the state depended solely upon the unreliable testimony of the police officers, who were willing to testify that the stains upon the clothing and knife were blood, basing their testimony upon a visual inspection. These articles were kept during those long months in the city of Omaha, and within a stone's throw almost of any number of accomplished scientists who could have demonstrated the fact of the presence or absence of blood to a certainty, and at a minimum of expense, if the cost had been anything. A human life was at stake on the trial. The test of the stains could have put the question of the existence or absence of blood at rest and beyond all dispute. The prosecution saw proper to try the case without this test. The A B C of the law of evidence is that the evidence produced must be the best of which the case is susceptible. I grant the evidence introduced was competent, but the most convincing evidence of the character of those alleged stains would be the scientific test. Science can detect the existence of fresh blood, fresh blood dried, and dried blood. It seems to me there was no good reason for entering upon that trial without the tests having been made, and resorting to the wholly untrustworthy testimony of the police. The testimony of the harlot as to her smelling blood was equally untrustworthy. The fact of the accused

scratching his coat sleeve is of slight persuasive force. We all have done it. We all do it. I base this dissent solely upon the ground that the evidence of the guilt of accused is not sufficient to justify the extreme penalty of the law. Admitting that the rules of evidence were not violated in this trial, and that all the evidence adduced was the best of which the case was susceptible, we are yet confronted with the fact that every word of the criminating evidence offered may be absolutely true, and yet the accused be innocent.

The evidence produced by which it was sought to connect plaintiff in error with this murder was what is denominated circumstantial, the introduction of which is approved by the law of the land, and some features of the case are persuasive that he is the guilty party. But is that sufficient to justify the taking of his life and thereby closing the door against the truth should it be that he is not guilty? For one, I say: No. I am willing to join in an affirmance with the penalty of life imprisonment, but am not willing to affirm the death sentence, and hope the day of execution may be deferred until at least one month after the probable adjournment of the legislature, as it is possible the law may be changed so as to abolish the death penalty if the conviction is based upon circumstantial evidence. Circumstantial evidence is often a valuable aid in the detection of crime, but it is frequently misleading, and is believed by many to be unreliable and dangerous, in which I concur.

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## STATE, EX REL. LUTHER P. LUDDEN, APPELLEE, V. SILAS R. BARTON, AUDITOR, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,821.

**Schools:** NORMAL SCHOOL BOARD: COMPENSATION OF SECRETARY. Evidence of a contemporaneous and long-continued construction by the executive, legal and legislative departments of the state of sections 2, 3 and 5, subd. XIII, ch. 78, laws 1881, allowing

compensation to be paid to the secretary of the board of education of the state normal schools for his services as such, together with an appropriation by the legislature for that purpose, with the full knowledge of the fact that a member of the board was holding the office of secretary, *held* sufficient to authorize the auditor to approve such a claim and draw a warrant for its payment.

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

*Arthur F. Mullen, Attorney General,* for appellant.

*T. J. Doyle* and *G. L. De Lacy, contra.*

BARNES, J.

This proceeding in mandamus was commenced in the district court for Lancaster county to compel the auditor of public accounts to approve a voucher for the compensation of, and expenses incurred by, the relator from April 1, 1909, to Nov. 1, 1909, as secretary of the board of education in control of the state normal schools, and to issue a warrant for the payment of the same. The relator is a member of the board of education of the state normal schools, and the duly elected secretary of that board.

The petition, in substance, alleges that by reason of the establishment of several normal schools in this state, and the large enrolment therein, and on account of the largely increased appropriations thus made necessary, amounting to over $400,000, and for other reasons, it has become necessary for the secretary of the board of education to perform a large amount of labor of a clerical and accounting nature, which has been performed by the relator under the rules of the board; that, in payment for his services so rendered, the board of education allowed him at the rate of $25 a month, and the expenses incurred by him in performing his clerical duties; that there is due him therefor the sum of $175, and that there is an unexpended leg-

islative appropriation made for that purpose upon which the warrant may be drawn. The answer denies the authority of the board of education to allow any compensation to the secretary, and denies that any appropriation has been made to pay for such services. The court found in favor of the relator, and ordered a peremptory writ to issue, from which judgment the respondent has appealed.

The evidence shows that the establishment of the normal school at Kearney, together with the largely increased attendance at the Peru school, has vastly increased the volume of business required to be transacted by the board in order to keep a proper control, regulation and inspection of the financial affairs of these institutions. The appropriations made by the legislature for the biennium amount to more than $400,000. These appropriations are paid out under the direction of the board, and the vouchers are prepared and inspected by its secretary. In addition to the bookkeeping required to take care of these large expenditures, both schools have a number of other funds derived from deposits made and fees paid by the students, disbursements from which are made by and under the direction of the presidents of the respective schools. In each of these funds an account is kept with the individual student. Triplicate receipts are prepared; one given to the paying student, one retained at the school, and one sent to the secretary with a monthly report. These monthly reports with vouchers attached are checked over and verified in the secretary's office. The relator testifies that in order to do this an adding machine is used, and that he also procured the assistance of clerks and stenographers, who were paid by him from his personal funds. This system was devised and put in operation by the board of education some four or five years ago as a check upon the cash funds of the different institutions, and we have no doubt that it tends to a careful and efficient administration of their affairs. It is also shown that a large correspondence is conducted by the secretary, and he testifies that he has made no charge for keeping the minutes or for

duties imposed by the statute as a part of his official duties. It also appears that no office was furnished relator by the board, and he was compelled to use rooms in his own house in which to have this work performed; that the adding machine belonged to the state, but the typewriters used were his individual property. There is testimony by another member of the board that the amount represented by the voucher, in his opinion, was less than the necessary and required work would have cost if it had been done by others.

From the evidence in the case, we are thoroughly convinced that the work has been well performed by the relator and his assistants; that it was necessary, and has saved the state much more than the amount of the relator's claim. The respondent has not attempted to controvert the foregoing facts, but takes the position that the payment of the relator's claim is expressly prohibited by the provisions of sections 2, 3 and 5, subd. XIII, ch. 78, laws 1881 (Ann. St. 1909, secs. 11721, 11722, 11724) which read as follows: "Section 2. The members of the board of education shall annually elect a president and a secretary from among their own number, and the state treasurer shall be the treasurer of the board by virtue of his office. Section 3. It shall be the duty of the secretary to keep an exact and detailed account of the doings of the board, and on the first day of January of each year he shall transmit to the governor a report of all expenditures made during the preceding years, vouchers for which shall be kept on file in the office of the secretary and open to the inspection of the governor, auditor, and members of the legislature. Section 5. The board of education shall receive no compensation for their services, but shall be reimbursed actual expenses incurred in attending upon meetings of the board."

It is argued that the statute directly prohibits the board from receiving any compensation, and therefore it is apparent that no right exists in the relator to the compensation in question. On the other hand, it is contended

that, although the board is prohibited from receiving any compensation, still there is no prohibition against the payment of compensation to its secretary, and since the claim filed by the relator is for services performed by him, not as a member of the board, but as its secretary, he is entitled to have it allowed.

In *Territory v. Norris,* 1 Or. 107, the board of commissioners, selected to control the construction of the state penitentiary, appointed one of its members to act as secretary, and paid him $250 therefor. A suit was brought to recover the money back. The territorial supreme court held that the board had authority to employ a secretary; that the duties of the members of the board and its secretary are distinct, but not incompatible, and can be performed by the same person, and, if a member of the board had been selected and had served, he had a right to his reasonable compensation. In this state, while the law requires the board to elect one of its members as its secretary, still the duties of the board and the secretary are separate and distinct. He acts in a dual capacity while serving as a member of the board and in the performance of his duties as its secretary. He is not entitled to any compensation for performing his duties as a member of the board; but, while performing the distinct, different and separate duties which devolve upon the secretary of the board, he is not acting, strictly speaking, as a member of that body. He is simply its agent or servant, and the law nowhere expressly provides that the secretary shall receive no compensation for the performance of his duties. It therefore seems clear that the prohibition invoked by the respondent, if it exists at all, arises by implication or by a construction of the provisions of the sections of the statutes above quoted. To aid us in construing those provisions, we have the contemporaneous construction adopted by the legislature, the auditing department of the state, the governor, the legal department, and of the board itself, which has continued without interruption to the present time. It appears from the public records, of which

we may take judicial notice, that when the state normal school at Peru was established, and the board of education created by the act of June 20, 1867 (Gen. St. 1873, ch. 48, sec. 12) provision was made to pay for the services of the board at a specified rate per day, as well as to pay its expenses. In 1881 this provision for compensation was repealed, and the law in force was enacted. Prior to that time, and for each of the two preceding bienniums, the legislature had appropriated the sum of $600 to pay the expenses and *per diem* of the board of education, and, although that compensation was abolished by the act of 1881, it was understood that the necessary expenses of the board, including compensation for its secretary, must be met, and therefore the legislature immediately thereafter, and at the same session, increased the appropriation for that purpose to $800, and at the following session that amount was further increased to $1,000. The legislature at the 1893, 1895, 1897, 1899, 1901, and 1903 sessions appropriated $800 per biennium for that purpose. In 1903 provision was made for the construction of a state normal school at Kearney. In 1905 two schools were in operation, one at Peru, the other at Kearney, and an $800 item appears for expense of the board in the paragraph devoted to the Kearney normal school in the general appropriation bill, and a like sum in the paragraph which refers to the Peru normal. In 1907 and 1909 separate appropriations were made for the expenses of the state normal board; $1,900 being appropriated in 1907, and $2,000 in 1909.

Pursuing another line of investigation, the vouchers filed in the office of the state auditor since the change in the law in 1881 show that in each of the years 1881, 1883, 1885 and 1886 an allowance of about $50 was made to the secretary of the board for salary. No further claims for salary, as such, were filed until 1897, but the compensation of the secretary was paid under designations, such as expenses, etc. After the year 1897, and until December, 1904, salary claims of the secretary at the rate of $50 a year were filed and allowed. No claim for

salary was filed from December, 1904, until October, 1906, because the secretary, during those years, was the state superintendent of public instruction, who is prohibited by the constitution from receiving any compensation, other than that provided thereby, for any purpose whatsoever. In 1906 the present secretary was elected, and thereafter filed a claim, which was allowed, for clerical work for the board. From that time until the present claims have been filed by the relator and audited and allowed for "services as secy.," "clerical services," "use of typewriter," "office service," etc. There is also testimony that, when the legislature of 1909 was considering the matter of appropriations, the relator went before that body and gave it a full statement of the items and amounts necessary to conduct the business of the board, including compensation for its secretary, as claimed.

In view of the foregoing, we are of opinion that the contemporaneous and long-continued construction of the statute by the officers of the state so as to warrant the allowance and payment of compensation to the secretary of the board, and which has been concurred in by the legislature, should be adopted by the court as the meaning of the present law. In this connection it is proper to say that there seems to be no attempt on the part of the relator to obtain more than a fair equivalent for the services rendered, and not the slightest evidence of any moral turpitude. It is evident that the work which was light and trifling in amount in 1881, when the statute in question was enacted, has grown with the growth of the state, and that the law should have long ago been amended so as to provide a specific salary for the increased work which the secretary of the state board of education is required to perform. It seems, however, that the legislature has seen fit to adopt a different course and make sufficient and specific appropriations for the payment of a reasonable compensation to the secretary at each of its biennial sessions, and we are of opinion that those appropriations constitute sufficient authority for

the payment of the relator's claim, and are as effective for that purpose, while continued, as a general law upon that subject. By this we do not abandon the rule that a public officer must perform all of his official duties for the compensation provided by law. Indeed, it may be said that the relator's compensation as fixed and allowed by the board and approved by the legislative appropriation is his compensation as provided by law, and therefore this case is within that rule.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

REESE, C. J., dissenting.

I entertain no doubt of the justice of relator's claim, and that he ought, in fairness, to be paid the small compensation allowed him by the board. Neither do I doubt the power of the legislature to provide for its payment by a proper appropriation. Indeed, I believe it to be the duty of that body to do so. But the question with me is: Has it set aside any portion of the public money for that specific purpose? It is provided in section 22, art. III of the constitution: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." In *State v. Wallichs,* 12 Neb. 407, Judge LAKE, in writing the opinion of the court upon this clause, says: "In construing this provision of the constitution, the rule that the words are to be given their usual, ordinary meaning must not be disregarded. By this rule the term 'specific appropriation' means a particular, a definite, a limited, a precise appropriation." This language is quoted with approval in *State v. Wallichs,* 16 Neb. 679, and it is also held in *State v. Wallichs,* 15 Neb. 609, that "there can be no implied appropriation of money by the legislature. The auditor has no authority to draw a warrant upon the treasury except in pursuance of a specific appropriation." This, I think, has been the uniform holding of this court. I cannot believe that a "specific appropriation" has been made to pay this claim, however just it may be.

LETTON, J., dissenting.

While I agree with what is said in the opinion with respect to the value of the services rendered by the relator, I must dissent from the conclusion that a plain disregard by an officer of the state of the provisions of a statute, if continued for a long period of time, may make that lawful which by express terms is prohibited, and thus defeat the legislative purpose. Neither can I agree that where the members of a board are expressly prohibited from receiving compensation as such members, and the secretary is required by the statute to be a member of the board, the statute may be evaded by providing a salary for the secretary.

It is a well-established principle of law that an officer is not entitled to compensation except where the same is allowed or awarded him by a constitution or a statute, that the compensation allowed by law for duties performed in an official capacity are paid in full of all official services, and that he is not entitled to receive any additional or further compensation for services pertaining to his office. Mechem, Public Officers, secs. 855, 856; Throop, Public Officers, secs. 446, 477, 478.

This has been the rule in this state ever since the question first came before this court. *State v. Silver,* 9 Neb. 85; *Bayha v. Webster County,* 18 Neb. 131; *Stoner v. Keith County,* 48 Neb. 279. Judge SULLIVAN says in the opinion in *State v. Meserve,* 58 Neb. 451: "A public officer must perform every service required of him by law, and he must look to the statute for his compensation. If it provides none, then the services are gratuitous. *State v. Silver,* 9 Neb. 85; *Bayha v. Webster County,* 18 Neb. 131; *Adams County v. Hunter,* 78 Ia. 328; *City of Decatur v. Vermillion,* 77 Ill. 315; *Troup v. Morgan County,* 109 Ala. 162; *Sampson v. Rochester,* 60 N. H. 477. A person accepting a public office takes it with its burdens, and whenever those become insufferably oppressive he may resort to that excellent and adequate remedy which a wise

legislative foresight has provided, viz., a letter of resignation addressed to the proper authority." *State v. Eskew,* 64 Neb. 600; *O'Shea v. Kavanaugh,* 65 Neb. 639; *Nuckolls County v. Peebler,* 65 Neb. 356; *Red Willow County v. Smith,* 67 Neb. 213; *Power v. Douglas County,* 75 Neb. 734.

Under the statute, the secretary of the board is a public officer, and even without the express prohibition against members of the board receiving compensation, there being no fee or compensation provided by law for his services as such officer, he is not entitled to any compensation therefor. This can certainly be no less so when the payment of any compensation to a member of the board is directly prohibited. In *Moore v. Independent District,* 55 Ia. 654, the facts were that a school board, whom the statute prohibited from receiving any compensation, employed one of their own members to superintend the construction of a schoolhouse, and the action was brought to recover on a school order given him for such services. The court held that, the work being a part of the duty of the board of which he was a member, the plaintiff could not recover. See, also, to the same effect, *Weitz v. Independent District,* 87 Ia. 81.

It may be said, also, that, if the board can employ each member to render extra services, such a construction of the statute might become dangerous under other circumstances and with less careful and prudent officers. It is true that an officer may perform services foreign and in nowise appertaining to or interfering with his official duties, and may receive compensation therefor (*Cornell v. Irvine,* 56 Neb. 657); but it is clearly pointed out by the supreme court of the United States (*Converse v. United States,* 21 How. (U. S.) 463; *United States v. Brindle,* 110 U. S. 688) that the test in such cases is whether the duties of the one occupation or office are so diverse and different from those of the other that they cannot possibly fall under the same head.

As to the claim of contemporaneous construction, I am

unable to take the view that the facts in this case bring it within the purview of this doctrine. When in 1881 the legislature repealed the law which allowed compensation to the members of the board and prohibited such payments in the future, this was a clear and unmistakable manifestation of the legislative will. It rendered the former practice unlawful, and no department or officer of the state government was at liberty to set it aside by construction. *State v. Cornell,* 60 Neb. 276. In Illinois the state treasurers had for nearly 40 years retained certain fees, properly belonging to the state, under their construction of a statute, but the supreme court of that state held that the statute was plain and unambiguous and hence there was no room for construction. *Whittemore v. People,* 227 Ill. 453. In 2 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 473, it is said: "Long usage is of no avail against a plain statute; it can be binding only as the interpreter of a doubtful law and as affording a contemporary exposition." In section 474 we find the following: "If the meaning of a statute is clear and unambiguous, a practical construction inconsistent with that meaning will have no weight and will not be followed. A practical construction will not be followed when it would defeat the obvious purpose of the statute." Of course, if the evidence showed that an appropriation was made to pay a salary to the secretary, this would authorize the payment, being the last word of the lawmaker. It was evidently the object and purpose of the legislature in changing the law to constitute the position of member of the board one of dignity and honor, so that a person accepting it would do so, not for financial gain, but from a laudable, unselfish and patriotic desire to render valuable services to the state and to the cause of education. The statute is plain and unambiguous, and consequently the doctrine of contemporaneous construction is not applicable.

SEDGWICK, J., concurs in this dissent.

STATE, EX REL. TUTTLE, APPELLEE, V. WENDALL A. BIRDSALL, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,846.

1. Habeas Corpus: MISDEMEANOR: DEFECTIVE COMPLAINT. "After trial and conviction for a misdemeanor, a prisoner will not be liberated on a writ of habeas corpus because of the insufficiency of the complaint in said criminal proceedings, if by any possible construction of the language employed therein an offense against the law is thereby even defectively stated." *In re Caldwell*, 82 Neb. 544.

2. Appeal: QUESTIONS REVIEWABLE. Questions discussed in the brief of an appellant which are not raised by the findings or judgment of the district court as contained in the record will be considered by this court only so far as may be necessary to a proper decision of the case.

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

*E. D. Crites,* for appellant.

*B. P. McKelvey, contra.*

BARNES, J.

This is an appeal from an order of the district court in habeas corpus discharging one Trissie Tuttle from the custody of the sheriff of Dawes county. It appears that on the 26th day of February, 1910, a complaint was filed before the county judge of that county charging said Tuttle with a violation of the provisions of section 242* of the criminal code. A warrant was issued for her arrest. She was brought into court and tried on the charge of vagrancy contained in the complaint. She was found guilty and was committed to the industrial school for girls at Geneva, Nebraska. A warrant of commitment was issued and delivered to the respondent, who took her into his custody for the purpose of executing the same, and thereupon the parents of the girl obtained from the judge of the district court a writ of habeas corpus. On

the return of the officer to the writ, a hearing was had and she was discharged from custody. The respondent has appealed.

The record discloses that the accused was past 16 and less than 18 years of age when the complaint was filed. That fact is recited in the judgment of the county court. It must be conceded that the county judge had jurisdiction to try her on a criminal complaint, and we have frequently held that where the inferior court has jurisdiction of the subject matter and the person of the defendant, and the complaint, viewed in a liberal sense, can be construed to charge a violation of any section of our criminal code, unless it appears that no evidence was produced to sustain the charge, the defendant will not be released in a habeas corpus preceeding.

In *Ex parte Fisher,* 6 Neb. 309, this court held that, in a habeas corpus proceeding where the relator was convicted of a criminal offense, the judgment of the inferior court was conclusive as to every question of law, as well as of fact, that might have been considered and determined in the trial of the criminal case, and that we would not go behind the record of conviction and determine the constitutionality of the statute upon which such conviction was based. This case has never been overruled, in express terms, but the doctrine there announced has been somewhat modified by our more recent decisions. See *Keller v. Davis,* 69 Neb. 494; *Michaelson v. Beemer,* 72 Neb. 761; *In re McMonies,* 75 Neb. 702. These cases, however, simply hold that, if the proceedings leading up to the detention are absolutely null and void, the prisoner may be released on a writ of habeas corpus. We think the true rule for the determination of such cases was announced in *In re Caldwell,* 82 Neb. 544, and in *Rhyn v. McDonald,* 82 Neb. 552, where it was said: "After trial and conviction for an alleged misdemeanor, a prisoner will not be liberated on a writ of habeas corpus because of the insufficiency of the complaint in said criminal proceedings, if by any possible construction of the language

employed therein an offense against the law is thereby even defectively stated." This rule seems to be well supported by *Ex parte Williams,* 121 Cal. 328; *Ex parte Harlan,* 1 Okla. 48; *Ex parte Stacey,* 45 Or. 85; *Ex parte Williford,* 50 Tex. Cr. Rep. 417, 100 S. W. 919; *Ex parte Cabbs,* 79 Miss. 358, 30 So. 708; *McLaughlin v. Etchison,* 127 Ind. 474; *Ex parte Upson,* 7 Cal. App. 531; *In re Ruef,* 150 Cal. 665.

While the criminal complaint found in the record in this case is inartificially drawn, and many things are contained therein which may be considered as surplusage, yet we are unable to say that it is insufficient to charge the defendant with the crime of vagrancy. Therefore, it appearing by the return of the relator that he held the petitioner as a defendant in a criminal case under a warrant of commitment issued after she had been tried and found guilty of a criminal offense, it was error for the district court to release her upon a writ of habeas corpus.

It is stated in the respondent's brief that the district court held that the act of 1905 (laws 1905, ch. 59), commonly called the "juvenile court law," repealed articles I and II, ch. 75, Comp. St. 1909, known as the "reform school act." There is nothing said in the findings or judgment of the trial court upon that question, and out of fairness to that court we have felt that we should not determine that question.

For the determination of this cause, it is sufficient to say that by the constitution and the statutes of this state the county court is given jurisdiction to try and determine misdemeanor cases, like the one in question, and the act of 1905 does not deprive that court of such jurisdiction. In such cases, if there is a conviction, it is the duty of the court, as provided by section 5 of the reform school act, to commit the offender, if a boy, to the reform school, and, if a girl under 18 years of age, to the industrial school for girls. Finally, it appears that after the complaint was filed and the defendant was taken into custody the case could not be transferred to the juvenile court because

the defendant was over 16 years of age. See section 10, art. II, ch. 20, Comp. St. 1909. The county court therefore properly retained jurisdiction, and its judgment may not be reviewed by habeas corpus proceedings.

For the foregoing reasons, the judgment of the district court should be, and it is hereby,

REVERSED.

SEDGWICK, J., dissenting.

Trissie Tuttle was arrested upon warrant issued by the county judge of Dawes county upon a complaint filed in that county which charged her, it is said, with the "crime of vagrancy." The county judge found and certified that "she was 16 years of age her last birthday which was on December 5th." This finding was made on the 4th day of March, 1910, so that she will not be 18 until next December. The county judge ordered that she be sent to the state industrial school at Geneva, and the district court upon hearing of the writ of habeas corpus decided that the order of the county judge was without authority of law, and ordered that she be released from custody.

The majority opinion reverses the judgment of the district court and remands her to the custody of the sheriff under the order of the county judge. In the opinion it is said that she is between the ages of 16 and 18, and it is also said in the opinion "that after the complaint was filed and the defendant was taken into custody the case could not be transferred to the juvenile court because the defendant was over 16 years of age." I think this is a mistake. The original juvenile court act (laws 1905, ch. 59) expressly applies only to girls under the age of 16 years. The first clause of the first section provides that "that act shall apply only to children under the age of sixteen (16) years." The seventh section begins as follows: "When any child under the age of sixteen (16) years shall be found to be delinquent." At the next session of the legislature this was changed. Laws 1907, ch. 45. The first section there was amended so that it reads, "This act shall apply only to minors," and the seventh sec-

tion reads, "When any child under the age of eighteen (18) years shall be found to be delinquent," etc., making the act expressly apply, as its original title would indicate, to all children. This amendment was overlooked in deciding *Holton v. Sampson*, 81 Neb. 30. The title of the original act was "An act to regulate the treatment and control of dependent, neglected and delinquent children." The first section of the act as it now is provides that the words "delinquent child" shall include any child under the age of 18 years who violates any law of this state or any city or village ordinance, and section 7 provides: "When any child under the age of eighteen (18) years shall be found to be delinquent, dependent or neglected within the meaning of this act, the court may make an order committing the child to the care of some suitable institution, or to the care of some reputable citizen of good moral character, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent or neglected children, which association shall have been accredited as hereinafter provided, or if under the age of sixteen (16) years, to the care of a state industrial school. The court may, when the health or condition of the child shall require it, cause the child to be placed in a public hospital or institution for treatment or special care, or in an accredited and suitable private hospital or institution which will receive it for like purpose without charge." So that when any child under the age of 18 years is found to have violated any law of this state, it is delinquent, and section 7 provides what shall be done. The court by section 7 may commit such children to the care of some suitable institution, or some respectable citizen, or some association willing to receive it, "or if under the age of sixteen (16) years, to the care of a state industrial school," so that the court has no power to commit a girl between 16 and 18 years of age to the state industrial school. This provision of the law is plain and positive and does not require construction. There are some sections of the

juvenile court act that have been thought to be inconsistent with these provisions. The first section says that the act shall not apply to those "who are now, or who shall hereafter become, inmates of a state institution, or of any training school for boys or industrial school for girls, * * * unless such children shall have been placed therein under and by virtue of the provisions of this act." This implies two things: First, that the juvenile court may commit under proper conditions girls to the industrial school; and, second, it also implies that there may be girls committed to the industrial school not under the provisions of this act. If this means that the practice may continue of arresting girls charged with crime under the old statute, and in the county courts of the state, and that the county court may order them committed to the industrial school, such a construction would make this provision of the act inconsistent with the other provisions referred to. However, there is another construction that may be given to this. When young girls have been committed to the state industrial school, and it is found that they can be better taken care of otherwise, they may be paroled. This has been done frequently when the girls were of a tender age. If it then turns out that they are not fit for parole and ought to be returned, no proceedings are necessary, except the authority of the industrial school to return them to that institution. This clause that we are considering in the first section may apply to such cases as that. However that may be, the positive statement that girls under the age of 16 years may, under some circumstances, be sent to the industrial school, as found in section 7 of the act, prohibits sending girls over the age of 16 years to the industrial school, unless they have been previously committed to that institution and have been paroled or have escaped therefrom.

The majority opinion appears to be based wholly upon section 10 of the act. This section makes it the duty of the justices of the peace and police magistrates to transfer cases to the juvenile court when the child charged with

crime is under 16 years of age. This section was not changed when the other sections of the act were changed so as to make all children under 18 years of age subject to the jurisdiction of the juvenile court. This court, of course, cannot amend a section of the statute to correct an oversight of the legislature; but, when the section as it is allowed to remain is inconsistent with all other sections as amended, the court must construe them together and enforce the intention of the legislature. Justices of the peace and police magistrates cannot commit children to the reform or industrial schools under any circumstances. When children are before the county court, as in this case, that court has jurisdiction under the juvenile act. The seventeenth section of that act is as follows: "This act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care, custody and discipline of a dependent, neglected or delinquent child shall approximate, as nearly as may be, that which should be given by its parents, and in all cases where it can be properly done, the child to be placed in an approved family home and become a member of the family by legal adoption or otherwise."

It is said in the majority opinion that "the case could not be transferred to the juvenile court," and section 10 of the act is referred to as compelling such a conclusion. I think that in view of the other sections of the act, and the whole purpose of the legislature, and the amendments that have been made, justices of the peace and police magistrates should transfer the case to the juvenile court when the defendant is under 18 years of age, and so come within the purview of the juvenile court law; but, however that may be, section 10 has no application to the county court. That court, as already shown, has jurisdiction under the juvenile act, and to hold that, as a county court, the judge cannot transfer a proper case to himself as judge of the juvenile court is wholly unwarranted. When a case comes before him that belongs to the juvenile court he should act as such court, and that court has no power

to send a child over 16 years of age to the reform or industrial school. Perhaps the district court should not have discharged the defendant under the writ of habeas corpus. That court might have proceeded under the juvenile law, or possibly might have remanded the defendant to the county court for that purpose. But, in any view of the case, the warrant to the sheriff for the purpose of taking the defendant to the industrial school was in violation of the express provisions of the juvenile court law and was void, and the defendant was properly released therefrom.

The complaint in this case charges that this girl was "in total want of proper parental care," and the record fully justifies the charge. Her parents were living in the county and at the place where she was arrested. If she was a vagrant, it was their fault rather than her own. The circumstances were wholly insufficient to justify the order of the county court. It was peculiarly a case for the juvenile court. Of course, the sufficiency of the evidence should have been tested by appeal, and not by habeas corpus proceedings, but these considerations show the conditions for which the legislature was attempting to provide, and assist in construing the conflicting sections of the statute. If it is true that a young woman between the ages of 16 and 18 years, who has no means of support and is not properly cared for by her parents, may be arrested upon charge of vagrancy and sent to the industrial school without the assistance of the juvenile court and the probation officers of that court, or of the detention home now provided for by the amendments of 1907, it would seem that the juvenile court law is essentially a failure.

WILLIAM NELSON, APPELLEE, V. JACOB WIRTHELE, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,318.

Waters: DIVERSION: INJUNCTION. A landowner is entitled to an injunction to restrain the erection and maintenance of a dam in an old established drainage channel, partly natural and partly artificial, and the digging of a ditch, where the effect would be to collect and divert waters flowing therein and cast them in a body on his lands, which they would not otherwise reach.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

*D. W. Livingston,* for appellant.

*W. F. Moran, contra.*

LETTON, J.

The plaintiff and defendant are owners of adjoining tracts of land. This controversy arises from the fact that in the spring of 1907 the defendant contemplated damming a drainage channel, partly natural and partly artificial, but upon his own land, and digging a ditch from the point of obstruction in such a manner that the water would be diverted from its former channel and cast upon the lands of plaintiff. The work had been begun and partly completed when this action was begun. The petition contains the usual allegations as to irreparable damage and lack of adequate remedy at law, and prays for an injunction to restrain the construction and maintenance of the dam and ditch by which the waters might be diverted. The answer was a general denial. The court found for the plaintiff and granted a permanent injunction. Defendant has appealed.

The questions involved in the appeal are purely questions of fact. It is conceded that the defendant contemplated and had begun the construction of the dam and

ditch and the diversion of the water. The real matters in controversy are as to whether the proposed ditch would cast the diverted waters upon the plaintiff's land, or whether, as the defendant maintains, the waters would not reach plaintiff's premises but be carried thereby over defendant's land and into a ditch upon the right of way of the Missouri Pacific Railway; and, also, whether or not the construction of the contemplated dam and ditch had been abandoned and matters restored to their original condition by the demolition of the dam and the filling of the new ditch before this action was commenced. As to both of these questions there is a sharp conflict in the testimony. After considering the relations existing between the different witnesses and the probable interest which each may have in the result of the suit, we are inclined to take the same view of the evidence as did the district court and to find that the execution of defendant's plan would have caused such damage to plaintiff's property as to warrant an injunction. The same considerations apply to the evidence upon the question whether the proposed enterprise was abandoned before the beginning of the suit. It is unnecessary to set out the evidence at length. We are satisfied that it warrants granting the relief prayed.

The judgment of the district court is

AFFIRMED.

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## MAGGIE MILLS, APPELLEE, V. WILLIAM H. MILLS, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,332.

1. **Divorce: EXTREME CRUELTY.** There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty. *Myers v. Myers*, p. 656, *post*.

2. ———: **ALIMONY.** Where property, variously estimated to be worth from $4,000 to $5,600, has been accumulated by the joint efforts of

husband and wife continued for about 30 years, and in a case where there are no dependent children, and the plaintiff is 64 years old and in weak and infirm health, the discretion of the district court in awarding the plaintiff $2,500 as permanent alimony was properly exercised and will not be interfered with.

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

*J. R. Swain* and *H. C. Vail,* for appellant.

*A. M. Robbins, T. D. Meese* and *H. A. Robbins, contra.*

LETTON, J.

This is an action for divorce and alimony, which resulted in a decree granting plaintiff a divorce on the ground of cruelty and allowing her the sum of $2,500 as alimony. The defendant has appealed. He contends that the evidence is not sufficient to sustain the decree of divorce, and that the alimony is excessive.

We consider it unnecessary to relate the testimony at length. The plaintiff is a woman 64 years of age. She was married to defendant about 30 years ago. At the time of the marriage the defendant's property consisted of a team of horses, and a timber claim entry in Wheeler county, which is now a part of the home farm. After the marriage they settled upon this land, but, as was not uncommon in pioneer days, it was found necessary that money be earned elsewhere in order to maintain existence. The plaintiff worked as a cook in hotels in neighboring towns for a part of each year for about 17 years, while the defendant worked at different times at teaming for the government, and others. It is evident that the plaintiff is a hardworking, clean, and industrious but sickly woman, and that the defendant is a man of gruff manners, strong will, coarse language, and careless ways. There is no evidence of actual violence on his part against his wife, but there is ample proof of cruel, unfeeling, and harsh treatment of her. The plaintiff seems to have been

singularly liable to accidents resulting in fractures of her upper and nether limbs. The last incident of this kind occurred in 1908. At this time she fell and broke the bones of her wrist when procuring water at the flowing well near the house. She testifies in detail to the harsh language and the cold and unfeeling conduct of defendant at that time and while she was partially disabled by the accident, and his own testimony in regard to this occurrence corroborates her. While the defendant was a good provider of food, this seems to have been all that he thought it was his duty to supply beyond the barest necessities in the way of house room, furniture, and clothing. The case falls under the rule of *Ellison v. Ellison,* 65 Neb. 412. It is unnecessary to refer to the argument on condonation. Sufficient cruelty has been proved since plaintiff's return to make a case. From the whole record we think the testimony justifies and requires the decree.

It is contended that the alimony allowed is excessive. There are no children in the family. The defendant's property is the product of their joint labor. Some years ago there was a separation by mutual consent and the plaintiff was absent for some time, and during this period defendant contributed but little to her support. The preponderance of the evidence seems to be that the property, after deducting the mortgage debt, is worth at least $5,000. If, as some witnesses testify, the farm is worth $35 an acre, then the entire property is worth at least $6,600. If we accept the lower estimate as the actual value, the court awarded the plaintiff about one-half of the joint accumulations. The evidence shows that the wife had worked just as hard and strenuously, and presumably had passed through as many hardships, in order to accumulate this property, as the husband. The privations of pioneer life are apt to bear harder on a lonely and childless woman on a sand-hill claim than on a man who is free to move about. The plaintiff has now reached an age and is in such a state of health and strength that it is hardly probable that she will be able to earn her own support, while

defendant has no children to maintain and apparently is in much better mental and physical condition to take care of himself for the remainder of life. If we accept the higher estimate of the value of the land, the justice of the decree is still more apparent. Each case must be governed by its own circumstances as to the amount of alimony. *Walton v. Walton,* 57 Neb. 102; *Smith v. Smith,* 60 Neb. 273; *Metcalf v. Metcalf,* 73 Neb. 79.

The judgment of the district court is affirmed, but defendant is to be credited on the judgment with the amount of temporary alimony he has paid since it was rendered.

AFFIRMED.

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## HARRY JOYCE V. STATE OF NEBRASKA.

FILED FEBRUARY 28, 1911. No. 16,803.

1. **Criminal Law:** EVIDENCE: ACTS OF ASSOCIATES. Where a person is charged with a substantive offense of such a nature that he must be present at the time of its commission in order to support a conviction, the acts of any others who are associated with him in the commission of the crime in furtherance of the common design may be admitted in evidence.

2. ———: INDICTMENT: SUFFICIENCY. Where the gist of the offense charged is not the conspiracy, but is a substantive act of which one or more may be guilty, it is not essential that the fact of conspiracy or that the crime was committed in pursuance of a concerted design be averred in the indictment.

3. ———: ———. And in such case the fact that the persons concerned in the common crime are not jointly indicted makes no difference.

4. ———: TRIAL: ORDER OF PROOF. The order of proof is within the discretion of the trial court, and in such a case it is not essential that proof of the existence of a conspiracy be first made in order that evidence may be received of acts of one associated with the accused in the common design.

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

*H. F. Barnhart, D. H. Sullivan* and *M. H. Leamy,* for plaintiff in error.

*Grant G. Martin, Attorney General,* and *George W. Ayres, contra.*

LETTON, J.

At some time during the night of January 18, 1909, the vault of the Farmers State Bank, at Hadar, Nebraska, was entered by burglars, the safe blown open, and the money therein stolen. Harry Joyce, the accused, was tried and convicted on an information charging burglary by the use of nitro glycerine, and larceny of the money in the safe. The evidence on the part of the state is to the effect that one Morrison and Riley were with the accused in Sioux City, Iowa, early in January, 1909, where they were arrested by the chief of police and held in custody until the 12th of that month. While thus detained their photographs were taken and measurements made. They were seen in Sioux City on the 13th and 14th of January, and Morrison and Riley were seen there again on the 20th and 21st. The proprietor of a rooming house in Norfolk, Nebraska, testifies he rented a room on the evening of January 15 to Morrison, Joyce, and Riley, that he saw them on the 16th, and on the night of the 17th, but not afterwards. The cashier of the bank at Hadar saw Morrison in the bank both in the forenoon and afternoon of the 16th, when she changed some money for him and sold him a small draft, he giving his name to her as J. W. Morrison. A bartender in Hadar also saw Morrison on several occasions on that day. Mrs. Stanfield, a nurse by occupation, who lived close to the railroad station at Norfolk, which is about five miles from Hadar, testified that early on the morning of the 19th the accused and Morrison came to her house and requested her to dress a wound upon Joyce's hand, saying that the injury was a cut, to which she replied that it was a burn. She further

testified that the wound was a burn at the base of the thumb and on the palm of the hand, and that she applied an antiseptic dressing. A knife of peculiar shape was found in the vault among the debris on the morning after the explosion. A hardware dealer at Norfolk testified he sold such a knife to Morrison, or to a man who strongly resembled him, on the 15th or 16th of January.

The principal defense was an alibi, supported by the testimony of the accused himself, and of other witnesses more or less reputable. There was also evidence tending to show the absence of a scar on Joyce's hand about six weeks after the burglary.

It is contended in this court that the verdict is not sustained by sufficient evidence, and that it is contrary to law. As to the first point: The evidence is purely circumstantial, but it is indeed seldom that persons seeking to commit such a crime invite eye-witnesses to the act. The evidence seems amply sufficient to connect Morrison with the commission of the offense, and, while it is possible that the burn upon the hand of Joyce was not received at the time of the explosion which wrecked the safe, it is a singular circumstance that these men should be associated together for some time and immediately before the burglary, and should appear together at 5 o'clock in the morning immediately after the burglary, with a wound on the hand of the accused which he said was a cut made by a barbed wire, but which is shown to have been a burn, and that afterwards they returned to their former haunt in the slums of a neighboring city. It is true these circumstances may only be coincidences, but such a concurrence of incriminating circumstances goes far to satisfy the mind that the only reasonable hypothesis upon which they can be explained is that of the guilt of the defendant. Jurors are properly governed in weighing the probative effect of such testimony by the common experiences of every-day life, and, while the circumstances may have been susceptible of explanation consistent with the innocence of the accused, the fact that the testimony was met with

denial, and not with explanation, was evidently considered. We believe the evidence supports the verdict.

At the trial the introduction of certain photographs which were taken under the direction of the chief of police in Sioux City was objected to. These photographs had been used in the search for the guilty persons, and, while it is probable that the use of the photograph of the accused during the trial of the case was unnecessary, there is no contention made that it was not a true presentment of his physiognomy, and it is not shown that he suffered any prejudice by reason of his picture as well as his bodily presence being before the jury.

Instruction No. 1, given at the request of the state, is complained of. This instruction is as follows: "If you find beyond a reasonable doubt from the evidence that, at and before the time of the commission of the crime charged in the information, there existed a common purpose to rob said bank between the defendant and one James Morrison, or between defendant and James Morrison and any other person, and further find beyond reasonable doubt that such common purpose continued until the commission of said crime by one or more of said conspirators, then the acts and declarations of either of said conspirators, in preparing for and committing said crime, are the acts and declarations of each of them. And, in determining whether or not such conspiracy existed on the part of the defendant herein, you will carefully consider all the evidence in this case as to the acts of the defendant before and after the time said crime was committed, together with all the other evidence in this case." The accused contends that the acts and declarations of a party not named in the indictment as a conspirator or designated therein as unknown cannot be proved, and further that the evidence fails to show that a common design was formed in the mind of the defendant and Morrison to commit the crime charged.

We are of opinion that, where a person is charged with a substantive offense of such a nature that he must be

present at the time of its commission in order to support a conviction, the acts of any others who are associated with him in the commission of the crime in furtherance of the common design may be admitted in evidence (3 Greenleaf, Evidence (16th ed.) sec. 94), and that where the gist of the offense charged is not the conspiracy, but is a substantive act of which one or more may be guilty, it is not essential that the fact of conspiracy or that the crime was committed in pursuance of a concerted design be averred in the indictment. *Lamb v. State,* 69 Neb. 212; *Taylor v. State,* 3 Tex. App. 169; *Scott v. State,* 30 Ala. 503; *Martin v. State,* 89 Ala. 115, 18 Am. St. Rep. 91.

The fact that the persons concerned in the common crime are not jointly indicted can make no difference, because the inquiry is as to who was present participating in the act, and not who has been charged or indicted for the offense. *People v. McKane,* 30 N. Y. Supp. 95; *Taylor v. State,* 3 Tex. App. 169; *San Antonio Gas Co. v. State,* 22 Tex. Civ. App. 118, 54 S. W. 289.

It is contended that proof of the conspiracy must first be made before the state can show acts of a co-conspirator; but this is drawing too artificial a line to be compatible with the proper administration of justice. The order of proof is in the discretion of the trial court, and the circumstances may be so interwoven as to make separate proof of the design and of the substantive act impossible. *Clough v. State,* 7 Neb. 320; *Ream v. State,* 52 Neb. 727; 3 Ency. of Evidence, 425, note 64. If the jury believed that the accused was present with Morrison at the time the burglary was committed, then, in view of all the other testimony with regard to their association together before and after the commission of the crime, the acts and declarations of Morrison in pursuance of the common purpose were properly received as evidence against him.

The trial court seems to have proceeded in this case with commendable care and deliberation, and the rights of the accused were carefully protected. The jury were instructed with respect to the quantum of proof necessary

to convict where the evidence was circumstantial; they were cautioned as to the weight to be given the testimony of detectives; and they were further instructed that the information did not charge the crime of conspiracy, and that, if they failed to find beyond a reasonable doubt that at the time of the commission of the crime the accused was present aiding and assisting in breaking and entering the bank and opening the safe therein by the use of nitro glycerine, they should find defendant not guilty.

We find no prejudicial error in the record, and the judgment of the district court is therefore

AFFIRMED.

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MIKE BROWN, ADMINISTRATOR, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLEES.

FILED FEBRUARY 28, 1911. No. 16,292.

1. **Railroads**: NEGLIGENCE: SPEED OF TRAIN. It is not negligence for a railway company to operate a passenger train at the rate of 45 or 50 miles an hour during a bright, still day, in the open country where there are no obscure crossings.

2. ———: DEATH AT CROSSING: ISSUES: INSTRUCTIONS. If, in an action against a railway company to recover damages for the death of the plaintiff's intestate at a crossing, the sole allegations with respect to the defendant's negligence in failing to give warning of the approach of its train are that it did not sound a whistle or ring a bell as provided by section 104, ch. 16, Comp. St. 1909, it is not error to charge the jury that, if a bell were rung or a whistle sounded as required by statute, they should find for the defendant.

3. **Trial**: INSTRUCTIONS: CONSTRUCTION. Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism.

4. ———: REFUSAL OF INSTRUCTIONS. If the court on its own motion charges the jury substantially as requested, it is not error to refuse to restate those principles of law.

5. Witnesses: EXAMINATION. A witness should ordinarily be permitted to state the particular circumstance which directly called his attention to the fact about which he is called to testify.

6. Appeal: EVIDENCE: MOTION TO STRIKE. It is not error to overrule a motion to strike from the record all of an answer to an interrogatory where a part of the answer is competent, material, relevant, and responsive to the question.

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

*Sullivan & Squires, J. S. Kirkpatrick* and *C. H. Holcomb,* for appellant.

*J. E. Kelby* and *F. E. Bishop, contra.*

ROOT, J.

About 12 o'clock M., September 30,1906, George Brown was killed while attempting to drive over the tracks of the Burlington railway at a point where it intersected a rural highway in Custer county. The plaintiff is the administrator of Brown's estate and prosecutes this action against the railway company and its locomotive engineer. The defendants prevailed, and the plaintiff appeals.

The principal errors argued relate to the instructions. The issue of negligence joined by the pleadings is narrow. After describing the topography of the country in the vicinity of the crossing, the pleader charges "that said defendants carelessly and negligently, and without regard to the rights and safety of deceased and his companion, approached said crossing at such speed that, on discovering the said parties at said crossing, defendants were unable to control or stop said train, and carelessly and negligently approached said crossing without sounding the whistle of said engine and without ringing the bell thereon, at any point within 80 rods of said crossing." There is no other allegation, general or specific, that the defendants were negligent or that they violated any duty they or either of them owed the deceased.

The course of the highway is east and west, and the path of the railway southeast and northwest, but they cross each other practically at right angles. At this point the railway is laid upon a fill about five feet high, which gradually diminishes as it continues northward for about 600 feet, where it disappears, and the railway then enters a cut, not more than six feet deep at any point, which extends about 700 feet northwestward. For at least 800 feet westward from the crossing the highway is level, and there are no obstructions to the view in the area of the angle between the highway and the railway before it enters the cut.

Immediately before the accident Mr. Brown was driving two horses attached to a buggy. Brown and his companion were traveling eastward and the horses were walking. The sun was unclouded and there was no perceptible wind. The engineer and his fireman testify that the regular crossing whistle was sounded at the whistling post one-fourth of a mile northwest of the crossing, and that the bell upon the engine was ringing continuously during the entire trip. Two witnesses, traveling westward on the highway one-fourth of a mile east of the crossing at the time of the accident, testify that they did not hear the whistle sound or the bell ring. Two witnesses, one-half of a mile from the crossing at the time of the collision, testify to the same effect. Several passengers testify that they did not hear the bell ring or the whistle sound. Mr. Brown's companion testified in substance to the same effect. The express messenger says the highway warning was given as testified to by the engineer. There were 10 cars in the train. It was behind time and moving at the rate of from 40 to 50 miles an hour, probably 45 miles an hour. Mr. Brown was familiar with the crossing, knew that the train was late, and mentioned that fact when about 75 feet west of the crossing. The near horse was killed by the impact of a collision with the cylinder on the right hand side of the engine. Mr. Brown's companion insists that Brown looked northwestward just before the

team commenced to ascend the incline to the crossing and that the witness thenceforward was continuously on the lookout for the train, but did not discover it until the heads of the horses were within seven feet of the westward rail of the track, and that he cannot remember what subsequently happened until he regained consciousness in the baggage car. The jury were instructed that, if they found that the statutory warning was given by those in charge of the train, they should find for the defendants.

The plaintiff argues that the defendants should have given reasonable and timely warning of the approach of the train, and that sounding a whistle or ringing a bell as directed by statute was not a reasonable warning. It is not necessary to determine this question. In *Chicago, R. I. & P. R. Co. v. Sporer,* 69 Neb. 8, we had occasion to consider the law with respect to the duty of a railway company to give warning of the approach of its trains to an obscure crossing, and in *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790, we discussed the duty of a railway company to give notice of the movements of its trains upon a track in a city street. In the instant case no facts are pleaded to suggest that the defendants should have done more than to run the train at such a rate of speed that it could have been stopped so as to have avoided the collision, and further to observe the provisions of section 104, ch. 16, Comp. St. 1909, which require a whistle to be sounded, or a bell of at least 30 pounds weight to be rung continuously from a point at least 80 rods from where the railway crosses a public road or street until the locomotive shall have passed the crossing. The evidence is sufficient to sustain a finding that the bell was ringing as the statute required. We do not agree with the plaintiff's counsel that the statute requires the whistle to be sounded continuously and the bell to be rung during all of the time the engine traverses the space between the whistling post and the crossing. The statute is in the alternative and cannot in reason be otherwise construed. To hold that a railway train must be so controlled, under circumstances

such as surrounded the train in question, that it can be stopped so as to avoid a collision would paralyze traffic and destroy the usefulness of the railways. The testimony is convincing that Brown's horses were walking as they approached the crossing, and, until it was too late to overcome the train's momentum, there was nothing to suggest to the engineer that the driver would attempt to cross the railway.

We do not give unqualified approval to the twelfth paragraph of the court's charge. It deals with the subject of contributory negligence, and, if there were no other instructions upon this subject, it might lead the jury to believe that it was Mr. Brown's imperative duty to avoid the collision. However, when this instruction is considered in connection with the tenth and eleventh instructions, given by the court on its own motion, and the ninth instruction requested by the plaintiff and given by the court, we do not think the jury were misled, but must have understood that the law charged Mr. Brown with the duty of exercising his faculties for his own protection, and to use them with that care and caution a reasonably prudent man would have exerted under the circumstances of the case. The same discussion will apply to instruction numbered 13, given by the court on its own motion. Instructions must be read and construed together, and, if as thus considered they state the law correctly, should not be held prejudicially erroneous because one or more of them, taken separately, may be subject to just criticism. *Smith v. Meyers,* 52 Neb. 70; *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1; *Lincoln Traction Co. v. Brookover,* 77 Neb. 221. We conclude that instruction numbered 11, given by the court, contained the substance of instruction numbered 5, requested by the plaintiff, and there was no error in refusing to restate the principles announced in number 11. *Curry v. State,* 5 Neb. 412.

A physician, Dr. Washburn, was riding upon the train at the time of the accident, and subsequently attended Mr. Applin, Mr. Brown's injured companion. Dr. Washburn

in his deposition testified, in substance, that just before the accident his attention was challenged by a statement made by his little boy: "Look, papa, how fast those horses are coming!" An objection, interposed evidently during the trial, to the question and a motion to strike out the answer thereto were overruled. A witness may be permitted to state the circumstances which directed his attention to a material fact, and there was no error in permitting the witness to answer the question. 2 Elliott, Evidence, sec. 826. Whether the child's statement was of a character to permit his father to testify thereto is not necessarily involved, because part of the answer was competent, and the motion to suppress was directed to the entire answer, and not solely to the objectionable part thereof. Finally, the statement could not have prejudiced the plaintiff because the principal surviving actors of the tragedy agree that the horses were walking, and the instructions do not reveal that the case was tried or defended on the theory that Mr. Brown's horses were not under his control at the time of or immediately before the accident. If it is conceded, as we think it must be upon a consideration of all of the evidence, that the bell upon the defendants' locomotive engine weighed 100 pounds or upwards and was ringing continuously from the whistling post until the locomotive passed the crossing, it must follow that, upon the cause of action pleaded in the petition, the defendants should prevail, and the fact that some of the instructions interpreted the law liberally in the defendants' favor could not prejudice the plaintiff. We do not find it necessary to say that the evidence of George Brown's negligence is so conclusive that no verdict other than the one returned would be sustained by the evidence, but we do say that the evidence to suggest that he was in the exercise of ordinary care at the time of and immediately before the accident is meagre indeed.

Upon the entire record, we find no error prejudicial to the plaintiff, and the judgment of the district court is

## FRANK I. OLSEN, APPELLEE, V. JOHN A. MARQUIS, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,311.

1. **Appeal: PARTIES: WAIVER.** A nonjoinder of parties in an appeal to this court will be waived by not objecting until the case is submitted upon the merits.
2. **Jury, Right of Trial by.** In an action at law either party ordinarily, as a matter of right, is entitled to a jury trial.
3. **Injunction: REMEDY AT LAW.** An injunction should not be granted to restrain an action in a county court on an account stated, upon the sole ground that the defendant in that court contends that the account sued upon is the property of an insolvent third person against whom he holds a valid set-off in excess of the account in suit, as the defendant has an adequate remedy by interposing his defense in the county court.

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

*Charles G. Ryan,* for appellant.

*Harrison & Prince, contra.*

ROOT, J.

W. P. Marquis and John A. Marquis are father and son. The father resides in Grand Island, the son in Central City. In July, 1906, the plaintiff, a resident of Grand Island, and the elder Marquis jointly purchased 101 horses, which they subsequently sold. The evidence is uncontradicted that the younger Marquis furnished his father the money invested by him in these horses, but the evidence is conflicting as to whether the plaintiff knew that fact at the time of the purchase. The evidence tends strongly to prove that the plaintiff acquired such knowledge within a few weeks of that time, and before many of the horses were sold, and there is evidence tending to prove that the plaintiff subsequently, by his conduct, rec-

ognized John A. Marquis as a real party in interest in the venture. In March, 1907, the plaintiff selected one person and the younger Marquis another to settle the accounts made by the purchase and sale of the horses. These persons found, after taking an account of money paid out and money received, that the plaintiff retained $226.78 due his partner in the deal, and so stated the account. The following morning, on discovering that three items had not been considered by the accountants, it was agreed by Mr. Olsen that the balance should be $301.52. The testimony is conflicting as to whether the younger Marquis represented his father or himself in that settlement. The testimony is also in conflict as to whether the plaintiff agreed to pay the balance to John A. Marquis, but the evidence is clear, and there is no contention to the contrary, that the balance stated is absolutely accurate and that there are no charges against that sum because of any partnership transaction. Olsen did not pay this money, and justifies his refusal upon an alleged agreement between himself and the elder Marquis that Olsen should apply whatever might otherwise be due Marquis upon a store bill owing by him to the plaintiff. Thereupon John A. Marquis commenced an action against Olsen in the county court of Hall county to recover the account stated. Olsen answered and requested the court to implead W. P. Marquis as a party. The court refused to comply with the demand, and thereupon Olsen commenced this action in the district court for Hall county for an accounting between himself and the elder Marquis, for a judgment setting off the $301.52 against the store bill, and for an injunction to restrain John A. Marquis from prosecuting his action in the county court.

The plaintiff, among other things, alleges that W. P. Marquis is insolvent, and that the father and the son are in collusion with respect to the suit in the county court for the purpose of defrauding him. John A. Marquis moved to dissolve the injunction, but was denied relief. He then answered, denying the jurisdiction of the district

court to interfere with the action in the county court, and asked that the injunction be dissolved and the action dismissed. The district judge found in the plaintiff's favor, set off $301.52 against the elder Marquis' store bill, and perpetually enjoined John A. Marquis from prosecuting the action in the county court. John A. Marquis is the sole appellant.

There is nothing in the transcript to advise us whether W. P. Marquis answered in the district court; notice of appeal was not served upon him, and he has not appeared in this court. The plaintiff argues that there is a defect of parties and that we should not consider the case upon its merits. The objection is not otherwise presented than by an argument in the brief, and was not brought to our attention until John A. Marquis had submitted the case upon the merits. Upon the authority of *Bates-Smith Investment Co. v. Scott,* 56 Neb. 475, the objection will be held to have been presented too late for consideration.

In an action at law either party is ordinarily entitled, as a matter of right, to a jury trial upon all questions of fact. Const., art. I, sec. 6; *Mills v. Miller,* 3 Neb. 87; *Lamaster v. Scofield & Cowperthwait,* 5 Neb. 148; *Kinkaid v. Hiatt,* 24 Neb. 562; *Risse v. Gasch,* 43 Neb. 287; *Lett v. Hammond,* 59 Neb. 339; *Yeiser v. Broadwell,* 80 Neb. 718.

We do not agree with the plaintiff's counsel that the facts in the instant case create any exception to the general rule, or that their client did not have an adequate remedy at law by defending against John A. Marquis' demand. If the account were stated with the elder and not the younger Marquis, and the younger man did not have title to his demand, those facts could be proved before a jury as effectually as before a court. There were no unsettled equities between Olsen and his former partner growing out of that relation. If the account at any time was the property of W. P. Marquis, he could not assign it free from any right of set-off existing between himself and Olsen. Code, secs. 31, 106. If, as between the elder and the younger Marquis, the $301.52 was the property of the

son, yet by reason of some fact or facts he should be estopped from asserting his title as against Olsen, those facts could be pleaded in the county court, and, if established, would defeat the action. We search in vain for any just ground for an assertion that the county court could not do complete justice between the litigants in that action. Nor does the fact that the plaintiff offered to submit this case to a jury cure the error. The findings of a jury, if one were impaneled, would not bind the court, nor would the appellant have been thereby awarded a jury trial within the meaning of the constitution.

The fact, if fact it be, that Olsen contends for a partnership with W. P. Marquis is immaterial in the light of the fact that their business had been settled. The fact that there was an unsettled store account between them would not justify a recourse to this action. *Lamaster v. Scofield & Cowperthwait, supra.* Nor can the plaintiff justify his conduct on the theory that his action is in the nature of a suit in interpleader. W. P. Marquis makes no claim to the money, nor is the plaintiff impartial in his attitude with respect thereto, but asserts the right to retain it as his own.

The judgment of the district court, therefore, is reversed and the cause is remanded, with directions to dissolve the injunction and to dismiss the action as to the defendant John A. Marquis.

REVERSED.

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## HENRY SCHULTZ V. STATE OF NEBRASKA.

FILED FEBRUARY 28, 1911. No. 16,940.

1. **Burglary: INFORMATION: SURPLUSAGE.** An allegation in an information charging a violation of section 48 of the criminal code, that the building was entered during the night season, is surplusage and need not be proved.

2. **———: ELEMENTS.** One who unlawfully, wilfully, maliciously and forcibly breaks and enters a mill building with the intent to steal

property of any value is guilty, although there is no personal property therein. The third paragraph of the syllabus in *Bergeron v. State*, 53 Neb. 752, overruled.

3. ———: SUFFICIENCY OF EVIDENCE. The testimony of one witness, if relevant and accepted by the jury, may sustain a conviction of burglary, even though the accused positively denies under oath that he committed the offense.

4. ———: INSTRUCTIONS: ALIBI. In a prosecution for burglary, the accused having admitted that, 15 minutes prior to the time a person was detected attempting to rifle a safe in the office of a mill building, he was in close proximity thereto, and one witness having identified him as the guilty party, it is not prejudicial error for the court, after it has fully instructed as to the burden of proof, the presumption of innocence and as to every element essential to constitute the crime, and that if the proof is not beyond all reasonable doubt as to all of those elements the jury should acquit, to refuse to specifically instruct concerning the defense of an alibi, although the accused testified that at the precise time the burglary was committed he was about 20 rods distant from the mill building.

ERROR to the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

*C. H. Denney*, for plaintiff in error.

*Grant G. Martin, Attorney General, Frank E. Edgerton* and *F. L. Rain, contra.*

ROOT, J.

Henry Schultz prosecutes a petition in error to reverse a judgment of conviction of the crime of burglary.

The proof is satisfactory that the mill was entered during the night season, but the fact is immaterial. Section 48 of the criminal code does not now require that the breaking and entering shall have occurred during the night season.

Counsel for the accused argues that the evidence does not support the verdict, and especially is deficient with respect to the value of the property within the mill at the time of the burglary. About 5 o'clock P. M., June

30, 1910, the accused in company with several companions journeyed from Fairbury to Jansen for the purpose of indulging in intoxicating liquors. The train upon which Schultz expected to return was due at Jansen at 7:45 P. M., but did not arrive until 9:05. About 8:45 the witness Heidulk noticed an open window in the office of a mill situated south of the railway right of way and went to the building to investigate. After lighting a match and thrusting his head within the opening, he saw a man, positively identified by the witness as the accused, upon his knees before the open door of the office safe and so close to the window that Heidulk could touch him. After some words between these parties the marauder departed from the mill, evidently through a window in another part of the building, and was pursued a distance westward. Shortly thereafter the train arrived and the accused was taken therefrom before it departed. There is a conflict in the evidence, but the jury might find that Mr. Schultz sought to conceal his features by pulling his hat over his eyes at the time the village marshal entered the car. The evidence is satisfactory that the accused, when searched at the village jail, said to Mr. Heidulk: "You are the fellow that turned in the alarm. I will get even with you." The accused admits that he was in close proximity to the mill within 15 minutes of the time testified to by Heidulk, but testifies, in substance, that he was there for the purpose of locating an intoxicated companion, and immediately after failing in his search returned to the station, which is north of the right of way, and, after examining two empty cars on a track north of the station, went west to the station latrine and there remained until the train arrived. The accused positively denies having entered the mill. The testimony of a Mr. Belden, given during the preliminary examination, was transcribed and introduced in evidence during the trial of this case. The witness testifies in substance that, in response to his suggestion that the accused should search for their mutual friend Kinney, Schultz went to

the mill, and subsequently returned and inspected two empty cars on the track north of the station, but the witness admits that for about 15 minutes before the train arrived the accused disappeared from view, and during that time Belden noticed some person near the window of the mill office with a lighted match. Kinney was a stranger in the community, but formed an acquaintance with Belden and the accused during their trip to and sojourn in Jansen, at which place he entertained them in the saloon and loaned a dollar to Schultz. Kinney did not testify during the trial in the district court, and it is argued that he is the guilty man. While the evidence discloses that Kinney and the accused man are about the same height and size, the jury were justified in rejecting this argument if it were made to them. The evidence is in accord that, about an hour before Heidulk noticed the open window, Kinney was in a drunken stupor, whereas the man in the mill was active and outran his pursuers. Heidulk had known the accused for some eight years before the night in question, and sustained himself upon cross-examination. If the jury were satisfied beyond a reasonable doubt that the witness could and did identify the accused as the man Heidulk saw kneeling before the open safe, it cannot be said the evidence as to identity is insufficient.

No witness testified that the property in the mill was of any value, nor does the proof show there was any personal property therein save the safe and its contents and an office desk. The owner testified that nothing other than some papers was missing and they were subsequently found in a barrel near the mill. These documents were of sufficient importance to impel him to search for them. The jury would be justified in finding that the documents were of some value.

In *Wheeler v. State,* 79 Neb. 491, we followed *Spencer v. State,* 13 Ohio, 401, and held that one who wilfully, maliciously and forcibly breaks and enters any of the buildings described in section 48 of the criminal code, with

the intent to steal property of any value which he assumes is within the building, is guilty of a violation of that section, and that the value of the property actually within the building is not a necessary ingredient of the crime. Our criminal code was adopted from Ohio, and the decisions of the Ohio supreme court construing the criminal code of that state are persuasive whenever a like question is considered in this court. To the same effect is *State v. Beal,* 37 Ohio St. 108. These decisions are in harmony with the general rule both in England and in America. 2 Bishop, New Criminal Law (8th ed.), sec. 114. *Winslow v. State,* 26 Neb. 308, does not sustain the accused's position. The indictment in that case did not allege the name of the owner of the burglarized building, and did not charge that the intent was to steal property therein. The writer of the opinion suggests that, if the accused knew that there was no property in the building, his entry would not have been with the intent to steal, and we do not hesitate to reaffirm the proposition. We did not say that the criminal intent might not exist if the building were vacant and the defendant did not know that fact, nor did we say that in order to sustain a conviction there must have been proof of the value of whatever property was contained therein. In *Ashford v. State,* 36 Neb. 38, we again held that the specific intent alleged must be established. In *Williams v. State,* 60 Neb. 526, the accused was acquitted of the charge of burglary, and the conviction of larceny was reversed because of the erroneous instruction with regard to that crime. *Bergeron v. State,* 53 Neb. 752, lends some support to the argument of counsel for the accused, but, in view of the decision in *Wheeler v. State, supra,* the district court was right in refusing to grant a new trial because of the condition of the evidence with respect to the value of the personal property within the mill. The third paragraph of the syllabus in *Bergeron v. State, supra,* has for all practical purposes been overruled, and, to the end that there may be no further uncertainty on the subject, it is now formally

overruled. There was therefore no failure of proof upon any material allegation in the information.

The court did not err in refusing to give the instructions requested concerning an alibi. The accused admits being in the immediate neighborhood of the mill at the time it was burglarized. The court at the request of the accused instructed the jury that, "to warrant a conviction, each fact necessary to establish the guilt of the accused must be proved by competent evidence beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of guilt." The court also minutely defined all of the elements of the crime of burglary, and told the jury that the accused was presumed to be innocent until proved guilty beyond all reasonable doubt, that if the state failed to thus establish a single element of the crime, they must acquit, and that it was their duty, if possible, to reconcile the testimony with the presumption of innocence. The jury therefore, assisted as they were by the instructions, must have understood that, if the accused was in or near the station closet at the time Heidulk saw the burglar within the mill, Schultz could not be guilty, and, further, that, if they had any reasonable doubt that Heidulk could or did accurately identify the accused as the guilty person, they should acquit. There was therefore no prejudicial error in not giving the instructions requested. *State v. Shroyer*, 104 Mo. 441.

Counsel for the accused argues that, since his client denied under oath that he was in the mill and no witness corroborates Heidulk, the conviction should not be permitted to stand. We have referred to some facts tending to corroborate Heidulk, but if the case stood sustained by Heidulk's testimony alone and contradicted by the accused, if the testimony given by the witness for the state seemed reasonable with nothing to suggest that he was connected with the offense, it would be sufficient to sus-

tain the verdict. 12 Cyc. 486. We are of the opinion there is sufficient proof that access was not gained to the mill through an open door or window, but that the entry was forcible.

The accused was tried in a community where he had resided for many years; some of the jurors must have known him, and, with that knowledge aided by his appearance on the stand, were in a situation to find whether Heidulk or the accused told the truth, and to give credit accordingly.

Upon the entire record, we find no error prejudicial to the accused, and the judgment of the district court is

AFFIRMED.

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QUINTILLA M. DRESHER, APPELLEE, V. ANSON E. BECKER ET AL., APPELLANTS.

FILED FEBRUARY 28, 1911. No. 16,302.

1. **Fraud: MISREPRESENTATIONS OF VENDOR.** As a general rule, a mere misrepresentation of value, when made by the owner of land in an effort to sell it, is not actionable, but a vendor may be held liable in damages for misrepresenting the value of his realty to a nonresident vendee who relies on the misrepresentations in ignorance of such value and is prevented by the fraud of vendor from inspecting the property.

2. ———: ———: **MEASURES OF DAMAGES.** Ordinarily in an action to recover from vendor damages for conveying realty different from that shown to vendee, the measure of recovery is the difference in value between the property conveyed and the property shown, but where a nonresident vendee purchases realty without knowledge of its location and value, relying on vendor's misrepresentations in relation thereto, he may recover the difference between the value of the property and what it was represented to be, if he was prevented by the fraud of vendor from inspecting it.

3. **New Trial: NEWLY DISCOVERED EVIDENCE: DILIGENCE.** An applicant for a new trial on the ground of newly discovered evidence must show that he could not by the exercise of reasonable diligence have discovered and produced such evidence at the trial.

4. Principal and Agent: FRAUD: JOINT LIABILITY. Where principal and agent jointly participate in, and share the fruits of, actionable fraud, they are jointly liable for resulting damages.

5. ———: ———: LIABILITY OF PRINCIPAL. A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentalities employed by the latter in carrying out the fraudulent purpose.

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

*McGilton, Gaines & Smith,* for appellants.

*D. M. Vinsonhaler, contra.*

ROSE, J.

This is an action to recover damages in the sum of $6,040.86 for fraudulent representations whereby plaintiff was induced to exchange a quarter section of land in Merrick county for a house and lot in Omaha. From a judgment in favor of plaintiff for $3,232.16, defendants have appealed.

In her petition, plaintiff, among other things, pleaded, in substance, the following facts: Defendant Thomas Brennan represented to plaintiff that he was the agent of the owner of the Omaha property, and proposed the exchange. Defendant Anson E. Becker, an employee of Brennan, was the real owner, a fact not known to plaintiff until after the deal had been closed. To deceive plaintiff and induce her to make the exchange, defendants falsely and fraudulently represented to her that the Omaha property was situated in the most desirable residence portion of the city; that it was in good repair; that it was occupied by tenants who had leased it for the year 1908 at an annual rental of $810; and that it was reasonably worth $10,000. While the negotiations were in progress, plaintiff was a resident of Portland, Oregon, and was not familiar with Omaha, or with the value of property therein, but had previously transacted business with

Brennan, and had confidence in him. Brennan, at his office in Omaha, December 16, 1907, called Becker and said to him in the presence of plaintiff: "This is Miss Dresher from Portland, who is here to see about her farm." Thereupon Becker procured a conveyance and took plaintiff to a locality different from that described in the negotiations, showed her a piece of real estate different from that subsequently exchanged for her farm, and told her it was the property defendants offered to trade therefor. Plaintiff left Omaha the same day. At the solicitation of defendants she returned December 31, 1907, deeded her farm to Becker in exchange for a property different from that shown by him, relying upon the representations of defendants as to value, location, condition and rental. The answers admit the exchange of the properties and that Becker was in the employ of Brennan, but deny all allegations charging defendants with fraud or deceit, and allege that plaintiff knew the value of the Omaha property and that the title thereto stood in the name of Becker who was joint owner with W. V. Bennett; that the property shown to plaintiff was in fact the property exchanged for her farm, and that it was worth $10,000, though representations to that effect were mere expressions of opinion.

The court instructed the jury their verdict should be for the defendants if they found from the evidence that Becker showed plaintiff the property subsequently conveyed to her. Failure of the trial court to direct a verdict for defendants is assigned as error, and it is argued that the evidence is insufficient to sustain a finding that Becker did not show plaintiff the property described in his deed to her; that plaintiff was not deceived; that the representations as to value were mere expressions of opinion for which defendants are not liable, and that there is no competent proof that plaintiff was damaged, even if she did not see the Omaha property before the exchange was made. Plaintiff testified that Becker did not take her to the property in controversy, and she gave

details indicating that he took her to a different location and showed her another house. The trial developed incidents which suggest that she may have been mistaken, but her testimony was direct and positive, and she steadfastly adhered to her story through a trying cross-examination. She was directly contradicted by Becker, and under such circumstances the credibility of the witnesses and the weight of the evidence were questions for the jury. On this issue they found for the plaintiff. The finding is supported by sufficient evidence, and for the purpose of this appeal it establishes the fact that the property shown was not the property conveyed.

Is there competent proof of damages? The evidence shows that when plaintiff was residing in Portland in November, 1907, she received from Brennan letters written by Becker which contained such representations as the following: "I have a client who owns a pair of flats well located, which bring in a rental of $67.50 per month, or $810 annually. There is a mortgage against them as follows: $500 September 1, 1908; $500 September 1, 1909; $500 September 1, 1910; $2,250 September 1, 1911. * * * This property is always rented." "The price is $10,000." "The property is always occupied by good tenants." "You can always be assured of the above income from the property. You will notice that this income is sufficient to pay the instalments on the principal, as well as the interest and taxes, and it would not be long before you had the entire property free from incumbrance." At that time Becker occupied one of the flats. Four months earlier Brennan advertised the property for sale at $6,500. Plaintiff testified that in a conversation with Becker he represented the property to be worth $10,000, and said it was rented for the coming year. She further testified: "Well, Mr. Becker said that that property, renting for $810 a year, was more than I could get off of my farm, and that $810 a year would take care of the interest and the payments, and in a few years the property would be paid for. As to the value of the house I knew nothing,

because I knew nothing about Omaha property, so far as valuation is concerned. I relied on his word." The proof also shows that the house was vacated shortly after it changed hands, and remained empty for some time. Finally a tenant was procured for one of the flats at a rental of $20 a month. The evidence would justify a finding that the property was worth $6,500 at the time of the sale, and it was mortgaged for $3,750.

It is true, as a general rule, that a mere misrepresentation of value, when made by the owner of land in an effort to sell it, is not actionable, but "the rule is otherwise where the purchaser resides a considerable distance from the location of the land, is ignorant of its value, and is prevented from examining the property or from making inquiries as to its condition and value by trick or fraud of the vendor." *McKnight v. Thompson,* 39 Neb. 752. Under the circumstances of the present case, misrepresentations as to location, value, and contracts with tenants, as well as conduct preventing the purchaser from inspecting the property, are actionable. *Stochl v. Caley,* 48 Neb. 786; *Hoock v. Bowman,* 42 Neb. 80. In such a view of the law, defendants argue, however, that the measure of damages is the difference in value between the property conveyed and the property shown, and they insist that plaintiff cannot recover any sum under the evidence because there is no proof of the value of the real estate described in her testimony as the property shown her by Becker. The rule invoked by defendants is generally applied where vendee relies on the value of the land shown and sues vendor to recover damages for conveying other property. *Odell v. Story,* 81 Neb. 437; *Hoock v. Bowman,* 42 Neb. 80. The present case is not controlled by the rule stated for the following reasons: Plaintiff did not live in Omaha. She did not know the value of the real estate. In exchanging property she did not rely on the value of the property shown nor make proof thereof. By fraud she was prevented from inspecting the property conveyed to her, and her testimony shows that she relied on

the representations of defendants as to value, location, rental and leases. Her evidence as to the measure of damages conforms to the following principle: "Where real estate is purchased on the personal representations of the seller, and such representations are false as to the location of the property, the measure of damages is the difference in value between the property as represented, and as it actually is." *Woolman v. Wirtsbaugh*, 22 Neb. 490. An instruction on the measure of damages is also criticised, but it is in harmony with the rule stated.

A reversal is next asked because the trial court refused to grant a new trial on the ground of newly discovered evidence. The ruling was justified under the doctrine that an applicant for a new trial, on the ground of newly discovered evidence, must show that he could not by the exercise of reasonable diligence have discovered and produced such evidence at the trial. *Matoushek v. Dutcher & Sons*, 67 Neb. 627; *Andrews v. Hastings*, 85 Neb. 548.

Another ground of complaint is that the verdict is excessive. Under the rule already stated, defendants were liable for the difference between the value of the Omaha property when it was exchanged and what it was represented to be. Four months before representing the value to be $10,000 defendants advertised it for sale at $6,500, and the evidence will justify a finding that the value was the same when it was conveyed to plaintiff. In this view of the evidence, the judgment for $3,232.16 is not excessive. It is true that plaintiff's farm was mortgaged for $1,200, but defendants knew its value, and plaintiff gave Becker a mortgage on the Omaha property for that sum in addition to assuming an existing mortgage of $3,750. In this respect the trial court will be sustained.

It is finally insisted that, in any event, Brennan had no part in the fraud and that he is not liable for damages. The false representations appeared in letters over his name. Becker was his agent and was an undisclosed owner of the property. Brennan introduced plaintiff to Becker and received a commission based on a false valu-

ation of $10,000. He shared the fruits of the fraudulent conduct. A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentalities employed by the agent in carrying out the fraudulent purpose. *McKeighan v. Hopkins,* 19 Neb. 33; *Osborn Co. v. Jordan,* 52 Neb. 465.

No reversible error has been found, and the judgment is

AFFIRMED.

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WILLIAM W. BELL ET AL., APPELLEES, V. STANLEY STEDMAN, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,328.

1. Appeal: FINDINGS: CONFLICTING EVIDENCE. A finding of fact upon conflicting evidence in an action at law will not be disturbed in the supreme court on appeal unless manifestly wrong.
2. Brokers: COMMISSION. Where real estate brokers, in strict conformity with their contract of agency, produce a purchaser ready, able and willing to purchase the land of their principal on the terms prescribed by him, his agreement to pay them their stipulated commission cannot be defeated on the sole ground that his wife refuses to join him in a deed to such purchaser.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

*Paul Jessen,* for appellant.

*W. F. Moran, contra.*

ROSE, J.

This is an action by two real estate agents to recover from their principal a stipulated commission of $96 for procuring for him a purchaser ready, able and willing to purchase 80 acres of land in Otoe county for $4,800. From a judgment for the full amount of plaintiffs' claim defendant has appealed.

By written contract defendant appointed plaintiffs his exclusive agents to sell the land for $4,800, agreeing to pay them a commission of 2 per cent., and promising to deed the land as they should direct. The appointment was never revoked, and on the terms therein prescribed plaintiffs produced a person ready, able and willing to make the purchase. The judgment is assailed on two grounds: (1) Defendant is not liable for the commission, because he had previously notified the agents he would not sell the land for $4,800. (2) The sale was defeated through no fault of defendant, but through the prospective purchaser's refusal to accept a deed in which defendant's wife would not join.

1. Whether plaintiffs, before making the contract of sale, were notified by defendant that he would not sell the land for $4,800 was a question of fact. On this issue the evidence was conflicting, and it was resolved against defendant by the finding of the trial court in favor of plaintiffs. For the purposes of this appeal, therefore, defendant did not notify plaintiffs he would not sell the land for $4,800.

2. Defendant owned the land, but did not live on it. It was not a homestead. The title stood in his name. He was a married man. Did his wife's refusal to join in the deed release him from his obligation to pay his agents their stipulated compensation? The services entitling them to their commission were fully performed. Nothing more would have been required of them had the wife joined in the conveyance. It was no part of their duty to persuade her to do so. They were not guarantors of title. Defendant had a lawful right to employ them to sell his land and to bind himself to pay for their services, when performed. In fixing the terms of the agency, the conveyance of a merchantable title was fairly within the contemplation of both principal and agents. The price agreed upon indicated that. A year earlier plaintiffs sold the same land to defendant for $4,400, and assured him at the time that it could be resold within a short time at

an advance of $5 an acre. The implication from all the circumstances, as between the agents and their principal, was that the latter undertook to convey a merchantable title in the event of a sale. *Middleton v. Thompson,* 163 Pa. St. 112; *Gauthier v. West,* 45 Minn. 192; *Birmingham Land & Loan Co. v. Thompson,* 86 Ala. 146; *Phelps v. Prusch,* 83 Cal. 626. The right to commissions cannot be defeated solely because there is a defect in the vendor's title. *Barber v. Hildebrand,* 42 Neb. 400; *Knapp v. Wallace,* 41 N. Y. 477; *Gonzales v. Broad,* 57 Cal. 224; *Roberts v. Kimmons,* 65 Miss. 332; *Barthell v. Peter,* 88 Wis. 316; *Kock v. Emmerling,* 22 How. (U. S.) 69. Under the facts of the present case, the refusal of the wife to join in the deed did not release her husband from his contract to pay his agents for the services performed by them. *Kepner v. Ford,* 16 N. Dak. 50; *Hamlin v. Schulte,* 34 Minn. 534; *Clapp v. Hughes,* 1 Phila. (Pa.) 382.

There is no error in the judgment of the trial court.

AFFIRMED.

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E. D. JONES, APPELLANT, V. PAUL FISHER ET AL., APPELLEES.

FILED FEBRUARY 28, 1911. No. 16,317.

1. Taxation: FORECLOSURE OF TAX LIEN: JURISDICTION. In an action brought in the district court by a county to foreclose a tax lien on real estate for delinquent taxes assessed and levied prior to 1903, the determination of the question whether or not the county could, under the statute, maintain such action, without an antecedent administrative sale by the county treasurer and the issuance to the county of a tax sale certificate as a basis for such proceedings, goes to the existence of a cause of action, and not to the jurisdiction of the court.

2. ———: ———: DECREE: VALIDITY. And in such a case, while the judgment or decree would be erroneous in the sense that a reversal of it might be obtained by prosecuting an appeal therefrom, yet it is not for that reason void and subject to collateral attack.

3. Mortgages: ASSIGNMENT: RECORD. An assignment of a real estate mortgage is an instrument affecting the title to real estate, within the purview of our recording act.

4. ———: FORECLOSURE: DECREE: CONCLUSIVENESS. "An assignee of a mortgage whose assignment is not of record is barred by a decree foreclosing a prior lien in a suit to which his assignor, who appeared of record as owner of the incumbrance, was made a party, unless he records his assignment prior to the recording of the deed under judicial sale pursuant to such decree." *Gillian v. McDowall*, 66 Neb. 814.

APPEAL from the district court for Box Butte county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

*Montgomery & Hall*, for appellant.

*William Mitchell, contra.*

FAWCETT, J.

From a decree of the district court for Box Butte county, dismissing plaintiff's suit for the foreclosure of a mortgage upon the southwest quarter of section 27, township 27, range 50, in said county, plaintiff appeals.

The material facts are that in August, 1889, defendant Paul Fisher obtained a loan of $500, from the American Loan & Trust Company, for which he gave his first mortgage bond payable August 1, 1894. To secure this bond Fisher and his wife executed to the trust company a mortgage upon the land above described. September 2, 1889, the trust company assigned the bond and mortgage to plaintiff by written assignment which was never acknowledged or recorded. Subsequently, the trust company went into the hands of a receiver, appointed by the United States circuit court. September 21, 1894, the receiver of the trust company, under an order of court, executed to plaintiff a written assignment of the mortgage which recited that the same was given "for the purpose of perfecting an unacknowledged assignment dated September 2, 1889." This assignment was not recorded by plain-

tiff until June 24, 1908, and plaintiff brought the present suit September 16, 1908. In the meantime, and on September 24, 1901, Box Butte county brought a foreclosure suit in the district court, for the taxes for the years 1894 to 1899, inclusive, making the Fishers and the American Loan & Trust Company defendants. The Fishers being nonresidents, service was had upon them by publication. Personal service was duly had upon the American Loan & Trust Company. That suit proceeded to a decree in which the court found that due service had been had upon all of the defendants therein and entered default against each of the defendants for want of answer; that the lands described were liable to assessment and taxation for the years named; that said taxes had been duly assessed (for certain sums named); that said taxes were due and delinquent; "that the said lands have been advertised for sale for the payment and satisfaction of the said taxes for the length of time and in the manner required by law, and, having been offered for sale by the county treasurer of said county, the same was not sold for the want of bidders, and that the said taxes constitute a first lien and paramount lien upon the said real estate;" and adjudged that "in case the defendants fail for 20 days from the entry of this decree to pay or cause to be paid to the plaintiff (the costs and amount found) that the defendants be foreclosed of all equity of redemption in and to the said real estate," and that the said premises be sold as upon execution, etc. A sale was duly had and confirmed and a deed issued to the bidder, Theodore Colvin, defendant herein. The sheriff's deed was dated August 19, 1902, and filed August 21, 1902. Defendant Colvin went into possession of the lands under the deed and has retained such possession ever since. The main points argued by plaintiff here, and the only ones we deem it necessary to consider, are: (1) Were the proceedings and decree of the district court in the tax foreclosure suit void for want of jurisdiction? (2) If not, were plaintiff's rights under his unrecorded assignment barred by such decree, he hav-

ing failed to redeem from such sale and the confirmation thereof within two years? Neither of these questions is now an open one in this state. In *Logan County v. Carnahan,* 66 Neb. 685, we held that as the law then stood "no action for the foreclosure of a tax lien can be maintained, unless based upon a tax deed and tax sale certificate." In all cases arising prior to the amendment of the statute in 1903, that decision has been adhered to; but in *Logan County v. McKinley-Lanning Loan & Trust Co.,* 70 Neb. 399, we held: "(1) In an action brought in the district court by a county to foreclose a tax lien on real estate for delinquent taxes, the determination of the question whether or not the county could, under the statute, maintain such action, without an antecedent administrative sale by the county treasurer and the issuance to the county of a tax sale certificate as a basis for such proceedings, goes to the existence of a cause of action, and not to the jurisdiction of the court. * * * (3) Where the district court has jurisdiction of the subject of the action and of the parties in a foreclosure proceeding, questions which affect the regularity of the decree are concluded thereby. Such a decree cannot be assailed for any mere irregularity upon a motion to set aside a sale made in pursuance of such decree." In the opinion we said that the petition praying for a foreclosure of the tax lien upon which the decree was based was manifestly defective "in that it was not alleged that the land had been sold for delinquent taxes by the county treasurer and a tax sale certificate issued to the county, as is held must be done in the recent case of *Logan County v. Carnahan,* 66 Neb. 685; on rehearing, 66 Neb. 693. But, while the judgment or decree was erroneous in the sense that a reversal of it might have been obtained by prosecuting an appeal or a petition in error, yet it was not, for that reason, void and subject to collateral attack. * * * In determining whether, in a given case, the county is authorized to maintain a suit to foreclose a tax lien, the court acts upon a matter confessedly within its jurisdic-

tion, and its judgments and decrees become final unless appealed from or reversed, even though the rendition of the decree is erroneous because no tax sale certificate has been issued by the county treasurer to the county bringing the suit, as is required to be done in the regular exercise of the power thus conferred on such counties." We think this is decisive of the first point above noted.

As to the second point, we held in *Ames v. Miller,* 65 Neb. 204, that an assignment of a real estate mortgage is an instrument affecting the title to real estate, within the purview of our recording act; and in *Gillian v. McDowall,* 66 Neb. 814, we held: "An assignee of a mortgage whose assignment is not of record is barred by a decree foreclosing a prior lien in a suit to which his assignor, who appeared of record as owner of the incumbrance, was made a party, unless he records his assignment prior to the recording of the deed under judicial sale pursuant to such decree." Under these holdings the second point must also be decided adversely to plaintiff.

Our holdings in the above cases have not been overruled or departed from and must now be considered as the settled law of this state. The service in the tax foreclosure suit upon the American Loan & Trust Company, the mortgagee of record at the time that suit was instituted, was personal service in due form. The assignment of plaintiff was not recorded until many years after defendant had obtained and recorded his sheriff's deed and gone into possession of the lands thereunder. No attempt was ever made by plaintiff to redeem from the tax sale within the statutory period of two years, nor at any time until the commencement of this suit. All rights under his mortgage are therefore barred, and the judgment of the district court in dismissing his suit was right. Under this holding we think the other points discussed in plaintiff's brief are immaterial.

The judgment of the district court is therefore

AFFIRMED.

## CHARLES P. BRESEE, APPELLANT, V. FRANK SEBERGER, APPELLEE.

FILED FEBRUARY 28, 1911. No. 16,321.

1. **Process:** CONSTRUCTIVE SERVICE: PROOF OF SERVICE. "Where proof of service by publication in a foreclosure case has been made by affidavit which is defective, the court, in furtherance of justice, may, after the decree and sale thereunder, permit an additional affidavit to be filed, showing the actual facts as to such publication." *Britton v. Larson*, 23 Neb. 806.

2. **Mortgages:** FORECLOSURE: DECREE: COLLATERAL ATTACK. The question as to whether or not a mortgage in process of foreclosure is by its terms barred by the statute of limitations is one which goes to the existence of a cause of action, and not to the jurisdiction of the court; and, where it appears that the court had jurisdiction of the necessary parties to such foreclosure proceeding, its decree entered therein, though erroneous, is not subject to collateral attack.

3. **Evidence:** ABSTRACT OF TITLE. An abstract of title received in evidence without objection is competent proof of the execution and recording of a deed as therein recited.

APPEAL from the district court for Rock county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

*A. M. Morrissey*, for appellant.

*J. A. Douglas, contra.*

FAWCETT, J.

Plaintiff brought suit in ejectment in the district court for Rock county to recover the possession of the northwest quarter of section 32, township 29, range 17, in said county, and for rents and profits. The petition does not set out the chain of title but alleges simply that the plaintiff is the owner of the title in fee simple and entitled to the immediate possession of the land. The answer contains, first, a general denial, and then alleges that defend-

ant became the owner of the land through the foreclosure of a mortgage executed by Frank P. Bushnell, the original owner under patent from the government. Defendant prevailed, and plaintiff appeals.

The record shows that, after the execution of the mortgage by Bushnell, he conveyed the land to one Lay, who conveyed it to Frank Lyman, who conveyed to Charles P. Lyman; the deed to Charles P. bearing date April 19, 1888, and recorded June 25, 1888. Plaintiff claims under an unrecorded deed from Charles P. Lyman and wife, executed to plaintiff August 19, 1908, for a consideration of $10, and also under an unrecorded quitclaim deed from one T. A. Thompson, who, so far as the record shows, never had any title. In the foreclosure suit Frank Lyman and Charles P. Lyman were both made defendants, and, they being nonresidents, service upon them was had by publication. Plaintiff contends that the mortgage foreclosure proceedings under which defendant obtained his sheriff's deed were void by reason of a defective proof of publication of service upon the Lymans. This contention is disposed of by the evidence that, something like two months prior to the time of the trial of this case, defendant filed an amended and corrected proof of publication in the foreclosure suit, which, after due notice to plaintiff, was examined and approved by the court and made a part of the record in that case. The proof thus furnished shows that the notice was in fact published the required length of time, and completely establishes the sufficiency of the service upon the Lymans. That this practice is proper was fully settled in *Britton v. Larson,* 23 Neb. 806. We there held: "Where proof of service by publication in a foreclosure case has been made by affidavit which is defective, the court, in furtherance of justice, may, after the decree and sale thereunder, permit an additional affidavit to be filed, showing the actual facts as to such publication." In that case the foreclosure suit was commenced in July, 1874; decree entered the following month, and the sale confirmed and a deed ordered September 20,

1876. In 1885, nine years after the confirmation of the sale, a motion to amend the proof of service by publication was sustained, and the action of the district court in permitting such amendment was affirmed. No other defect in the foreclosure proceedings under which defendant obtained title having been pointed out, it follows that all right, title and interest of the Lymans, under whom plaintiff claims title, had been foreclosed more than six years prior to the time plaintiff obtained his alleged title under the unrecorded deeds above referred to.

Plaintiff contends that the mortgage was, by its terms, barred at the time the foreclosure suit was commenced, and that, therefore, defendant could not gain any rights against Lyman or his grantee, the plaintiff, in that proceeding, and that the court erred in excluding certain evidence offered in support of that proposition. The trouble with plaintiff's contention is that the fact which he sought to prove by his offer was one that went to the existence of a cause of action, and not to the jurisdiction of the court to enter the decree of foreclosure. If the court erred in its judgment, that error should have been corrected on appeal. The judgment cannot now be assailed collaterally.

Objection is made by plaintiff that no sufficient foundation was laid for the introduction by defendant of his sheriff's deed, in that he offered the record of the deed instead of producing the original. It is unnecessary to discuss this question, for the reason that an abstract of title, offered by defendant and received without objection, shows the issuance of the sheriff's deed to defendant February 24, 1902, and the filing of the same for record June 23, 1902. There is, therefore, no merit in plaintiff's contention.

The judgment of the district court is

AFFIRMED.

THOMAS J. L. PECK, APPELLANT, V. GARFIELD COUNTY ET AL., APPELLEES.

FILED FEBRUARY 28, 1911. No. 16,327.

**Taxation: TAX DEED: VALIDITY.** A tax deed, issued in April, 1904, without an affidavit showing the service of a notice to redeem, as required by section 124, art. I, ch. 77, Comp. St. 1901, having been first filed with the county treasurer, is void.

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

*Clements Bros.* and *C. A. Davis,* for appellant.

*E. M. White* and *H. A. Robbins, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Garfield county to redeem from a private tax sale of the southwest quarter of section 32, township 22, range 14, in said county. Issues were joined, and from a decree dismissing plaintiff's suit for want of equity, and quieting defendants' title to the lands in controversy, plaintiff appeals.

A number of questions are argued in briefs of counsel, but, as one of the points discussed is decisive of the case, the others will not be considered. The land was sold by the treasurer, at private sale, to J. R. Ratcliff on March 25, 1902, for the delinquent taxes for the years 1899 and 1900. The tax sale certificate was assigned by Ratcliff to P. P. Scott January 16, 1904. November 5, 1903, prior to the assignment, Ratcliff prepared and signed a notice to redeem and deliver it to F. M. Key, who at that time was sheriff of Garfield county, for service. The proof of service was made by Mr. Key, not by affidavit as required by statute, but in an ordinary form of return as sheriff. Upon this proof of service alone the treasurer on April 1, 1904, issued to P. P. Scott, assignee of Ratcliff, a tax deed. On July 1, 1905, P. P. Scott and wife conveyed the land

by quitclaim deed to defendant H. A. Obert. In October, 1906, plaintiff tendered to the treasurer the sum of $80 to redeem, which sum the treasurer testifies was sufficient to cover all taxes, interest, costs and penalties of the tax sale. The treasurer refused to receive the money and permit a redemption for the reason that a tax deed had been issued. Some contention is made by defendants that plaintiff is not the owner of the land, and therefore is not entitled to prosecute this suit, but that contention must fail, as the only competent evidence on the question is that, at the time of the tax sale and at the time of the issuance of the tax deed, plaintiff was the equitable owner of the land and in possession of the same under a verbal contract of purchase from one Warren Prentice, who during all of those times was the record owner of the title. Plaintiff also introduced in evidence a quitclaim deed from Warren Prentice and wife to him, dated August 18, 1906, and testified that he obtained this quitclaim deed by sending Prentice the balance of the money.

The statute in force at the time the tax sale was made and tax deed issued was the revenue law of 1879, which without change appears as section 123, art. I, ch. 77, Comp. St. 1901, which provided among other things: "Hereafter no purchaser or assignee of such purchaser of any land, town or city lot, at any sale of lands or lots for taxes or special assessments due, either to the state or any county or any incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this state, shall be entitled to a deed for the lands or lots so purchased, until the following conditions have been complied with, to wit: Such purchaser or assignee shall serve or cause to be served a written or printed or partly written and partly printed notice of such purchase on every person in actual possession or occupancy of such land or lot, and also the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county, at least three months before the expiration

of the time of redemption on such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he has purchased, for what year taxed or specially assessed, and when the time of redemption will expire." Section 124 provided: "Every such purchaser or assignee by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of the foregoing section, stating particularly the facts relied on as such compliance, which affidavit shall be delivered to the person authorized by law to execute such tax deed, to be by such officer entered on the records of his office, and carefully preserved among the files of his office, and which record or affidavit shall be *prima facie* evidence that such notice has been given. Any person swearing falsely in such affidavit shall be deemed guilty of perjury, and punished accordingly." In this case no affidavit of service of the notice required by section 123 was made by either the holder of the tax certificate or by any one as his agent, nor was any record produced showing that any such affidavit had been filed; so that the only proof of service of the notice required by section 123 in the hands of the county treasurer when he executed the tax deed was the unsworn statement of Mr. Key, in the form of a sheriff's return. At that time the law did not authorize the sheriff, in his official capacity, to serve a private notice of redemption; hence, there was no authority for him to act officially in the performance of such an act. When Mr. Ratcliff placed his notice of redemption in the hands of Mr. Key he made him, personally, his agent to serve such notice, and the duty rested upon him to see that his agent filed an affidavit of service precisely as he would have had to do had he made the service himself. The unsworn statement of Mr. Key, who happened at that time to hold the office of sheriff, that he had served the notice, was entitled to no greater weight than the unsworn statement of any other private individual. His unsworn return as sheriff was not the kind of proof required by statute, and therefore was

not competent evidence. For the failure of Mr. Ratcliff, the holder of the tax sale certificate, to perform the plain statutory condition precedent to his obtaining a tax deed, the deed issued upon such certificate was absolutely void. It follows that the court erred in refusing to permit plaintiff to redeem. The law governing cases of this kind is well settled. *Thomsen v. Dickey,* 42 Neb. 314; *King v. Cooper,* 128 N. Car. 347; *State v. Gayhart,* 34 Neb. 192; *Miller v. Hurford,* 11 Neb. 377; *Zahradnicek v. Selby,* 15 Neb. 579.

The judgment of the district court is reversed and the cause remanded, with directions to enter a decree canceling the tax deed under which defendant claims, permitting plaintiff to redeem from the tax sale, and quieting plaintiff's title to the property, in accordance with the prayer of his petition.

REVERSED.

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## LAFE BURNETT V. STATE OF NEBRASKA.

FILED FEBRUARY 28, 1911. No. 16,735.

1. **Criminal Law: VERDICT: REVIEW.** In a criminal prosecution, the determination of the credibility of the witnesses and the weight of the evidence being peculiarly within the province of the jury, a verdict of guilty, based upon sufficient competent evidence, will not be disturbed, even though this court may entertain doubt as to the correctness of the jury's finding.
2. Evidence examined and found to come within the foregoing rule.
3. Instructions given and refused, examined, and *held* no error.

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

*Lafe Burnett* and *F. G. Hamer,* for plaintiff in error.

*Arthur F. Mullen, Attorney General,* and *George W. Ayres, contra.*

*Ritchie & Wolff, amici curiæ.*

FAWCETT, J.

This case is before us for a second time. A statement of the complaint and of the facts will be found in the opinion of BARNES, J., upon the former hearing. *Burnett v. State,* 86 Neb. 11. The former conviction was set aside upon questions of practice and error in the instructions, but, in addition thereto, the court had grave doubts as to the guilt of the defendant. Upon the second trial the defendant was again found guilty and sentenced to be confined for a term of 20 days in the county jail of Phelps county. While we still entertain doubt as to the defendant's guilt, yet, two juries having passed upon the credibility of the witnesses and the weight of the evidence and found the defendant guilty, we do not now feel justified in substituting our estimate of the same for that of the jury. It will serve no good purpose to set out the evidence in detail. There is sufficient testimony in the record to sustain a verdict either way.

While it seems clear to us that behind this prosecution is the husband of the alleged paramour of the defendant, who evidently thinks that a conviction in this case may aid him in litigation between himself and said alleged paramour, who is his wife, over property of which she claims he has defrauded her, after having first secured her confinement in an insane asylum when she was not insane, and who has manifested his vindictiveness by employing private counsel to assist in the prosecution of defendant, notwithstanding the fact that the county of Phelps has an able county attorney and the state has an able attorney general, either of whom is abundantly able to take care of the prosecution; and, while there are many circumstances in the case which tend strongly to corroborate defendant's assertion of innocence, yet there is sufficient testimony upon the part of the state to sustain the conviction. The determination of these questions being for the jury, we must, however reluctantly, accept the jury's verdict. If the prosecuting witness is actuated by

the thought above indicated, he is in error, as the conviction of defendant in this case will have no weight with the court in determining the questions involved in the litigation between the witness and his wife.

We have carefully examined the instructions both given and refused, and find no error. The presiding judge seems to have given the defendant a fair trial. The result to the defendant is unfortunate, but we see no way of giving him relief without invading the province of the jury. This we do not feel at liberty to do.

The judgment of the district court is therefore

AFFIRMED.

LETTON and ROOT, JJ., concur in the conclusion.

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FRED KOCKROW ET AL., APPELLEES, V. JAMES S. WHISENAND ET AL., APPELLANTS.

FILED FEBRUARY 28, 1911. No. 16,843.

1. School Districts: ORGANIZATION: PRESUMPTIONS. "After a school district has exercised the franchises and privileges thereof for the period of one year, its legal organization will be conclusively presumed, whatever may have been the defects and irregularities in the formation or organization of such district." *State v. School District*, 42 Neb. 499.

2. ———: ISSUANCE OF BONDS: SUBMISSION OF QUESTION. A petition of electors in a school district organized and operating under subdivision XIV, ch. 79, Comp. St. 1909, is not a prerequisite to the submission by the board of education of such district to the voters thereof of a proposition for the issuance of school bonds to be used by said board in borrowing money for school purposes; but an election may be called and such proposition submitted upon a vote of two-thirds of the members of the board of education of such district.

3. ———: VARIANCE IN NAME: VALIDITY OF CONTRACTS. Where the name of a school district is given in the statute, and such school

district upon its organization and for many years thereafter, without protest or objection by either the state or the taxpayers or legal voters residing in said district, uses a name in which the words contained in the statutory name are to some extent transposed, and also adds a number to said name for purposes of designation or convenience, such variance in the name will not invalidate acts done or contracts entered into by said school district.

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

*C. H. Epperson* and *A. C. Epperson,* for appellants.

*M. L. Corey, P. E. Boslaugh* and *S. W. Christy, contra.*

FAWCETT, J.

Plaintiffs brought suit in the district court for Clay county to enjoin the defendants from issuing, registering and selling school bonds to the amount of $20,000, proposed to be issued for the purpose of building an addition to the high school building in the city of Harvard. A perpetual injunction was granted as prayed. Defendants appeal.

A number of questions are argued, but we deem it necessary to only consider three of the points presented: (1) The statute of limitations. (2) The necessity of a petition by one-third of the qualified electors of the district prior to the submission of the question of a bond issue to the voters. (3) The alleged discrepancy in the name of the school district in the submission of the proposition and in the ballots used at the election. These we will consider in the order named.

1. It is contended by plaintiffs that the school district never had a legal organization; in fact, that it was not possible for it to ever have had a legal organization, for the reason that the city of Harvard, which forms a part of the district, never had at any one time a population of more than 1,500 inhabitants, and that all of its acts in re-

lation to the proposed bond issue are therefore void. In the stipulation of facts, upon which the case was submittted to the district court, it is admitted that the city of Harvard never had a population of 1,500; that no petition signed by one-third or any other number of the qualified voters of the district was ever presented to the board, requesting that a vote be taken for or against the issuance of the proposed bonds; that at the election called for voting upon the bond issue there were cast 524 votes, 276 being cast for and 248 against the proposition; that in the proceedings leading up to the submission, and in the resolution, the notice of submission and the ballots used at the election, the school district was not designated as "The School District of Harvard, in the County of Clay, in the State of Nebraska," but was in all of those proceedings designated as "Harvard School District No. 11, Clay County, Nebraska," or as "Harvard School District No. 11 of Clay County, Nebraska;" that subsequent to April 18, 1887, annually, two members of the board of education of the district were elected at the time of the general city election; that the members of the board qualified on or before the first Monday in May following their elections, respectively; that the regular meetings of the board had been held on the first Monday of each month since May 1, 1887; that the district had continued from that date to the time of the commencement of the suit, its board performing the regular duties and exercising all the powers of a board of education; that in April, 1893, the board of education of Harvard school district issued $15,000 bonds upon the authority of an election held in the district; that such bonds were issued in the name of "Harvard School District No. 11 of Clay County, Nebraska;" that on June 16, 1904, the district conveyed two separate tracts of land by separate deeds, signed "Harvard School District No. 11, by A. J. Moger and Jesse F. Eller;" that on March 19, 1910, the district purchased a one-acre tract of land, and upon September 2, 1901, purchased another tract, and in each instance received title by warranty deed, in which

the district was named as "The School District No. 11 of Harvard, in the County of Clay, in the State of Nebraska;" or "The School District No. 11 of Harvard, in Clay County, Nebraska;" that the school district has been designated upon the records in the office of the county clerk and the office of the county treasurer of Clay county as "Harvard School District No. 11 of Clay County, Nebraska," and in that name has levied taxes which have been paid by the taxpayers of the district without objection to the use of said name; that the county superintendents of the county have frequently in their official correspondence with the board designated and referred to said school district by the use of the words "No. 11" for the purpose of designating the same; that the boards of education of said district have, since May, 1887, employed superintendents of public instruction for various periods of time, in one instance for the period of three years; that no action has ever been instituted by plaintiffs or any one else or by the state to question the right of the district to operate under subdivision XIV, ch. 79, Comp. St. 1909, and no written objection thereto has ever been filed with any county superintendent or with the boards of education of said school district; that the plaintiffs in this suit each voted at the election here in controversy, and neither plaintiffs nor any other taxpayer or legal voter of said school district have or has ever made objection, prior to the institution of this suit, to the use of the name intended to designate said school district in the call for an election upon the ballots used thereat; that at the election held July 1, 1907, 164 votes were cast; that at the election in 1908, 410 votes were cast; that the election for the bonds in controversy was called by the consent of five members of the board of education, expressed at a regular meeting of said board at which only five members were present; that plaintiffs have been residents and taxpayers and legal voters in said district for from 6 to 23 years. It thus appears that this school district has been in existence and its board of education performing all the functions

and duties of a board for over 23 years, without any objection either by the state or by any resident, legal voter or taxpayer of the district. Its elections were participated in by the plaintiffs, one of whom, the evidence shows, himself served for a period of three years as a member of the school board.

If this were a case of first impression, we would not hesitate to hold that the legality of the organization of this district cannot now be inquired into; but no such responsibility is involved, as we find ample authority to support such a holding. Section 8, subd. III, ch. 79, Comp. St. 1909, which has been in force for many years, provides: "Every school district shall, in all cases, be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of one year." In *State v. School District,* 13 Neb. 78, we held: "After a school district has exercised the franchises and privileges 'thereof for the term of one year' its legal organization will be presumed as to all of its corporate acts." In the opinion by LAKE, C. J., it is said: "This section is exceedingly comprehensive. Its terms are sweeping. It applies, as its language clearly imports, 'in all cases' wherein the doings of a district, as such, are called in question or in any way involved, as well to acts during the first year, and from which this presumption arises, as to those performed afterwards. So far, therefore, as concerns the capability of the district to take upon itself the obligation of a borrower of money, its complete organization at the time it assumed to do so must be indisputably presumed." In *State v. School District,* 42 Neb. 499, we held: "After a school district has exercised the franchises and privileges thereof for the period of one year, its legal organization will be conclusively presumed, whatever may have been the defects and irregularities in the formation or organization of such district." In the opinion by NORVAL, C. J., after quoting the section of the statute above set out, it is said: "It is conceded that, under the foregoing provision, if there had been nothing at fault in the

formation and organization of school district No. 19 but mere irregularities, its legal organization would be presumed. It is, however, contended that no such presumption exists where the jurisdictional steps prescribed by the statute for the erection of a school district have not been taken. In other words, where there has been a total disregard of the requirements of the statute in the formation of a school district the organization is void on its face, and in such case the section quoted above does not apply. We are not willing to place so narrow or limited a construction upon the statute. Had the legislature intended that the section should apply alone to the districts where but mere formal defects or irregularities appear in their organizations or formations, it would have said so; but instead it has used language susceptible of but one construction, and that is, that the presumption of legal organization after the lapse of a specified period applies to 'every school district' and 'in all cases.'" The opinion then quotes from the opinion of Chief Justice LAKE in *State v. School District,* 13 Neb. 78, the language which we have already above quoted. *State v. School District,* 13 Neb. 78, was an original application for mandamus, and *State v. School District,* 42 Neb. 499, was a proceeding in *quo warranto.*

In *State v. School District,* 54 Minn. 213, the supreme court of Minnesota had under consideration a statute identical with ours, except as to the words "in all cases," which appear only in our statute. The action in that case was by the attorney general upon an information in the nature of *quo warranto.* The court made short work of the case in the following language. "We do not find it necessary to follow counsel in their discussion of the question of the validity of the action of the board of county commissioners in establishing the district or the question of the discretionary power of the court in such cases, because, in our judgment, the proceeding was barred by the statute." We adopt the language of Mitchell, J., in the short opinion filed as follows: "If these municipalities are sub-

ject to be called into court to defend their original organization, and be subject to dissolution, after they have gone on raising taxes, buying property, contracting debts, and exercising all their usual franchises for years, the mischief and embarrassment that might ensue would be incalculable. These were the evils which the statute was designed to prevent by providing that, after a school district had exercised the franchises and privileges of a district for one year, the legality of its organization should not be questioned. To hold that the presumption is disputable, and merely shifts the burden of proof, would render the statute of very little value. The suggestion is made that the presumption applies only to the 'organization' (that is, the action of voters in electing officers, etc.), as distinguished from the 'establishment,' of the district by the board of county commissioners. To give it this construction would also render the statute practically nugatory." To the same effect, construing similiar statutes, are *School District v. Union School District,* 81 Mich. 339; *People v. Van Horn,* 20 Colo. App. 215; *Collins v. School District,* 52 Me. 522. Following the authorities above cited, we hold that the legality of the organization of the Harvard school district, of which the defendants are the board of education, cannot now be questioned, and that it is duly operating under subdivision XIV, ch. 79, Comp. St. 1909.

Plaintiffs place great reliance in *Chicago, B. & Q. R. Co. v. School District,* 60 Neb. 164, while defendants insist that the decision there announced is wrong and should be overruled. An examination of the case cited will show that in that case the point upon which this case turns was not presented or considered. The only question there presented and considered was whether the 1,500 inhabitants referred to in section 1, subd. XIV, referred to the city located in the school district, or to the entire territory of the district; and we there held that the phrase, "having a population of more than 1,500 inhabitants," relates to and is descriptive of the city, and not of the district. We

do not think it is necessary to either overrule or distinguish that case. If the question here were whether this school district was legally organized and conducting its affairs under any particular statute, or subdivision thereof, then the reasoning quoted from the opinion would apply; but when a school district has been organized, whether rightly or not, under a particular subdivision of the school law, and has thereafter conducted its affairs under that particular subdivision for more than one year (in this case 23 years), and during all of that time has elected its school board and transacted all of its business in a manner only permitted by that particular subdivision (in this case subdivision XIV), and during all of that time, as admitted by the stipulation in this case, no action has ever been instituted in court by the state or by any resident, elector, citizen or taxpayer to question the right of such school district to operate under such particular subdivision, then, if the statute of limitations is to be given any force and effect, the fact that it is a school district operating under that particular subdivision cannot be questioned. In such a case, it is not the population of the city or the population of the district which controls, but it is the particular organization of the district which cannot subsequently be questioned; and, if that particular organization cannot subsequently be questioned, the district cannot subsequently be switched over to some other subdivision of the school law, under which it has never acted and the provisions of which it has never observed or followed. We hold, therefore, that, by virtue of the statute of limitations above set out, the right of this district to continue to operate under the particular subdivision under which it has acted for so many years cannot now be questioned.

2. Was a petition by one-third of the qualified electors of the district necessary to authorize the board of education to submit the question of the issuance of bonds to the voters of the district? We think not. Section 24, subd. XIV, *supra*, provides: "That the aggregate school tax,

exclusive of school bond taxes, shall in no one year exceed twenty-five mills; provided, that in cities of the first class having a population of more than forty thousand a school tax, exclusive of school bond taxes, may be levied that will yield a revenue of $150,000 each year. But the board of education may borrow money upon bonds which they are hereby authorized and empowered to issue, bearing a rate of interest not to exceed six per cent. per annum, payable annually or semi-annually at such place as may be mentioned upon the face of the bonds; which loan shall be paid and reimbursed in a period not exceeding thirty years from the date of said bonds. Provided that no bonds shall be issued nor the question of issue submitted to the voters without the consent of two-thirds of the members of the board of education, and be offered in the open market and sold to the highest bidder for not less than par value of the dollar; and provided further than no bonds shall be issued by the board of education without first submitting the proposition of issuing said bonds at an election called for that purpose, or at any regular election, notice whereof shall be given for at least twenty days in one or more papers published within the district to the qualified voters of the district, and, if a majority of the ballots cast at such election shall be for issuing bonds, said board may issue bonds in such amount as may be named in the election notice." The record shows that the board of education in this case proceeded regularly, in accordance with the provisions of the statute just quoted.

3. It is contended by plaintiffs that the name of the Harvard school district is fixed by statute as "The School District of Harvard, in the County of Clay, in the State of Nebraska," and that the designation of the board as "Harvard School District No. 11, Clay county, Nebraska," is such a variance from the name given by statute as to render the proceedings of the board void. This objection, in the light of the stipulation of facts, is too technical for consideration. None of the plaintiffs suffered thereby, as they were all present and voted at the election, and the

stipulation shows that the vote cast at this election was the largest cast at any election for a number of years. The election was held at the usual voting places, was duly advertised in the local paper, and the fact of the election being held was evidently well known by all the voters of the district. The record shows that the name used in the proceedings leading up to the election and upon the ballots is the name by which the district has been known and by which it has transacted its business ever since its organization, even in the buying and selling of real estate. It is not alleged that such use of the name was fraudulent, or that harm resulted therefrom, or that any one was misled, hindered or delayed, nor was any objection interposed at or prior to the election or at any time prior to the commencement of this suit. To use a number in connection with the name for purposes of designation or convenience is mere surplusage, and we think it would be "straining at a gnat" to hold that such use would invalidate any proceedings taken by the board of a school district.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree dissolving the injunction heretofore granted and sustaining the validity of the bonds in controversy, in harmony with the views expressed in this opinion.

REVERSED.

SEDGWICK, J., dissenting.

The attorneys for the plaintiffs mistakenly contended that the school district had no existence because it was not organized under the right section of the statute. That proposition is very much discussed in the majority opinion, and there is no doubt that, the school district having acted as such for more than a year, is a *de facto* corporation fully qualified to act as a school district. The cases cited are collateral attacks upon the existence of the district, and, being such, are determined by the statute itself. This case, it seems to me, is very different; there is no doubt that a school district exists and has the powers

necessary to a school district to conduct its schools and other necessary duties, but the question in this case is whether a school district can transfer itself from one class to another so as to greatly enlarge its powers, and that, as it seems to me, is the precise question that was stated and decided in *Chicago, B. & Q. R. Co. v. School District,* 60 Neb. 164. In that case the railroad company tried to enjoin its taxes, claiming that the school district was organized as this school district now claims to be organized under subdivision XIV. If it was of one class, the class created by subdivivison XIV, it could not levy more than 2 per cent. taxes on the valuation. It attempted to levy 3.5 per cent., and the question was whether it belonged to the one class or the other. It does not seem to be optional with the school district to classify itself. The statute is mandatory. It describes the kind of territory it is legislating for—a city with 1,500 inhabitants—and then says, "shall constitute one school district," and may vote bonds without a prior petition of the voters, so that the statute itself absolutely fixes the status of the school district as to whether it is under subdivision XIV or under the general school law. *Chicago, B. & Q. R. Co. v. School District, supra,* so considers it, and I think correctly; and it says that the class to which the district belongs is fixed by the statute, and depends upon the population of the city, and not upon the population of the district. It refuses to enjoin the tax because the city of Minden does not contain 1,500 inhabitants, and therefore the statute would not place it in the class described in subdivision XIV, but in the other class.

The purpose of the statute that provides that, where a school district has operated for a year or more, it shall be deemed a corporation and qualified to act as a district is very plain. It is pointed out in the cases that are cited in the majority opinion. Some of them were actions in *quo warranto* to dissolve the district, and the court takes occasion to point out what the effect would be if a school district should be so dissolved. The ordinary procedure,

to appoint a receiver to take possession of the property and administer it, or any other recognized procedure upon the dissolving of a supposed corporation, would be very disastrous in such case. But surely the purpose of the statute was not to enable a school district, which had been by the statute placed in one class, to transfer itself into another and so enlarge its powers. I cannot conceive what would be gained by such a law as that, or why the legislature should have any such purpose. The majority opinion overrules the case of *Chicago, B. & Q. R. Co. v. School District, supra,* in very few words. It is virtually said that if the court then had known of this statute, or if this statute had been relied upon, the decision in that case would have been very different; that is, that the decision is entirely wrong, but the court was excusable because it was not told of the statute providing that when a district has existed for one year it could do whatever it chose to do. I think that the decision in that case is right and ought to be followed.

ROSE, J., also dissents.

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AGNES KRULL, APPELLEE, V. EDEN A. ROSE, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,239.

1. Indians: LEASE OF LAND: IMPROVEMENTS: REMOVAL: INJUNCTION. A tenant under a lease of lands allotted to a member of an Indian tribe, which lease provides that all improvements put upon the land by the tenant during the term shall remain upon the land and be considered as having been placed thereon by the tenant as part consideration for the lease, will be enjoined from removing such improvements from the land at the end of his term.

2. ———: ———: ———: ———: ———. In an action to enjoin him from so doing, the fact that he first entered into possession of the land under an assignment of a lease which was duly authorized and contained such provision, but which assignment was

void because not authorized by the proper officers of the government, and placed improvements on the land both while in possession under such void assignment and under the subsequent valid lease, is no defense.

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

*J. A. Singhaus,* for appellant.

*O. C. Anderson, H. L. Keefe* and *F. Dolezal, contra.*

SEDGWICK, J.

This defendant made certain improvements upon land in Thurston county which he held under a lease, and at the end of his term this action was brought in the district court for that county to restrain him from removing these improvements from the land. The district court found in favor of the plaintiff and entered a decree accordingly. The defendant has appealed.

There is a stipulation in the bill of exceptions, and also a stipulation filed in this court, in which certain exhibits are mentioned as exhibits A, B, C, and D, and are described. We find exhibits so marked attached to the record, but they do not correspond with the description in the stipulations referred to. There are also four exhibits in an envelope which is attached to the record. From these circumstances, and from the manner in which the record is made up, we do not feel certain that we have discovered the precise question that was determined by the trial court.

As we understand the record, the controversy is in regard to lands that were allotted by the government to one Harriet Wolf, a member of the Omaha tribe of Indians, and the land was conveyed to her by patent from the government in 1884. Afterwards, the said Harriet Wolf being deceased, her heirs, with the approval of the proper officers, as the law in regard to conveyances of Indian lands required, leased these lands to the defendant. This

lease was executed in September, 1899. It is attached to the record and marked as exhibit C, but is not so described in the stipulation. This lease, as is usual in such cases, contains the agreement that "he (the lessee who was this defendant) will not remove therefrom any houses, buildings, fences, or other improvements erected thereon during the time for which said land is hereby leased by him, but said houses, buildings, fences, or other improvements shall remain a part of said land and become the property of the party of the first part as a portion of the consideration for this lease in addition to the other considerations herein named, and that he will surrender and return said land and premises at the expiration of this lease in as good condition as when received, ordinary wear and tear in the proper use of the same for the purpose hereinbefore indicated and unavoidable accidents excepted." These lands when allotted to the Indians by the government were usually wild, without any improvements thereon, and the policy of the government was to have the lands improved, and when they are leased the rental to be paid therefor is not large and is fixed with a view to this policy of the government, the expectation being that the tenant will improve the land and that all improvements will remain upon the land as provided in the lease. The said lease was for three years and expired on the 1st day of January, 1903. Afterwards, in September, 1902, another lease was made by the same parties to the defendant for another term of three years, which expired on the 1st day of January, 1906. This lease was in the same form and contained the same stipulations. The improvements made by tenant consisted of buildings and other improvements that, as between landlord and tenant, are usually considered, in the absence of stipulations to the contrary, to be the property of the tenant to be removed by him at the end of his term; but under the express stipulations of these leases there can be no such right on the part of the tenant.

As we understand the brief of the defendant, it is sought

to avoid this construction of his agreement by the following consideration: It appears that after the death of the allottee her heirs first leased the premises to one Farley, who assigned his lease, and his assignee, or the said Farley, afterwards assigned it to this defendant, and the defendant was in the possession of the lands under this assignment at the time that he entered into the lease directly with the heirs of the allottee, as above stated. The lease from the heirs to Farley contained the usual provision in regard to improvements above quoted, and his first assignment was approved by the government. The assignment of that lease to this defendant was not approved by the proper officers of the government. From this circumstance it is argued, as we understand the brief, that the defendant had no contract when he first went into possession of the land, since an assignment of such a lease without the approval of the government is void, and that therefore he was to be regarded as a mere trespasser when he first went into possession of the land, and as such was not bound by the covenants in the Farley lease, and that, as he made some of the improvements in question while he was so in possession as a trespasser, his title to such improvements could not be questioned. Without determining whether he could avail himself of the invalid assignment of the Farley lease, and take possession thereunder, and then repudiate its conditions and so assume the position of a trespasser, or, if he could, what his rights as a trespasser upon this real estate would be in these improvements, we think that by entering into these two leases with the approval of the government, and holding the land thereunder for six years without making any claims to improvements placed thereon prior to entering into these leases, he has waived any such technical defenses, if they ever existed in his favor, and is now bound by the terms of the leases under which he holds.

It follows that the judgment of the district court is right, and it is therefore

AFFIRMED.

AGNES KRULL, APPELLEE, V. EDEN A. ROSE, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,240.

1. **Landlord and Tenant:** HOLDING OVER. If a tenant under a written lease for the term of three years holds over 45 days after the expiration of his term without the consent of the landlord, he will not become a tenant from year to year, unless the landlord has recognized him as tenant while so holding over.
2. ———: NOTICE TO QUIT. The notice to quit prescribed by the statute of forcible entry and detainer is not for the purpose of terminating the tenancy, but is rather preliminary to the action for recovering possession, and is properly given after the right of action has accrued.

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

*J. A. Singhaus* and *F. S. Howell,* for appellant.

*O. C. Anderson, H. L. Keefe* and *F. Dolezal, contra.*

SEDGWICK, J.

The defendant had possession of the land in question under a lease for a term of three years which ended on the 1st day of January, 1906. He failed to surrender possession of the premises at the end of his term, and in February, following, this action of forcible entry and detainer was begun in the justice court by the landlord to recover possession of the land. The action was appealed to the district court and there tried, and judgment entered in favor of the plaintiff, and the defendant appeals.

The position of the defendant, as we under stand it in the brief, appears to be that, having held over his term for about 45 days before the notice to quit was served upon him, he must be considered as a tenant from year to year, and that such tenancy cannot be terminated without the six months' notice. "Where a tenant for a year remains in possession over his term, and is recognized as a

tenant by the landlord, and no new contract is shown, he becomes a tenant from year to year." *Montgomery v. Willis*, 45 Neb. 434. That is, when a term stipulated in a written lease for a year has ended, and the landlord recognizes him as tenant thereafter by receiving rent or in any other way, showing that both parties regard the relation of landlord and tenant as still continuing, and there is no further agreement as to the terms of the tenancy, defendant is to be considered as holding for another term upon the same conditions as specified in the original lease. In this case the landlord did not recognize him as tenant in any way after the term expired, and there is, of course, no presumption that the parties had agreed that the same relation of landlord and tenant should continue for another year.

The three days' notice to quit prescribed by the statute of forcible entry and detainer is not required for the purpose of terminating the lease. The lease has already ended by its own terms and would not need any notice to terminate it. This three days' notice is a part of the proceeding to obtain possession when a tenant is wrongfully holding over after his term has expired. This notice is usually given after the right of action accrues, and three days before the complaint is filed with the justice.

The judgment of the district court is right, and is

AFFIRMED.

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MARGARET MYERS, APPELLANT, V. FREDERICK MYERS, APPELLEE.

FILED FEBRUARY 28, 1911. No 16,263.

1. **Divorce: EXTREME CRUELTY.** There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty.

2. ———: PRIOR AGREEMENT AS TO PROPERTY. A contract between husband and wife without permanent separation, which provides that each party shall control the income of certain specified property accumulated by their joint efforts with other similar provisions, was rightly held by the trial court to be temporary in its nature, and not binding upon the court in entering a decree of absolute divorce in an action brought several years after making the said contract.

3. ———: ALIMONY. Property which has been accumulated by the joint efforts and economy of husband and wife, and the title for convenience or by accident taken in the name of the wife, may, upon granting an absolute divorce, be adjudged to be property of the husband with suitable allowance to the wife as permanent alimony.

4. ———: ———. An allowance of $4,000 alimony to the wife, upon a decree of divorce in favor of the husband, will not be changed upon appeal of the wife, the total property of the husband being found to be $8,000 above incumbrances, and there being no special circumstances justifying a larger allowance.

APPEAL from the district court for Lancaster county: WILLARD S. STEWART, JUDGE. *Affirmed.*

*Tibbets & Anderson* for appellant.

*A. W. Lane, contra.*

SEDGWICK, J.

The plaintiff began this action in the district court for Lancaster county to obtain a divorce from the defendant. The defendant filed an answer and cross-petition asking for a decree of divorce in his favor, and asking that certain real estate, the title to which had been taken in the plaintiff's name, should be decreed to be the property of the defendant. The plaintiff dismissed her petition, and the action was tried upon the cross-petition of the defendant. The court found the issues in favor of the defendant, and entered a decree of divorce, and that the property specified was his property, and allowed the plaintiff permanent alimony. The plaintiff has appealed to this court.

These parties were married in New York state in 1872, and removed to Lancaster county, this state, in 1878, where they have since resided. Four children have been born to them, one of whom died in infancy, and the remaining three are of legal age. The youngest, a daughter, is living with her mother. The other daughter and a son are married and living by themselves. Neither of these parties had any property at the time of their marriage. Both of them have been industrious, frugal, and economical, and they have accumulated property of the value of from $8,000 to $12,000, consisting of a farm of 80 acres in Lancaster county and several town lots and small buildings in Lincoln. The defendant testifies that their trouble began about 12 years ago. The plaintiff's testimony is substantially the same upon this point, except that she states that earlier in their married life the defendant was too careful of expenses and neglected to furnish her with money as she thought he should have done. The evidence in the case consists wholly of the testimony of the plaintiff and defendant, their children and son-in-law, and a woman who testified briefly to some circumstances that she had observed in their manner of living. The members of the family were examined somewhat at length, and the record is voluminous.

Without going into an analysis of the evidence, it is sufficient to say that all the witnesses testify to conditions existing for many years that would be intolerable in any family, and they express themselves generally as believing that it would be impossible for these parties to live together as husband and wife. It seems that this conclusion is justified from this evidence. Several years ago this defendant began an action for divorce in the district court for Lancaster county. It appears that the matter was heard by the court at that time, and, although this record does not show very fully what was done, it is conceded that the court after hearing the evidence advised the parties to abandon those proceedings and endeavor to live together as they should. This was accordingly done, but

it immediately developed that the same conditions existed as before, and, instead of improving, matters became worse. The defendant testifies that he cannot possibly live with the plaintiff; that the conditions are such that his health and even his life are in danger, and the plaintiff and the children testify to substantially the same thing. The plaintiff's petition having been dismissed, the difficult duty devolved upon the trial court to determine whether the conduct of the plaintiff toward the defendant has been of such a nature as to furnish him just grounds for a decree of divorce. The evidence of the defendant shows conclusively that he is an honest and sincere man. It is impossible to doubt the truth of his statements as to any matters of fact within his knowledge, and this is substantially true of the plaintiff, as well as the other members of this family. No acts of personal violence were testified to by any of them. The difficulty in the case is to determine from this evidence which party is responsible for the conditions which existed which made their separation unavoidable. That the defendant was very careful and saving of his finances there is no doubt. That this sometimes resulted in his denying, or at least hesitating to furnish, reasonable necessities for his wife seems probable; and yet the defendant testifies that their trouble originated in the management of the children and other similar matters; that he desired that the children be kept in school at the time when they were from 12 to 15 years of age, or, if they left school, that they be required to work and help to support the family, and named some other things of a similar nature that he thinks started the difficulty between them. He also states that his wife refused to consent to his desired changes in the management of the property, and details many circumstances in that connection which he thinks show that she desired to make him trouble. She testifies that the whole trouble arose from their property arrangements, and it would seem from the evidence that this had much to do with the matter. When they bought the farm, and also when they bought some of

their other real estate, the titles were taken in the name of the wife. It appears that neither of the parties gave much thought to this matter at the time. Both apparently considered that it was quite immaterial which held the legal title, but later, when things were not as pleasant between them as they had been, the plaintiff began to assume that the property which stood in her name was her property, and not the property of the family. When the defendant realized that all this property was beyond his reach and control, the trouble between them became serious. It is sometimes said that the husband is the head of the family, and that the determination of matters in regard to the family property ultimately rests with him. For some purposes the law so considers it. The trial court heard these witnesses, saw their demeanor toward each other, their manner of testifying and their general conduct, and he may have concluded from this evidence that the theoretical position as to the head of the family was in this case reversed. The defendant testifies that plaintiff allowed him but one bureau drawer in which to keep his clothes; that she didn't allow him to use the writing desk; that she took his pictures and Grand Army relics from the walls and threw them in the kitchen; that he had to lie on the kitchen floor to rest when she had company; and that when his son, then about 15 years of age, "took a chair to him," she did not stop the boy, did not tell him he should not do it, "didn't even open her mouth." She told him at one time that she was almost persuaded to break up the home, and finally said she would do it. On one occasion when the daughter was present and threatened him with the "fire poker," her mother did not interfere. The plaintiff says it was the lamp lighter, and not the fire poker, and that she herself held it in her hands and flourished it somewhat, and that the defendant then went out. From this and much more such evidence in the record, together with the appearance and manner of the witnesses, the trial court might have concluded that plaintiff herself was more responsible for the conditions

that existed than was the defendant. We do not find evidence in the record that requires us to come to a different conclusion, and in this view of the case the decree of divorce in favor of the defendant is sustained by the evidence.

In March, 1906, these parties entered into a written contract, reciting that differences had arisen between them, and that they desired to "provide for the division of the income of the real estate that stands in the name of the parties," and then it provides that neither party shall be responsible for the maintenance, care or support of the other, and that the defendant shall have the income of certain real estate, and that the plaintiff shall have the furniture and household effects and the income from certain other real estate. The agreement also provides that it should in no way affect the title to said real estate, except as to the interest expressly agreed, and that, in case of the death of either party, the survivor should have a life interest in all the property, the remainder to the children. It is conceded by both parties that this contract was not made in view of a divorce or final separation of the parties. The trial court found that the contract was temporary in its nature, and could not control in the determination of the rights of the parties in the property upon a divorce being granted, and in this we think the trial court was clearly right.

The court found that the real estate was in fact the real estate of the husband, and that the title taken in the name of the wife was without any agreement or intention to make it the property of the wife. The plaintiff urgently contends that the trial court was in error in this. When property is accumulated by the industry and careful economy of both husband and wife, it should be considered as the property of both. The fact that the property is paid for with the earnings of the husband, when those earnings are made possible by the care, thrift and economy of the wife, does not necessarily make it the exclusive property of the husband. If the title is taken

in the name of one of them for convenience or by accident, the real rights of the parties are not affected thereby. If the husband conveys property to his wife, there may be a presumption, in the absence of any evidence, that it was intended as a gift, and the title may in such case become fixed in her; but, when all the evidence in regard to the transaction is before the court, it devolves upon the court to determine what the real intention of the parties was. Our law, as it has been construed, unfortunately does not allow the court to make an equitable division of real estate in divorce actions. We think the court did right to treat this property as though it were in the name of the husband and to allow the wife suitable permanent alimony, which is the course our law has been construed to provide.

The court found the value of the property to be $9,000, with $1,000 indebtedness, and decreed that the defendant pay the plaintiff $4,000 alimony. We do not find anything in the evidence requiring us to modify this decree in favor of the plaintiff. The case is an unfortunate one. It devolved a delicate and difficult duty upon the trial court. We do not feel certain that we can do better than the trial court has done.

The judgment of the district court is therefore

AFFIRMED.

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CHRISTOPHER TIERNAN, APPELLEE, V. THOMAS J. THORP, APPELLEE; CITY OF LINCOLN, APPELLANT.

FILED FEBRUARY 28, 1911. No. 16,319.

1. **Municipal Corporations:** EXCAVATIONS UNDER STREETS. Under the charter of the city of Lincoln as contained in chapter 13*a*, Comp. St. 1893, the city council had power to grant the right to a lot owner to excavate a room under an alley adjacent to his lot to be used as a boiler and coal room, under suitable regulations protecting the public in the free, safe and unobstructed use of the alley.

2. ———: ———: PRESUMPTIONS. When the evidence shows that an ordinance was enacted in 1892 authorizing such excavations, and that the same was thereupon made by the lot owner and a boiler installed therein, and that the excavation has been ever since that time used by the lot owner for such boiler room for the heating of a large building on such lot, and that the same was safely and securely covered and maintained by the lot owner, it will be presumed, in the absence of proof as to the terms of the ordinance, that the ordinance was complied with in the construction of said excavation, and that the work was done with the approval of the city council.

3. ———: ———: AUTHORITY TO REMOVE. After such excavation has been so maintained and used for more than 15 years, the city authorities cannot summarily declare it a nuisance and destroy or remove the same as such.

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

*C. C. Flansburg* and *L. A. Flansburg,* for appellant.

*E. P. Holmes, G. L. De Lacy* and *R. S. Mockett, contra.*

SEDGWICK, J.

The district court for Lancaster county enjoined the defendant, the city of Lincoln, from interfering with, removing or destroying repairs made by the plaintiff in the alley at the rear of the property owned by the plaintiff, and the city has appealed.

The petition alleged that the defendant Thorp was interfering with this property and threatening to continue doing so. He answered denying these allegations, and the court found in his favor. As the plaintiff has not appealed, the defendant Thorp is no longer interested in this litigation.

On November 29, 1892, the owner of this property applied to the city council for "permission to excavate in the alley of said building for the purpose of storage for coal," and the record of the proceedings of the city council introduced in evidence recites that "the ordinance to authorize the owner (of the real estate on which the building

stands) to construct an areaway in the alley in said block to the full width of said alley, and to provide for arching the same, and keeping said alley in suitable condition for travel, * * * was put to passage, and the required pass on the vote, ayes: Chapman, Daily," etc., naming 12 councilmen, and reciting that two councilmen, naming them, were absent. These two entries appear to be all of the record in regard to the matter. Thereupon the owner of the property constructed a room under the alley about 90 feet in length and the full width of the alley, 16 feet, and about 9 feet in depth. In this room he installed a boiler for heating the building, which is a four-story building. The plaintiff and his grantors have used this room for a boiler room and for the storage of coal from that time continuously until the commencement of this action. The room is covered with an arch of brick and concrete supported by iron "I" beams and is covered over with cement. It has been continuously used for travel, and there is no evidence that it was ever allowed to become unsafe, nor is there any serious complaint in that regard. The covering of this room is about 18 inches higher in the center than the level of the streets at either end of the alley, and slopes gradually toward the ends of the alley. It appears to have been constructed in accordance with the surface of the ground at that time. Just before the commencement of this action in 1908, some of the employees of the city began breaking up the covering of this room with the avowed intention and purpose to remove the covering and fill up the excavation and reduce the grade to conform with the level of the streets at the ends of the alley. It is claimed that the city council had ordered this to be done, and it is intimated that an ordinance has been passed for that purpose. There is no competent evidence in the record that this covering of the area was not in accordance with the original grade as established or adopted by the city, and the assistant city engineer testified that "in case the alley is about level we sometimes put a hump in the center," meaning, as we understand it, that it is not un-

usual in such cases in establishing the grade of the alley to raise the center somewhat so as to facilitate drainage.

The answer of the defendant alleges that "the excavation and the roof over same maintained by plaintiff in the public alley of the city of Lincoln is an unlawful obstruction therein and a nuisance, and it is made the duty of the defendant, the city of Lincoln, by the statutes of Nebraska through its proper officers to remove the same; that this defendant is about to proceed to grade and pave said alley, and the said excavation and roof over the same interfere with such improvements, and it is necessary that the same be removed in order that such improvements be properly made and such alley be restored to a safe condition for the public use," with a general denial.

1. It is contended that the city council was without authority to authorize this construction in the alley, and that there is no evidence that the city ever did authorize any such construction as was in fact made. It appears, as already stated, that there was an ordinance passed authorizing the then owner of the property under whom the plaintiff now claims to "construct an areaway in the alley * * * to the full width of said alley, and to provide for arching the same, and keeping said alley in suitable condition for travel." We are not informed as to the details and language of the ordinance. The work was one of public notoriety. The city authorities must have taken notice of the manner in which it was being done, and we have recently held that under such circumstances it will be presumed that the work was done pursuant to the ordinance, and in compliance with its terms, and with the approval of the city authorities. *City of Omaha v. Philadelphia Mortgage & Trust Co., ante,* p. 519.

The authority of the city council to authorize such use of the streets and alleys is thoroughly discussed in the briefs and many authorities cited. It is, of course, conceded that the city council cannot deprive the public of the ordinary use of the streets and alleys of the city for travel and other necessary and usual public purposes.

Any private use thereof which substantially interferes with such public use is unlawful, and it may be conceded that any attempt of the city authorities to authorize such use of the streets and alleys would be *ultra vires*. The care and control of the streets and alleys is confided to the city council. The council must determine, in the first instance, what is and what is not an improper interference with the public use of its streets and alleys. The council must be allowed some discretion in such matters, and its action will not be interfered with by the courts unless it clearly violates some public or private right.

The privilege of excavating under sidewalks and streets for coal rooms, vaults and subways is of great value and convenience, and, if properly regulated and controlled by the authorities, may be used with little or no inconvenience to the public. Judge Dillon suggests that the right of the lot owner in this respect does not depend upon his ownership of the fee in the streets. 2 Dillon, Municipal Corporations (4th ed.) sec. 699. The same author quotes with approval, and as of general application, the following from the opinion of the supreme court of Illinois, in *Nelson v. Godfrey*, 12 Ill. 20: "We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it; but as such a privilege is a great convenience in a city, and may with proper care be exercised with little or no inconvenience to the public, we think that authority to make such cellars may be implied in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work. * * * Neither the public nor other individuals can derive any possible advantage from such a use of the sidewalk, but it is solely for the benefit of the person thus using it, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible."

It may be questionable whether the owner of the adjacent lot can claim this privilege as a right in the absence

of any statute governing the matter. Courts have differed in opinion upon this point. The charter of the city of Lincoln when this work was done provided that the city should have power by ordinance "to remove all obstructions from the sidewalks, curbstones, gutters, and cross-walks at the expense of the owners or occupiers of the grounds fronting thereon, or at the expense of the person placing the same there, and to regulate the building of bulkheads, cellars, and basementways, stairways, railways, window and doorways, awnings, hitching posts and rails, lamp posts, awning posts and all other structures projecting upon or over adjoining excavation through and under the sidewalks in said city." Comp. St. 1893, ch. 13*a*, art. I, sec. 67, subd. IX. It is suggested that the last clause limits the entire section, but cellars, basements and railways do not project over sidewalks, and the legislature must have intended this section to extend to streets and alleys. The power to regulate these things having been given by the legislature, it must have been intended that they should be allowed under suitable circumstances and with proper regulations protecting the public in the free and unrestricted use of the streets and alleys. We conclude that the city council had power to authorize this use of the alley by ordinance, and did so authorize it in 1892.

2. It is contended that the city council in the exercise of the police power, and the general power given it by statute over its streets and alleys, may declare this "excavation and the roof over same * * * an unlawful obstruction and a nuisance," and that it is the duty of the city "to remove the same," and that the city may proceed to "grade and pave said alley" and "remove the excavation and roof over the same" for that purpose. It will be seen from the above quotation of the answer that this is the entire defense of the city. There is no allegation of any fact from which it can be seen that public travel or any other public use of the alley is in any way interfered with, nor that the plaintiff has in any way neglected

his duty in regard thereto, nor that any ordinance has been enacted fixing or changing the grade of the alley, nor that plaintiff has refused to lower this covering of the excavation so as to admit of change of grade, nor that any proceedings have been taken looking to a condemnation of plaintiff's property for public use.

There is in evidence a resolution and ordinance, and proof of publication of the ordinance, making this alley a paving district, ordering it paved and the cost thereof assessed against the property in the district. These were not within the issues tendered by the answer. It was in pursuance of this ordinance that the city proceeded to remove the excavation and roof as a public nuisance.

We have already seen that this excavation was not unlawful, and therefore, of course, not a nuisance at its inception. If it is such now, when did it become so? Could the city have declared it a nuisance immediately after authorizing it, and its construction at great expense pursuant to that authority? If not, when did that right on the part of the city accrue? We think that the city having authorized the construction and maintenance of this excavation and covering, and the grantee of this right having acted upon it and expended large sums of money in constructing this improvement, the city cannot now summarily destroy this property as a public nuisance. *Agnew v. City of Pawnee City,* 79 Neb. 603; 2 Dillon, Municipal Corporations (4th ed.) sec. 675; *Gregsten v. City of Chicago,* 145 Ill. 451; *Crocker v. Collins,* 37 S. Car. 327, 34 Am. St. Rep. 752; *City R. Co. v. Citizens Street R. Co.,* 166 U. S. 557. See, also, cases cited by Voorhees, J., in *Mill Creek Valley Street R. Co. v. Village of Carthage,* 18 Ohio C. C. Rep. 216, affirmed in 62 Ohio St. 636.

These are the only questions presented by the pleadings, and the judgment of the district court thereon is right, and is

AFFIRMED.

## STATE OF NEBRASKA V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED FEBRUARY 28, 1911. No. 16,535.

1. Courts: JURISDICTION. By the provisions of the constitution this court has original jurisdiction of all civil cases in which the state is a party. Const., art. VI, sec. 2.
2. ———: ———. Any civil action in which the state has such interest as that the action may be brought and prosecuted in the name of the state is within the original jurisdiction of this court.
3. Intoxicating Liquors: VIOLATION OF STATUTE: INJUNCTION. A court of equity has jurisdiction to enjoin the violation by a railroad corporation of the act of 1909, which forbids intoxication and the drinking of intoxicating liquors upon railroad trains. Laws 1909, ch. 83.
4. ———: ———: ———: PARTIES: JURISDICTION. Such action is properly brought in the name of the state by the attorney general acting in his official capacity, upon the application of the state railway commission; and when so brought this court has original jurisdiction thereof.

ORIGINAL action by the state. Demurrer to petition. *Demurrer overruled.*

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

*J. E. Kelby* and *H. F. Rose, contra.*

SEDGWICK, J.

This is an original action in this court, begun in the name of the state by the attorney general upon the application of the state railway commission. The petition alleges that defendant is a corporation authorized to do business in this state, and that the business which it is authorized to do "is the building and operation of public highways in said state for the carriage and transportation of persons and property within and through, and in and

out of, said state for hire and profit; that defendant has been for many years last past, and now is, operating about 2,000 miles of railroad in the state of Nebraska, carrying thereon and thereover passengers and freight, both state and interstate, and that on many of its passenger trains in said state it maintains and hauls dining and buffet cars for the convenience and accommodation of its passengers, and for profit and benefit to defendant"; that, notwithstanding the provisions and prohibitions of the statute hereinafter set forth, "the said defendant, by and through its employees, agents, conductors and porters, has been continuously for many years last past, and now is, furnishing, supplying and selling to its passengers patronizing said dining and buffet cars, through its servants, agents, conductors and porters, in and upon its said dining and buffet cars in the state of Nebraska, intoxicating, malt, spirituous and vinous liquors without itself, or its porters, servants, agents or conductors, first having procured a license to sell such liquors in the counties through which it hauls its said dining and buffet cars in the state of Nebraska." It specified 45 counties of the state through which the defendant so operates, and alleges: "That the sales of said liquors on said cars are unlawfully made, and said liquors are unlawfully suffered and permitted by defendant, its agents, conductors, employees and porters to be drunk thereon; that the attention of defendant has been, by the Nebraska state railway commission, repeatedly called to the fact that such liquors were and are being unlawfully sold on its said cars; that said commission has urged and requested defendant to desist from selling said liquors on said cars; yet, notwithstanding said notice and request by said commission, defendant has failed, neglected and refused to discontinue said unlawful conduct, and still fails, neglects and refuses to respect the laws of the state of Nebraska in that behalf and the request and demand of the said Nebraska state railway commission; that said dining and buffet cars, on which said intoxicating liquors are by defendant, its

agents, conductors, employees and porters so as aforesaid unlawfully sold and suffered and permitted to be drunk, are attached to and hauled by its fast limited passenger trains, which do not stop at all its stations on its lines, but only at a limited number thereof, making rapid runs and crossing county lines without stopping, and stopping only a few minutes at larger stations, thereby making it impossible for county and prosecuting attorneys to locate the exact county where sales are made, the name or names of the individual or individuals through whom the sale or sales are made, the name or names of the person or persons to whom the sale or sales are made, thus rendering it practically impossible for such county attorneys to bring and successfully prosecute criminal actions for individual violations of the law. Moreover, it is rendered practically impossible to make arrests of persons on said trains without interfering with and delaying interstate commerce and the carrying of the United States mails; and, to secure obedience to and respect for the laws of the state of Nebraska in the premises, the state is without any adequate remedy or means of redress, except in a court of equity by injunction to restrain defendant, its officers, agents, servants, conductors, employees and porters from violating said law. That defendant did not have, and has not now, any express power or authority under its articles of incorporation or charter to sell intoxicating liquors within the state of Nebraska, nor is the power or authority to sell intoxicating liquors one of the implied powers of such corporation, nor is such sale incidentally necessary to enable defendant to carry into effect its express or chartered powers as a corporation, and all sales of intoxicating liquors that are being made and have been made by defendant are *ultra vires;* and that the sale of intoxicating liquors by and on the part of defendant constitutes an excess and abuse of its corporate franchise, a violation of public law to the public detriment, productive of public mischief, tends to defeat public policy, and constitutes a continuous nuisance that cannot be

stopped or abated, except by injunctive order made and issued in and by a court of equity." The petition also asks for a temporary injunction against the defendant, restraining and enjoining the defendant, "its agents, officers, servants, conductors, employees and porters from selling intoxicating, malt, spirituous or vinous liquors to its passengers or others on its said dining and buffet car or cars, or on any other of its said cars, in its trains carrying passengers in any of the counties in the state of Nebraska through which the same are hauled, in which defendant has not first procured a license to sell said liquors, and enjoining and restraining said defendant, its agents, officers, servants, conductors, employees and porters from suffering and allowing said liquors to be drunk upon its passenger trains within the state of Nebraska; that upon the final hearing of this cause said injunction be made perpetual."

To this petition the defendant has filed a general demurrer upon two grounds: First. "The court has no jurisdiction of the subject matter of the action." Second. "The petition does not state facts sufficient to constitute a cause of action." The statute forbids the selling of intoxicating liquors in this state without first obtaining a license therefor, and in 1909 the legislature enacted a statute entitled, "An act to prevent intoxication and the drinking of intoxicating liquors on passenger trains and coaches in the state of Nebraska, and providing a penalty for failure to enforce the provisions thereof." Laws 1909, ch. 83. The act appears as sections 38*a*-38*d*, ch. 50, Comp. St. 1909. The first section of the act is as follows: "It shall be unlawful for any person to be found in a state of intoxication or to drink intoxicating liquors of any kind, as a beverage, upon any railway passenger train, coach, closet or vestibule thereof, or platform connected therewith, while said passenger train or coach is in the service of passenger transportation within this state; and all conductors finding any person in a state of intoxication or drinking intoxicating liquors of any kind, as a beverage,

upon said train or trains, are hereby authorized and empowered to remove such person from the train, and if any person found drinking intoxicating liquors thereon shall not desist or abstain immediately after being advised to so do by such conductor, then such intoxicated person or persons drinking intoxicating liquors of any kind as a beverage upon said train, may be removed by such conductor at the first station at which the train may stop, having a depot and a depot platform, provided that such removal shall not take place in the night time, unless there are people upon said platform in whose charge such person so removed may be placed; and if the person removed has any unused portion of his ticket for transportation, the conductor so removing him from said train shall furnish the person so removed with a written statement showing the amount of such unused transportation, and the same shall entitle the holder to a refund, from the railroad company issuing the same, of the value of the unused transportation, which shall be payable at any station of the company where tickets are sold, upon demand and surrender of the conductor's written statement aforesaid." The second section makes it a misdemeanor for any person to be found in an intoxicated condition riding upon railroad trains, or found drinking intoxicating liquors of any kind as a beverage after having been ordered to desist therefrom by the conductor, while on such train. The third section makes it the duty of the railroad companies to keep the provisions of this act in plain, legible print posted in some conspicuous place in each and every passenger coach, sleeping or dining car; and the fourth section of the act makes it the duty of the Nebraska state railway commission "to see that the provisions of this act are enforced."

The first question presented is as to the jurisdiction of this court. The original jurisdiction of this court is derived from the constitution. Legislation cannot enlarge or restrict it. The constitution gives this court original jurisdiction of all "civil cases in which the state is a

party." Const., art. VI, sec. 2. If an action of this nature can properly be brought by the state, this court has orignal jurisdiction thereof. The question of jurisdiction, then, depends upon the two propositions: First. Is this a matter of equitable cognizance? Second. If it is, is the state, as such, the proper party to prosecute the action? The courts of this state, so far as we are aware, have never been called upon to enjoin the sale of liquor, nor to enjoin any action that did not affect property rights, nor directly interfere with personal rights or privileges. This action so far, then, is without precedent in this state. But this is not a reason for refusing the aid of a court of equity. The jurisdiction of such courts arose from the necessity of adapting new remedies to new conditions. It is the duty of a court of equity, as was said by an early English chancellor, to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights, for which there is no other remedy," and Judge Redfield remarks that this language of the chancellor "is certainly worthy of the ablest, the wisest, and best judges who ever administered the chancery law of England or America." 2 Redfield, Law of Railways (6th ed.) p. 366. We are then to inquire whether this proceeding is founded on reason and justice and comes within the fundamental and long established principles of equity jurisprudence. *State v. Crawford,* 28 Kan. 726. It will be conceded that equity will not interfere to punish crime; it will not enjoin actions solely because they are forbidden by the criminal law. The criminal law is to be enforced by prosecution for its violation, in which the right of trial by jury must remain inviolate. But the jurisdiction of a court of equity "is not ousted by the fact that the obstructions are accompanied by or consist of

acts in themselves violations of the criminal law." *In re Debs,* 158 U. S. 564. If the facts are such as to require equitable action, those courts will apply the remedy, although the act enjoined is criminal and may be punished as such. "The penalty for a violation of such injunction is no substitute for, and no defense to, a prosecution for criminal offenses committed in the course of such violation." *In re Debs, supra.* The opinion of Mr. Justice Brewer in the case above cited is unusual, even in the work of that eminent jurist, for its clearness of expression in the application of established principles to new conditions, and, while we derive much assistance from that opinion, it contains one expression which has caused the writer much hesitation and careful study. At page 593 of the official report the author says: "Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law." The same great jurist said in another case: "The dollar is not always the test of the real interest. It may properly be sacrificed if anything of higher value be thereby attained." *United States v. Western Union Telegraph Co.,* 50 Fed. 28. It seems to us that civilization is so far advanced that there are rights and privileges, not predicated upon "the dollar," that are worthy of the protection of the state, and, when other means fail, the principles of equity judisprudence have sufficient vitality to afford the means adequate for that purpose.

There is another element in this case not involved in the case considered by Mr. Justice Brewer, and which, it seems to us, is of controlling importance. The defendant is a public service corporation; it exercises the right of eminent domain, and is one of the instrumentalities of the

state for promoting the public welfare. As such, the state exercises a direct supervision and control over it, and is in a sense responsible for its policies and methods. The supreme court of Wisconsin has said that a court of equity will assume jurisdiction: "(1) When a corporation is abusing powers given for public purposes; (2) or is committing a breach of trust; (3) or is acting adversely to public policy." *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425, 527. The supreme court of Indiana enjoined an incorporated social club from conducting prize fights, and stated the law to be that "an injunction against the abuse of corporate privileges by conducting prize fights will not be denied because the wrongful acts constitute crimes." *Columbian Athletic Club v. State*, 143 Ind. 98. In Kansas, an action was brought "to perpetually shut up and abate the further continuance of a certain illegal liquor saloon." The court declared that such a saloon is a public nuisance, not only by the express provisions of their statute, but also "from the necessary implications of the statute, and by the indirect force of the statutes, which make the keeping of the saloon, and the consummation of each sale of intoxicating liquors, criminal offenses." The matter is discussed at large, and the court concludes that the relief ought to be granted but for the provisions of their statute, which directs that "upon the judgment of any court having jurisdiction, finding such place to be a nuisance under this section, the sheriff, deputy, or undersheriff, or the constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place." *State v. Crawford*, 28 Kan. 726. This is held to be a plain and adequate remedy at law granting all the relief that a court of equity could give.

Our statute does not provide such a remedy at law, and the conditions of this case are quite different from those involved in the suppression of an ordinary illegal liquor saloon. The policy of our state as regards the matters herein complained of is clearly marked out in its legisla-

tion. The sale of intoxicating liquors without license is illegal. The sale or use of intoxicating drinks on railroad trains is especially contrary to the declared policy of the state. There can be no doubt that it is within the authority of the legislature to declare and enforce this policy. The comfort and safety of the traveling public are involved, as well as other ordinary considerations usually thought sufficient to bring the subject matter of the legislation within the police power of the state. Contrary to this policy of the state, this great corporation, which is peculiarly subject to the regulation and control of the law-making power, is encouraging and promoting the drinking of intoxicating liquors by its passengers on its trains in direct violation of the laws of the state, and in direct violation of the duty expressly imposed upon it by the statute, which is designed to prevent such practice in the interest and for the safety of the people of the state, for whose service the corporation was created and whose convenience and safety it is required by law to serve and protect. It is doing this, "not merely occasionally or incidentally, but * * * openly, publicly, repeatedly, continuously, persistently, and in direct defiance of the constitution and statutes of the state. This we think makes them nuisances by the necessary implications of the statutes, and by the necessary but indirect force of the statutes. The repeated, continuous and persistent violations of the statutes are what make them nuisances, independent of the express terms of the statute declaring them to be such. Indeed, we would think that every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated is a public nuisance." *State v. Crawford, supra.* In that case their statute provided a complete and adequate remedy, but our statute has failed to do so. A reference to the allegations of the petition above quoted will show that individual prosecutions, if indeed practicable, are wholly inadequate to the situation. It is not so much a matter of injury to the several counties through which these

trains pass or the people thereof, as it is to the people of the state generally who travel through those counties. Experience shows that the burden and expense of enforcing the law and vindicating the policy of the state will not be assumed by local prosecuting authorities; and that the probable failure of such attempted prosecutions, in a measure at least, justifies such inaction.

We think that these considerations require courts of equity to assume jurisdiction, and also invest the state with the power and duty to act. In the case to which we have so often referred we find the following language: "It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties." *In re Debs,* 158 U. S. 564, 586. This seems also to be the duty of the state in such matters as are entrusted to its care.

In *State v. Pacific Express Co.,* 80 Neb. 823, the original jurisdiction of this court is maintained in language stronger than is necessary to justify our jurisdiction in this case. This court, speaking through LETTON, J., there declared the law to be: "The jurisdiction conferred upon this court by the constitution 'in all civil cases in which the state shall be a party' is not confined to cases in which the state has a mere pecuniary interest, but may extend to all cases in which the state, through its proper officers, seeks the enforcement of public right or the restraint of public wrong. A wrong of a nature which affects the rights and interests of people living in almost every city,

town and village in the state, as well as persons living in the country, when committed by a public service corporation, is a public wrong. An action to restrain such a wrong by the state is within the jurisdiction of this court." This view of the law is again emphatically indorsed by the court, speaking through BARNES, J., in *State v. Adams Express Co.*, 85 Neb. 25. Referring to the decisions above recited, he says: "On proper pleas, and after a full hearing, the jurisdiction of the court and the right of the state to maintain the action were sustained. * * * Having finally adjudicated those questions, they will not again be referred to in this opinion." We must now sustain these principles in the case at bar, or overrule those decisions.

The statute expressly makes it the duty of the state railway commission to see that the law against having or drinking intoxicating liquors on railroad trains is enforced. In performing that duty the railway commission advised and sanctioned these proceedings. We conclude, then, that the matter presented is a proper subject for equitable cognizance; it is within the province of the state to prosecute the proceedings; and, the state being the proper party plaintiff, this court has original jurisdiction.

The demurrer to the petition is therefore

OVERRULED.

LETTON, J., absent and not sitting.

BARNES, J., dissenting.

I am unable to concur in the majority opinion. It was the purpose of the fundamental law to make this a court of review, and not one of general jurisdiction. To that end the constitution, by which this court was created, fixed and determined its jurisdiction. It is expressly stated in that instrument that "the supreme court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as

may be provided by law." Const., art. VI, sec. 2. Construing that section, we have heretofore consistently refused to assume original jurisdiction in equity cases where an injunction was sought as the main or principal remedy. The only exceptions to this rule are the suits brought to enforce anti-trust laws, and the express cases mentioned in the majority opinion. Those cases were properly brought and prosecuted by the state as the party plaintiff, and in all of them the property rights of the citizens of the state generally were directly involved, and it clearly appeared in all of them that in no other way could those rights be conserved and protected. It is therefore clear that those cases were within the rule announced by Judge Brewer in the *Debs* case, which is so often referred to in the majority opinion. It is perfectly apparent, however, that this is a suit brought for the sole purpose of enforcing our criminal law by enjoining the defendant from violating the provisions of chapter 50 of the Compiled Statutes entitled "Liquors," and commonly called the "Slocumb law." To say that this court has original jurisdiction in all civil actions in which the state is a party, and the state is a party to this action, therefore this court has original jurisdiction to entertain it, is reasoning in a circle, so to speak. If this were the rule, it would require us to take jurisdiction of all civil actions brought to prevent the violation of any of the provisions of our criminal code, for in all such cases the state would necessarily be the party. It was never intended that this court should have original jurisdiction in every civil case where the state could be made a party plaintiff. It seems clear that that provision applies only to those cases where the state really and in fact has such an interest as entitles it to substantial relief, either by way of protecting its property or the property and rights of its citizens generally. It is worse than idle to assert, in order to assume jurisdiction, that the sale of malt, spirituous or vinous liquors, to be served to the patrons of the defendant's railroad with their meals in its dining cars, constitutes a public nuisance, for no

citizen of the state is injured thereby, either in his person or his property. It cannot be truthfully asserted that violations of the provisions of our liquor laws by the defendant cannot be punished and the laws properly enforced by the usual and ordinary method of criminal prosecutions. Such prosecutions furnish a full, complete and adequate remedy for the evils of which complaint is made. It is well known that defendant's through trains all stop a reasonable length of time at every county seat upon its lines of railroad in this state. Any one who desires to do so may enter the defendant's dining cars at meal times and obtain the necessary evidence to sustain all needful criminal prosecutions. Therefore no necessity exists for the interposition of a court of equity, or the allowance of an order of injunction. As a matter of fact, the plaintiff's petition in this case, when stripped of the specious argument which it contains to induce us to assume original jurisdiction, simply presents a suit in equity to enjoin the violations of the liquor laws of this state, and substitute for the penalties provided therein for their violation such punishments as we may see fit to administer in contempt proceedings.

Finally, if injunction is the proper method of enforcing our criminal law, suits to that end should be commenced in the district courts of this state, which are courts of general and not special or limited jurisdiction. Those courts are open at all times, and have full power to grant all necessary relief, and from judgments there rendered appeals may be taken to this court. If that method is pursued, no question as to our jurisdiction would arise. By requiring such actions to be commenced and prosecuted in the district court, we would be able to devote more of our time to the hearing of the many cases brought here by appeal, and thus conserve the main purpose for which this court was created. This would also, in a measure, relieve the overcrowded condition of our docket.

For the foregoing reasons, among others, I am of opinion that the demurrer to the jurisdiction should be sustained and the proceeding dismissed.

## STATE OF NEBRASKA V. UNION PACIFIC RAILROAD COMPANY.

FILED FEBRUARY 28, 1911. No. 16,534.

ORIGINAL action by the state. Demurrer to petition. *Demurrer overruled.*

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

*N. H. Loomis, Edson Rich, J. A. Sheean* and *E. F. Pettis, contra.*

SEDGWICK, J.

This is a companion case to *State v. Chicago, B. & Q. R. Co., ante,* p. 669. There was a general demurrer to the petition in this case also. For the reasons there given, the demurrer is

OVERRULED.

BARNES, J., dissents.

LETTON, J., not sitting.

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## JAMES MORRISON V. STATE OF NEBRASKA.

FILED FEBRUARY 28, 1911. No. 16,658.

1. **Burglary: EVIDENCE.** A defendant may be convicted of the crime of "burglary with explosives" upon circumstantial evidence alone. The evidence in this case is held to be sufficient to support the conviction.

2. ———: ———. In a trial for burglary, it is competent for the prosecutor to prove that an article found at the scene of the crime immediately after the burglary was discovered was the property of the defendant, and was sold to him shortly before the crime was committed. The party who sold the article to the

defendant, if otherwise qualified, is a competent witness for that purpose.

3. **Criminal Law**: EVIDENCE: ADMISSIBILITY. If the cashier of the bank burglarized testifies that she sold a draft to defendant at the bank shortly before the burglary, and that the draft which she produces at the trial is in her handwriting, and is the one that she so sold to defendant, an objection to receiving the draft in evidence on the ground that it is not sufficiently identified is properly overruled.

4. ———: ———: REVIEW. If photographs of the defendant and his supposed accomplices are produced at the trial of a criminal case and offered in evidence by the state and excluded by the court, it will not be presumed that the defendant was prejudiced thereby. No error on the part of the trial court can be predicated upon such a proceeding, unless it appears that objection was made at the time, and that there was some action or ruling of the court prejudicial to the defendant.

5. **Burglary**: INFORMATION: EVIDENCE. Upon an information which charges burglary with the use of explosives and that nitroglycerine was the explosive used, it is necessary to prove the use of explosives. The evidence in this case is found to be sufficient for that purpose, and also sufficient to prove that the explosive used was nitroglycerine.

6. ———: SENTENCE. The penalty for the crime of burglary with explosives prescribed by statute is imprisonment in the penitentiary for life, or for any term not less than 20 years. The defendant in this case has served a term in the penitentiary for burglary, and under the evidence a sentence of 30 years in the penitentiary will not be interfered with by this court.

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

*H. F. Barnhart, M. H. Leamy* and *D. H. Sullivan,* for plaintiff in error.

*Arthur F. Mullen, Attorney General,* and *George W. Ayres, contra.*

SEDGWICK, J.

The defendant was convicted in the district court for Pierce county of the crime of burglary with explosives

under section 50*a* of the criminal code. He was sentenced to 30 years' imprisonment in the penitentiary, and has brought the case here for review.

The first complaint made is that the conviction is not warranted by the evidence. It appears from the record that the state attempted to prove that this defendant, together with one Joyce and another party, entered the Farmers & Merchants Bank of Hadar, in the town of that name, in Pierce county, on the night of the 19th of January, 1909, and opened the bank's safe by the use of explosives, and stole several hundred dollars of the money of the bank. Said Frank Joyce was also informed against and convicted of this alleged crime, and upon a review of the record this court affirmed the judgment of conviction. *Joyce v. State, ante,* p. 599. It appears from the opinion in that case that upon the trial the evidence more strongly implicated the defendant in the case at bar, and the conviction of the defendant Joyce in that case was sustained largely because of the evidence showing his association with the defendant Morrison, and also showing that the said Joyce participated with the said Morrison in perpetrating the crime. The evidence in both cases is entirely circumstantial, and is recited at some length in the opinion in the case of *Joyce v. State, supra.* Without repeating or discussing the evidence there recited, it is sufficient to say that we think that the verdict is amply supported.

The 19th of January of that year was Sunday, and on Saturday preceding this defendant was in the town of Hadar during the most of the day, and was twice in the bank that was burglarized, and was inspecting the tool house from which certain tools were taken to be used in the burglary, and was without any apparent business or purpose in the town of Hadar. To explain his presence in Hadar he testified that he was selling jewelry on the streets, and that he sold three several articles of jewelry in that town that day. His testimony upon this point is wholly unsupported, and no person to whom he sold or attempted to sell any jewelry appeared as a witness in his

behalf. The keeper of a rooming house in Norfolk, which is about five miles distant from Hadar, testified positively that these three parties stayed at his house in Norfolk during the night of the 18th, and that on Sunday evening, the 19th, they were still there until 8 or 9 o'clock; the theory of the state being that they went from Norfolk in the night to perpetrate the burglary. The defendant testifies that he came from Sioux City, Iowa, to Norfolk and Hadar, and that on Sunday morning, the 19th, he returned from Norfolk to Sioux City, and was there during Sunday and Sunday night. He brings several witnesses to corroborate him in this testimony. One witness, a Mrs. Fellman, testifies quite positively that she saw the defendant at Sioux City on Sunday evening, the 19th. She was, however, not acquainted with the defendant, never saw him before, and only saw him then two or three minutes in a company of seven or eight young men who were at that time drinking and carousing. The remaining witnesses who support the defendant in his evidence of an alibi are of very questionable character. One of them has been in the penitentiary for burglary; two others were saloon-keepers, or connected with saloons where the defendant and his associates spent considerable of their time; and, although their evidence is direct and positive, the jury were not compelled to believe their statements, contradicted as they were by witnesses known by the jury to be respectable and competent people.

There is some complaint made in regard to the manner in which the court submitted the question of an alibi to the jury. The usual instruction was given, and we have not discovered any error in that connection.

There was evidence that a knife was sold to the defendant in Hadar on Saturday before the burglary, and a similar knife was found in the bank immediately after the burglary was discovered. The dealer who sold the knife was allowed to testify that the knife found was the one sold by him to the defendant, and the knife was offered and received in evidence over the objection of the defend-

ant. This he complained of, but we do not find any error in this ruling. It was for the jury to determine whether the witness who identified the knife was competent to do so, and the force of this evidence was entirely for the consideration of the jury.

On the afternoon of Saturday before the burglary, the defendant bought a draft for $2 at the bank that was afterwards burglarized, and this draft was received in evidence over the objection of the defendant. The objection is that no sufficient foundation was laid. The cashier of the bank identified the draft, and testified that it was in her handwriting, and that she made it out and sold it to the defendant. This was a sufficient foundation, and there was no error in receiving it in evidence.

Several photographs were produced upon the trial and identified as the photographs of the defendant and of two supposed accomplices. These photographs were afterwards offered in evidence, but upon objection of the defendant they were excluded by the court. It was complained that producing them in court and exhibiting them to the jury was prejudicial to the defendant. We have not found that any objection was made at the time to this proceeding, or that the attention of the court was called to any possibility of prejudice to the defendant arising therefrom, and there is no reference in the brief to any such objection in the record. It is too late now to complain of a proceeding that was acquiesced in at the time, even if it should appear that the defendant was prejudiced thereby, which is not very apparent from this record.

It was necessary under this information to show that explosives were used in committing the burglary, and as the information alleges that the explosive used was nitroglycerine, it was thought necessary to introduce evidence of that fact. It is complained that the evidence is not sufficient to show that it was nitroglycerine that was used. A witness was examined to explain the nature and effect of nitroglycerine, and he described its properties and appearance. He had examined the premises, includ-

ing the vault and safe, after the burglary, and testified that from the things he had observed there he was able to testify what explosive was used, and that it was nitroglycerine. He also testified that nitroglycerine entered more or less into all explosives that were used in such work. This evidence was wholly uncontradicted, and we think that it was sufficient to support the information in this respect, even if it should be held necessary to make such proof, which we do not decide.

The defendant appears to be a professional. He has already served a term of imprisonment for burglary. The penalty prescribed by statute for this crime is imprisonment in the penitentiary for life, or for any term not less than 20 years, and under such a statute the sentence of 30 years in this case is not excessive.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

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CHARLES D. VAN HORN, ADMINISTRATOR, APPELLEE, V. COOPER & COLE BROTHERS, APPELLANT.

FILED MARCH 16, 1911. No. 16,264.

1. **Master and Servant**: ACTION FOR DAMAGES: EVIDENCE: SUFFICIENCY. The evidence, a portion of which is stated in the opinion, *held* sufficient to require the submission of the case to the jury.

2. ———: ———: NEGLIGENCE: EVIDENCE: SUFFICIENCY. If there is any competent evidence from which a want of proper care can be reasonably inferred, the matter becomes a question of fact for solution by the trier of fact, which, in a jury trial, is the jury.

3. **Appeal**: INSTRUCTIONS: STATEMENT OF ISSUES. The statement of the issues to be tried, as contained in the instructions, was more elaborate and in greater detail than can be commended, but, there being no unfairness in the statement and no material matter omitted, the judgment will not, for that reason, be reversed; no prejudice being shown.

4. **Instructions** given are examined, and when considered together, as

a whole, are found to contain no such prejudicial error as to require a reversal of the judgment; there being no material error or misdirection therein.

5. **Master and Servant:** ASSUMPTION OF RISKS: NEGLIGENCE OF MASTER. There was sufficient evidence to sustain a finding that decedent entered into the service of defendant to engage in a specific line of labor; that the repairing of the elevator was not within his line of employment; that he knew little or nothing of the mechanism, use or handling of elevators; that defendant was fully aware of such want of knowledge before the accident, and was just before that time reminded of the fact. *Held*, That decedent assumed the ordinary risk of the service which he undertook to perform, but that he did not assume the, to him, unknown risks of the more hazardous service; that sending him upon such dangerous service of which it was known he had no knowledge was, under the circumstances, an act on the part of his superior from which the jury might infer negligence.

6. ———: ———. "A servant has a right to assume that his master has used due diligence in providing reasonably safe appliances with which, and a reasonably safe place in which, the servant is to perform his duties, and does not assume the risk of danger arising from the master's negligence in that respect, unless the servant knows and realizes such risk of danger." *Kotera v. American Smelting & Refining Co.*, 80 Neb. 648.

7. ———: INJURIES TO SERVANT: CONCURRENT NEGLIGENCE OF MASTER. If an injured servant is free from contributory negligence, the master will be held liable where such injury was caused by the concurrent negligence of the master, or his vice-principal, and of a fellow servant.

8. **New Trial:** NEWLY DISCOVERED EVIDENCE: DILIGENCE. In order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been newly discovered must be such that the party applying for the new trial could not with reasonable diligence have discovered and produced it at the trial.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

*Hall, Woods & Pound* and *Greene, Breckenridge & Matters*, for appellant.

*W. B. Comstock* and *O. B. Polk, contra.*

REESE, C. J.

This action was commenced in the district court for Lancaster county by plaintiff as administrator of the estate of Frank C. Van Horn, deceased. It is alleged in the petition, among other things, that the decedent was on the 16th day of October, 1907, and for a short time prior thereto had been, in the employ of the defendant, a corporation, as a pipe cutter and fitter in its place of business; that defendant maintained for its use in handling and storing its goods, which consisted of steam, water and plumbing supplies, in its two-story building, a freight elevator, which elevator had become out of order, and which the decedent was ordered to repair; that the repairing of said elevator was outside the scope of the employment of the decedent and in which he was unskilled; that in obedience to the instructions of defendant's agents, and with them, the decedent went to the top of the elevator shaft and upon the cross-beam of said elevator, which was near the top of said shaft, and while so situated the elevator fell to the bottom of the shaft, carrying with it the decedent, his death being the result; that the elevator was negligently constructed in its supports and safety appliances; that the cables by which the elevator was suspended were old, worn and rusted, were too short, and would not support the elevator; that at the foot of the shaft a support had been constructed, so that one side thereof was substantial and strong, while the other side was composed of weak and unsafe timber and material, to such an extent that when the elevator struck thereon it was caused to tilt, whereby the decedent was violently thrown out and against the floor of the building, receiving an injury from which he soon thereafter died. It is also alleged that defendant's agent was guilty of negligence in leaving decedent in his perilous position and placing an incompetent and inexperienced person in charge of the elevator; that the defects in said elevator were unknown to decedent, but were known to defendant. A judgment

for $10,000 was demanded. Defendant answered, admitting its own corporate capacity, the death of Frank C. Van Horn on or about the date alleged in the petition, and that on and immediately prior to the day of his death he was in the employ of defendant All other allegations of the petition are denied. It is affirmatively alleged that decedent was well acquainted with the conditions pertaining to the work with which he was engaged, the condition of the premises, the dangers incident thereto, and with such knowledge he continued in the service and assumed the risks thereof; that the injuries received were the result of his own carelessness and negligence, and not that of defendant, and if not of his own negligence it was by reason of the negligence of a fellow servant. A jury trial was had which resulted in a verdict in favor of plaintiff for $5,000, on which judgment was rendered. Defendant appeals.

The motion for a new trial consists of 29 assignments, some of which are of considerable length, and need not be here set out. The assignments of error presented to this court consist of objections and exceptions to the instructions given and refused by the district court, and that the court erred in overruling the motion for a new trial. At the close of plaintiff's evidence defendant moved for a peremptory instruction to the jury to return a verdict in its favor, but which was refused. Afterward, at the close of the evidence, when both parties had rested, the request for a directed verdict in defendant's favor was again made and refused. The former request was based upon the contention that there was no "testimony in the case which shows that the injury to plaintiff's decedent resulted from actionable negligence of the defendant," and that "the evidence shows that the injury to plaintiff's decedent resulted, either from the personal negligence of Frank C. Van Horn or the negligence of his fellow servant." In support of the latter request, it is contended that "the evidence shows that the plaintiff's decedent assumed the risks of the service in which he was engaged, and which

resulted in the injury to him." The examination of these assignments necessarily involves something of a history of the employment of decedent and his connection with defendant's service.

Decedent's father, plaintiff herein, was engaged in the plumbing business in Lincoln. Defendant was a wholesale dealer, among other things, in plumbing supplies. The decedent was a locomotive fireman. Some time before the accident which resulted in his death, he abandoned his employment as a fireman and became engaged in his father's business, but not having sufficient knowledge of the plumber's trade he entered the employ of defendant, in order to familiarize himself with that line of work. There is sufficient evidence to sustain a finding by the jury that the employment upon which he entered was to learn to handle pipe-cutting machinery, how to run it, and to become familiar with the plumbing supply business, and for that purpose he accepted a much less compensation than he was able to earn at his former occupation; that he was unacquainted with the use of elevators. The elevator in defendant's place of business was what is known as a "freight elevator," the motive power of which was electricity, and was controlled exclusively by the person seeking to be taken up or down, there being no one assigned to that particular line of service. The decedent had used it during the short time of his employment with defendant, as occasion required, in passing to the upper and lower stories of the building. On the day of the accident the elevator became lodged or stuck between two of the floors, and decedent was sent up the shaft for the purpose of making the needed investigation and repairs, in order that the cage might be released. There was room between the floor of the cage and the next floor below in which timbers could have been placed across the opening, and all damage from a fall of the cage could have been obviated, but no such precaution was taken. The decedent went upon the cross-beam of the cage and, it is claimed, removed a ring or contrivance spoken of as a

"button," by which the upward movement of the cage was checked. It is said the purpose of this was to permit the cage to ascend to near the cross-beam at the upper end of the shaft, in order that the cage might be fastened to the cross-beam with a rope and thus prevent it from falling. The evidence on this point is not entirely clear. There is also sufficient evidence to justify a finding that Gilbert Cooper, the son of the president of defendant, was to some extent in charge of the business and employees of the house, and that the ascent of the decedent to the top of the shaft was by his permission, if not his direction. There was not sufficient light where decedent was at work, and he called for a light. Gilbert Cooper left decedent to procure a light, but was gone about 20 minutes, having stopped on his way to converse with some one, and before his return the cage fell, and the death of Van Horn was the result. The evidence upon the trial showed that the cable upon which the cage was suspended broke, or was cut off, at the drum upon which it was wound and un wound in raising and lowering the cage. From that fact, and perhaps other considerations, it is argued that the cable was too short. It also appears that the safety appliances were out of order, or not in place, and therefore there was nothing to impede the downward rush of the cage. It is very clear that for some reason they did not hold or check the fall of the cage.

From these and other evidentiary facts shown we conclude that the court did not err in refusing the two instructions asked, the giving of which would have been to hold that as matter of law there was "no testimony in the case which shows that the injury to plaintiff's decedent resulted from actionable negligence of the defendant," or that it was shown that the injury "resulted either from the personal negligence of Frank C. Van Horn or the negligence of his fellow servant Christensen, or it was accidental," or that in entering upon the service of defendant the decedent "assumed the risks" thereof. Under the evidence these questions were all for the consideration

of the jury, and not the court. There seems to be no evidence that defendant adopted any measures looking to the prevention of the fall of the cage or the safety of its employees. There was sufficient evidence of the want of care on its part to require the submission of the case to the jury. If there is any competent evidence from which a want of proper care can be reasonably inferred, the matter becomes a question of fact for solution by the trier of fact, which in this case was the jury.

It is insisted that the action of the court in the submission to the jury of the issues presented by the pleadings was erroneous, and in support of the contention the cases of *Murray v. Burd,* 65 Neb. 427, *Parkins v. Missouri P. R. Co.,* 4 Neb. (Unof.) 1, 13, and *Cornelius v. City Water Co.,* 84 Neb. 130, are cited. It must be conceded that the statement of the issues to be tried, as contained in the instructions, is more elaborate than can be commended. It is not claimed that the statements are unfair or that anything was omitted which should have been stated, and, indeed, no such claim could be sustained; but it is undoubtedly true that the instructions contain more of the allegations than were necessary to present the material issues to the jury. While declining to approve the instructions as a matter of practice, we are unable to say that they worked or could result in any prejudice to defendant, and for that reason they will not be held to require a reversal of the judgment on that account.

The brief of defendant, as well as the argument of counsel at the bar of this court, present quite a severe arraignment of the instructions. Quite a number of instructions were given, and when considered together, as they should be, we are unable to find any such prejudicial error in them as calls for the reversal of the judgment. It is true that all the defenses pleaded were not contained in any one instruction. This would have been difficult without resulting in confusion. The law of negligence as applicable to the various features of the case was fully given in the fourth, fifth and sixth instructions, and in the sec-

ond requested by defendant; that of the negligence of a fellow servant in the seventh and eighth; contributory negligence in the tenth; and the assumption of risks in the twelfth, and in the fourth requested by defendant. We are unable to detect any material error or misdirection in the instructions when considered as a whole, or failure to instruct upon any material issue involved in the case. It was shown that in the descent of the elevator it struck a platform or support at or near the bottom of the shaft; that one side of that platform gave way, while the other stood firm; that by such means the elevator was tilted at an angle of about 30 degrees; and it was argued that, from the position of the decedent when discovered immediately after the accident, the improper construction of the support had caused decedent to be thrown out, striking heavily, and thus receiving the fatal injury; and that the faulty construction of the support, its breaking down as above indicated, was the proximate cause of the severity of the injury received by decedent. By the fourth instruction the jury were told that if they believed from the evidence that the manner of the construction of the support was the proximate cause of the injury to the decedent, and that the defect of construction was not known, or was not apparent or in obvious view, they would be justified in finding defendant guilty of negligence; but if they believed from the evidence that the manner of construction of the support was not the proximate cause of the injury to decedent, or that the manner of its construction contributed to his protection upon the falling of the elevator rather than otherwise, they would be warranted in concluding that defendant was not guilty of negligence on that ground. This instruction is assailed upon the ground that there was no evidence that the construction of the framework of that support had anything to do with the injury of decedent. As to this, it must be sufficient to say that the facts of the condition of the support and the effect upon the cage of the elevator when striking it were shown, and it was for the jury to say

from the facts submitted whether the support was negligently constructed and such construction was the cause of the extent of the injury. The instruction was properly given.

As we have already intimated, there was sufficient evidence to sustain a finding that the decedent entered the service of defendant for a specific purpose and to engage in a specific employment. There is no doubt but that he assumed the ordinary risks of the service which he undertook to perform. The repair of the elevator was no part of that service. It must be apparent that the service which he was directed to perform in connection with the repair and release of the elevator, and of which his employer was informed he knew little or nothing, was much more hazardous than the work he was employed to do. The mere sending him to that work at the time his superior (for Gilbert Cooper was shown to be his superior) was informed of his want of knowledge was, under the circumstances, such an act on the part of his superior as from which the jury might infer negligence. Under any view of the case, as held in *Kotera v. American Smelting & Refining Co.*, 80 Neb. 648, "a servant has a right to assume that his master has used due diligence in providing reasonably safe appliances with which, and a reasonably safe place in which, the servant is to perform his duties, and does not assume the risk of danger arising from the master's negligence in that respect, unless the servant knows and realizes such risk of danger." Such has been practically the uniform holdings of this state and country.

As to the contention that the accident was the result of the negligence of a fellow servant, if we eliminate the question of the negligence of the master, there is still doubt as to any negligence on the part of the servant. That person was called by defendant as a witness, and he testified decedent was telling him what to do and was doing the work, which was, evidently, the conclusion of the witness, but no facts are stated which to any great

extent support the conclusion. When it is remembered that the master, in the person of Gilbert Cooper, was present giving directions until he went for the light, it must be apparent that his was the directing spirit, and his conduct and declarations at the time must, to some extent at least, have controlled the actions of both. There was enough shown from which the jury might find that he was guilty of a want of care. The law appears to be well settled that, if the injured servant was free from contributory negligence, the master would be liable where such injury was caused by the concurrent negligence of the master, or his vice-principal, and of a fellow servant. 26 Cyc. 1302, and cases cited in notes. The witness testified that he did not know if the "knob" or controller button had been removed prior to the accident, nor who removed it, if it were removed. He also testified to the efforts of the decedent to arrest the upward movement of the elevator, but that such efforts were unavailing. While the accident was a most unfortunate one, both for employer and employee, we are unable to discover any such error on the part of the court or jury as to require a reversal of the judgment.

The motion for a new trial was filed the 23d day of February, 1909. On the 2d day of April, following, defendant filed a supplemental motion for a new trial, based on newly discovered evidence. In support of this motion a number of affidavits were filed, to the effect that the next morning after the accident certain mechanics and machinists were employed by defendant to repair and restore the elevator to its former usefulness. By those affidavits it was sought to be shown that the cable was not broken or cut off at the drum, as shown upon the trial; that the cable had broken or "pulled in two at the point where it passes around the sheave or pulley on the top of the elevator"; that the witnesses measured the length of the cable and found it of sufficient length, not too short; that they loosened the ends of the cable at the point of attachment to the drum; that the power that operated the ele-

vator was sufficient, when in motion, to break the cable, and that the cable was in good condition; that an examination was made "for the purpose of discovering just how it happened that said elevator fell and what caused the fall thereof"; that they made such notes of what was found at the time as to the condition of the elevator, the cable, its size, and condition from wear and use, and that it was not materially weakened by wear or rust or broken strands. Without discussing the materiality or immateriality of this alleged newly discovered evidence, but for the purposes of the case conceding its materiality, it is yet clear that the showing was insufficient. The defendant was in the possession of the building, elevator and business continuously before and after the accident. It employed the mechanics to inspect and repair the elevator the next morning after the accident and death of Frank C. Van Horn. They came and made their investigation in the presence of both the Coopers. All that the mechanics discovered was known, or could have been known, to them on that morning. It is not reasonable to suppose they did not know. The interest one would naturally take in his own affairs of that magnitude forcibly suggests that they did know. The elevator had fallen the evening before. Not only had it been damaged, but the young man had been killed. The presence of the mechanics, when coupled with their mission there, would naturally suggest a solution of the problem as to the cause of the accident. They were all there together in the building. The elder Cooper was the president of the company and in charge of its affairs. Gilbert, the junior Cooper, had been in the employ of defendant for many years, was interested in its success, and had charge to a greater or less extent of the control of its business and employees. They *did* know all before the trial that they knew thereafter. The evidence was therefore not "newly discovered." It is claimed that they did not advise the attorneys representing defendant of the facts within their knowledge until after the trial.

This was either negligence or stupidity. We cannot assume that it was the latter, for both are men of long experience and good business capacity. The statute (code, secs. 314, 316) requires that the evidence, alleged to have been newly discovered, must be such that the party applying for the new trial "could not with reasonable diligence have discovered and produced at the trial." The evidence was "discovered," but there was no "reasonable diligence." The fact that they failed to communicate the facts within their knowledge to defendant's attorneys cannot change the result. It is indispensable that the moving party should show diligence. 2 Thompson, Trials, sec. 2767. In *Matoushek v. Dutcher & Sons,* 67 Neb. 627, we held that, "to entitle a party to a new trial on the ground of newly discovered evidence, it is not enough that the evidence is material, and not cumulative, but it must further appear that the applicant for a new trial could not have discovered and produced such evidence at the trial." In *McNeal v. Hunter,* 72 Neb. 579, it was held that "a defendant will not be allowed a new trial on the ground of newly discovered evidence where it appears that such evidence was known at the beginning of the trial, and no seasonable effort was put forth to procure such evidence at the trial," etc. See, also, *People v. Williams,* 242 Ill. 197, annotated in 17 Am. & Eng. Ann. Cases, 313. The witnesses by whom it is alleged the facts set forth in the affidavits were known reside within the city of Lincoln, and have so resided during the whole time intervening between the accident and the trial. We can find no abuse of discretion on the part of the court in this feature of the cause.

We discover no prejudicial or reversible error on the part of the district court. The judgment is therefore

AFFIRMED.

SADIE A. BAILEY, APPELLEE, V. JOHN H. KLING, APPELLANT.

FILED MARCH 16, 1911. No. 16,345.

1. **Appeal:** STRIKING PORTION OF ANSWER: HARMLESS ERROR. The error, if any, of the district court in sustaining a motion to strike out portions of an answer will not require a reversal of a judgment, if, upon the trial, the subject involved in the stricken portions of the answer was gone into, and the issue submitted to the jury by appropriate instructions, and no prejudice resulted.
2. **Trial:** INSTRUCTIONS: CONSIDERED AS A WHOLE. In the examination and construction of instructions given to a trial jury, they must be considered as a whole, and a defective one will not require a reversal of a judgment where the defect is cured by another instruction given.
3. **Appeal:** HARMLESS ERRORS. Insignificant errors committed upon a trial, but none of which are so prejudicial as to require the reversal of a judgment, will not be considered on appeal.
4. ———: EXCESSIVE VERDICT: REMITTITUR. "Where it appears that a judgment is based on a verdict which is excessive, though not given under the influence of passion or prejudice, it may be permitted to stand, even in actions *ex delicto*, on condition that the excess be remitted." *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713.
5. **Damages** *held* to be excessive, and plaintiff allowed to file a remittitur.

APPEAL from the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed on condition.*

*A. H. Byrum*, for appellant.

*W. C. Dorsey* and *Bernard McNeny, contra.*

REESE, C. J.

This action is for slander. The petition is in the usual form, and alleges the use of language by defendant to plaintiff, in the presence and hearing of others, by which defendant is accused of charging plaintiff, who is unmarried, with being a lewd woman. The style of language

alleged to have been used is in the most rough and ungentlemanly form, but which we do not deem it necessary to repeat here. The charge is alleged to have connected plaintiff's lewdness with a "traveling" married man by the name of Glick.

Defendant filed an amended answer to plaintiff's petition, which consisted of: First, a general denial. Second, alleging that defendant was engaged in the merchandise business; that plaintiff was in his service as a saleswoman in his store; that they had a conversation in which defendant remonstrated with plaintiff as to her relations with the "traveling man," above named, plaintiff being warned against him and of being in his company alone and after night; that his warning was resented by plaintiff, but that he cautioned her that if she persisted in being in company of said person alone and in the night-time people would be justified in believing her to be a woman of immoral character; that defendant believed in the truth of what he had heard, and that all he meant and stated he meant was that her conduct and the reports about her would injure her standing in the community and her usefulness as a saleswoman in his employ and in their business relations; that what he said was without malice and for good and justifiable purposes. Third, on account of their relations as employer and employee, defendant felt an interest in the conduct and character of plaintiff in so far as her reputation was concerned, that an injury to her reputation would affect his business adversely should she remain in his employ, and that his admonition to her was a privileged communication. Fourth, that what he did say in said conversation was true.

Plaintiff moved to strike out the second and third paragraphs of the answer. No reason for striking out those paragraphs is assigned in the motion, and, so far as the record is concerned, we are left wholly to conjecture as to the reasons therefor. The motion was sustained and the paragraphs were stricken out, to which defendant excepted, and the ruling is now assigned for error. The

contention scarcely merits consideration here, as the order appears to have been practically ignored during the progress of the trial. All that could reasonably have been shown under the averments as they stood before the order was made was presented by the evidence. Defendant was permitted to testify to the relation between him and plaintiff as employer and employee, what he said to her, and his motive for so doing. The whole matter, as contended for by him, appears to have been given in evidence. By the instructions of the court the subject of the existence of mitigating circumstances was submitted to the jury. The error, if any, was cured, and no prejudice resulted.

Instruction numbered 4, given by the court, is quite severely criticised, and, if considered as standing alone, we should hesitate to approve it, for it practically instructed the jury that, if they found that defendant spoke the words as charged in the petition, unless he proved by a preponderance of the evidence all that was necessary to show, that plaintiff was what she was alleged to have been charged with being, she was entitled to recover; thus eliminating all consideration of mitigating circumstances from the instruction. However, in the next instruction the plaintiff's right to recover is made to depend on the absence of mitigating circumstances. The instructions, when considered together, are sufficient. There appears to be a number of more or less insignificant errors shown by the record, but none so prejudicial as to require the reversal of the judgment *in toto*.

It was contended that the verdict and judgment is excessive. We have examined the evidence as contained in the bill of exceptions with care, and reluctantly arrive at the conclusion that such is the fact. In all such cases this court has not hesitated to investigate this question in actions *ex delicto* as well as *ex contractu*, including cases of slander and of libel, and, when verdicts have been found to be excessive, have required remittiturs to be entered as a condition of affirmance, and, where it has been found

that there was no excess, the judgments have been affirmed. *Brooks v. Dutcher,* 22 Neb. 644; *Herzog v. Campbell,* 47 Neb. 370; *Bee Publishing Co v. World Publishing Co.,* 59 Neb. 713; *Bee Publishing Co. v. Shields,* 68 Neb. 750; *Bloomfield v. Pinn,* 84 Neb. 472.

The evidence as to the use of the language attributed to defendant is conflicting; but in the examination of this question we must assume from the verdict that defendant made use of the charges made to and against the plaintiff as to her chastity substantially as alleged in the petition and testified to by her and two other witnesses. There can be no doubt that the language so attributed to defendant was coarse and profane, showing him to be destitute of the finer sensibilities which characterize a true gentleman. Aside from the charges against plaintiff, the accompanying profanity, which he shows by his testimony he is in the habit of using, does not commend him to the respect of a jury of right-minded people. Therefore his conduct does not appeal to any great extent in his behalf. The right of recovery in such cases is not founded upon the idea of smart money, vindictive or punitive damages as a punishment to the wrong-doer, for such damages are not allowed in this state. The only damages which are recoverable are such as are compensatory—that which will compensate a plaintiff for the injury inflicted. This rule must be applied to each case as it may be presented. In all cases the charge is presumed to be false. Where the language is actionable *per se,* the law presumes a damage to the reputation and standing of the person slandered. In such cases the effect upon the mind of the person slandered is an element of damages. A slander of the kind here charged, if uttered against a lady of known virtue, of modesty and of correct lines of thought and life, never indulging in word or act against which any just criticism could be made, or which could shock the sensibilities of the most cultured and refined people, and upon whom such charge would have an injurious effect, would entitle her to a much heavier recov-

ery than one who would, herself, indulge in lascivious thoughts and conversations and improper acts and conduct regardless of the opinions or approval of correct-thinking people. It appears from the evidence in this case that plaintiff associated and consorted with a married man, alone, late at night; that at the time of the conversation during which the objectionable language was used plaintiff had expressed a purpose to go to St. Joseph, Missouri, when defendant suggested in no polite language that she was going with the man referred to, whom he denounced as a g—d d—d whore-master, when she responded, "That is what he is," and this was immediately followed by the alleged slanderous charge; that at a time previous to this she had informed defendant that the man referred to was keeping a prostitute at the city of Alma. She therefore knew the character of the man with whom it was alleged that she was consorting. Immediately upon the making of the charge against her by defendant, she went to a telephone to call the man whom both she and defendant had accused of being a libertine; but, failing to find him, caused him to be "hunted up," when she telephoned him of her trouble and desired him to come to her, the call for him being in connection with the conversation which had just before that time been held, and he returned to her. This action was soon thereafter instituted. The slanderous charge was made on Monday morning. The next Saturday morning plaintiff went to the store of defendant, called him into another room, where they were in privacy. We here copy the conversation which followed, as testified to by defendant and not denied by plaintiff. Defendant testified that, when they went into the room, "I pulled the curtain, and she asked me, she says: 'Why didn't you come up yesterday evening, as you agreed to come?' I said to her, 'Sadie, I didn't care to come; I told you when I left you that if I came to see you it would be in bright daylight, so people could see me.' Then she said: 'What are you going to do about this matter?' I said: 'What?' She said: 'What are you

going to do?' I said: 'What do you want?' She said: 'I want $1,000, I have got to give Glick $500 of that money.' " This testimony as to her having to give Glick half of the $1,000 is corroborated by the testimony of Harry Kling, a son of defendant, who was near by, but outside the door, who heard her make the statement. No part of this is denied by plaintiff. The man Glick was the only witness called in rebuttal. He testified that he was a traveling man and his home was in Atchison, Kansas; that he first became acquainted with plaintiff on the 28th day of December, 1907; that on the 2d day of August, 1908 (which was Sunday afternoon, the day previous to the speaking of the slanderous words), he called upon plaintiff "in regard to explaining to her where she could secure a position, in Almena, Kansas"; that he remained there "until the church bells began to ring for evening meeting," but was not alone with her at any time during his stay, which was at the home of Mrs. Sheck; that he had never called there before, and that Mrs. Sheck's daughters were present during his stay. Nothing further was asked of him as to his relations with plaintiff, or his demand or expectation of receiving any portion of the money plaintiff might recover. Plaintiff was not called upon to refute the testimony of defendant or his witnesses. The evidence that she had told defendant that Glick had a prostitute in the city of Alma, and that she was to give Glick $500 of the $1,000 she demanded upon compromise of her claim, must be taken as admitted. We do not overlook the fact that her mother is deceased; that her father resides at Stroud, Oklahoma; that she has been bereft of a mother's care and has had a struggle in life, laboring for her own education and support as testified to by her, although her age is not shown. The case is in some respects similar to that of *Brooks v. Dutcher, supra,* where a verdict of $3,000 was deemed excessive. We are persuaded that the same is true in this case, and that a judgment for $2,000 would be ample compensation for the damage sustained by plaintiff.

The judgment of the district court will be reversed and remanded for further proceedings, unless plaintiff file a remittitur in this court of $1,000 from the judgment. In case such remittitur is filed, the judgment of the district court for $2,000 will be affirmed, the costs in this court to be equally divided between the parties, each paying one-half thereof.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting.

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CARRIE NEWELL, APPELLEE, V. ANDRUS J. NEWELL, APPELLANT.

FILED MARCH 16, 1911. No. 16,352.

1. Appearance: JURISDICTION. A general appearance in a cause by a defendant confers jurisdiction over him in the action where the appearance is made, without reference to whether jurisdiction was obtained by process or not.
2. Trial: STRIKING ANSWER: JURISDICTION. The striking of defendant's answer to the merits from the files of the cause does not oust the court of jurisdiction over him.
3. Judgment: VALIDITY: STRIKING ANSWER. While the striking of an answer from the files in a suit for divorce and alimony, because of the failure of a defendant to pay required alimony and suit money, is erroneous and would be reversed on appeal after judgment, the decree is not void. The law prescribes a method for the correction of such errors, and its provisions should be followed if a review is desired.
4. Divorce: DECREE: REVIEW. Where a decree, even if erroneous, is rendered granting both a divorce and alimony to the wife, the husband will not be permitted to assail and strike out the provision for alimony alone, leaving that part of the decree for divorce stand. His remedy is by appeal from the final decree.

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

*Shotwell & Shotwell,* for appellant.

REESE, C. J.

This was an action for divorce and alimony. Defendant appeared generally, first, by application for extension of time in which to answer, and, second, by filing an answer to the merits. Upon application by plaintiff, defendant was ordered to pay certain sums of money for temporary alimony, suit money and attorney's fees. This he failed to do, and, upon motion, the court ordered his answer to be stricken from the files. That order was erroneous. *McNamara v. McNamara,* 86 Neb. 631. No exception was taken to the decision, and no appeal was taken from the final decree of divorce and alimony, which was subsequently rendered. The cause was tried, and on January 17, 1908, the court filed a memorandum of the decree granting the divorce and ordering the payment of $1,000 alimony. On the 14th day of January, 1909, defendant filed his motion "to strike and dismiss and vacate from the decree * * * the judgment for permanent alimony," for the reasons that (1) service was had upon defendant by publication; (2) no personal service of summons was had upon defendant; (3) defendant was not permitted to be heard in defense of such judgment; (4) the judgment for permanent alimony was rendered without giving defendant the right and opportunity to be heard in defense; (5) defendant's answer being arbitrarily and without just cause stricken from the files, his personal appearance was stricken from the record with it; (6) defendant's attorney having withdrawn from the case, there was no appearance in his behalf; (7) the decree for permanent alimony is void and rendered against defendant without due process of law. This motion was not presented to the court until the 3d day of March, 1909, when it was overruled, to which defendant excepted, and brings that ruling to this court by appeal. No brief, argument or other appearance is made by plaintiff in this court, and the cause is submitted upon the brief of defendant, the appellant.

It is contended by defendant that the striking of his answer from the files divested the court of all jurisdiction over him, and that its future decree is void for want of such jurisdiction. This contention is based largely upon the alleged fact that jurisdiction was obtained by publication. We need not inquire here whether the jurisdiction was obtained in the first instance by publication or personal service, as the general appearance made perfect that jurisdiction, without reference to the service, or, indeed, if any service was had. As we have seen, the order striking the answer from the files was erroneous, and the decree could have been reviewed and the error corrected by appeal. So far as is shown by the record then made, that action of the court was entirely satisfactory to defendant. By failing to appeal he lost his right to have that order reviewed. The motion to strike out a part only of a decree, leaving the divorce stand, cannot be treated as a motion for a new trial, for that seems not to have been desired. The appeal from the overruling of the motion cannot have the effect of bringing up the whole case for review. The law provides a method for the correction of errors, and the proceeding here adopted does not comply with any of its provisions.

The order of the district court overruling defendant's motion cannot be reviewed, and the appeal is dismissed at defendant's costs.

DISMISSED.

LETTON, J., not sitting.

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LUCY BELLE RYE, APPELLEE, V. NEW YORK LIFE INSURANCE COMPANY, APPELLANT.

FILED MARCH 16, 1911. No. 16,331.

1. Appeal: ERROR IN TRANSCRIPT. A clerical or typographical error in a transcript brought here on appeal from the district court, which is clearly shown to be such, will not deprive the parties of a hearing of the appeal upon its merits.

2. Insurance Contract: ENFORCEMENT. Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made.

3. ———: ———: NONPAYMENT OF PREMIUMS. Terms of the life insurance contract in question stated in the opinion, and *held* that, the assured having borrowed from the company the full amount of reserve accredited to the policy shortly before his death, there was no fund in the hands of the company to pay for continued insurance, and the assured having failed to pay his annual premium when due, and for more than 30 days thereafter, the policy could not be enforced.

4. ———: LOCAL CONTRACTS: LAWS OF FOREIGN STATES. "Insurance business transacted in this state by a New York insurance company without any provision that the New York laws shall govern is not subject to the provisions of the New York statute requiring a notice to be mailed to the policy holder in that state as a condition of forfeiture for nonpayment of premiums." *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866.

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

*A. W. Crites* and *J. H. McIntosh,* for appellant.

*A. M. Morrissey* and *A. G. Fisher, contra.*

BARNES, J.

Action by the beneficiary named in a life insurance policy to recover the sum named therein on account of the death of the assured. At the close of the evidence the district court directed the jury to return a verdict for the plaintiff, which was done. Judgment was rendered upon the verdict. The defendant excepted, and has brought the case here by appeal.

Plaintiff contended at the hearing that this court has no jurisdiction to consider the errors complained of because the record does not contain a true transcript of the pleadings on which the cause was tried in the district court.

It appears that in plaintiff's petition the date of the policy in question was alleged as of June 13, 1898. This was clearly a clerical or typographical error, as we shall presently see. When the defendant prepared its answer, that mistake was not noticed, and, following certain denials, it was stated therein: "It is true that on the 13th day of June, 1898, the defendant insured the life of said Henry H. Rye for the benefit of the plaintiff, and the defendant alleges that said insurance was evidenced by policy No. 958,680, and that the consideration therefor was the sum of $290.70, the receipt of which was acknowledged by the terms of said policy, and the payment of a like sum on the 13th day of June in every year during the continuance of said policy until 20 full years' premiums should be paid." When the transcript was filed in this court, it showed the date of the policy as June 13, 1899, instead of June 13, 1898. Such proceedings were subsequently had that the defendant was permitted to file a corrected transcript, which it has done, and therefore we proceed to determine the appeal upon its merits.

Plaintiff's next contention is that the defendant's assignments of error should not be considered because her action is based on a policy issued to the assured June 13, 1898, and not on the one contained in the bill of exceptions. In the face of the record this contention is absurd; and, if it were true, the judgment would have to be reversed, for the plaintiff produced no evidence showing or tending to show that the defendant ever issued any other policy on the life of the assured than the one contained in the record. That policy is numbered 958,680, and is shown by competent proof to be the only policy which he ever obtained from the defendant company. The record contains no evidence of the terms or conditions of any other policy, and we therefore conclude, as a matter of fact, that this action and the defense thereto are both based upon policy numbered 958,680, and none other.

This brings us to the consideration of the defendant's contention that the district court erred in directing the

jury to return a verdict for the plaintiff. It appears that on the 13th day of June, 1899, the defendant insured the life of Henry H. Rye, who was the plaintiff's former husband, by the policy contained in the record, and that plaintiff was named therein as his beneficiary; that the annual premiums which the assured agreed to pay fell due on the 13th of June each succeeding year thereafter to and including the year 1919; that the assured paid the annual premiums thereon to and including the one which fell due on the 13th day of June, 1905. This continued the policy in force to the 13th day of June, 1906, and for an additional 30 days thereafter, as provided by the terms of that instrument. It further appears, without question, that in the month of January, 1906, plaintiff and the assured borrowed of the defendant the entire amount of the reserve which had accrued and would accrue thereon up to the time of the payment of the next annual premium; that, when that payment became due, the assured failed, refused and neglected to pay the same at that time or within 30 days thereafter; that while in default of such payment, and on the 15th day of July, 1906, the assured was fatally injured, and that he died on the 25th day of that month. The policy in question provides: "If any premium or interest is not duly paid, and if there is any indebtedness to the company, this policy will be indorsed for such amount of paid-up insurance as any excess of the reserve held by the company over such indebtedness will purchase according to the company's present published table of single premiums, upon written request therefor within six months from the date to which premiums were duly paid. Such paid-up insurance shall be payable either if the insured shall die before the termination of the endowment period, or if the insured shall then be living; or, if no such request is made, an insurance equal to the net amount that would at that time be payable under this policy as a death claim, will automatically continue for as long a period of time as any excess of the reserve held by the company over such indebtedness will pay for

as a single premium for term insurance, according to the company's present published rates, and no longer; but, if such excess of reserve, applied as a single premium for term insurance, be more than sufficient to continue the insurance to the end of the endowment period, and if the insured survives that period, the remainder shall be paid in cash at the end of said period."

It is conceded that the plaintiff and the assured, in January, 1906, borrowed of the defendant the entire amount of the reserve accredited to their policy, and therefore when their default occurred, and their policy lapsed for nonpayment of premiums, there was no reserve fund in excess of their indebtedness with which to purchase additional insurance of any kind or continue the policy in force.

It is claimed, however, that at the death of the assured there was a surplus or profit to the credit of the policy, which continued it in force, and therefore the plaintiff was entitled to a judgment for the full amount named therein. The policy provides in express terms: "If the insured is living on the 13th day of June, 1919, which is the end of the twenty-year accumulation period of this policy, and if the premiums shall have been duly paid to that date, and not otherwise, the company will apportion to the insured his share of the accumulated profits." It appears that no surplus or profits could be ascertained or credited to this policy until the date of its maturity, which is the 13th day of June, 1919. Therefore plaintiff's claim to additional insurance upon this ground must fail.

Finally, it is plaintiff's contention that there could be no forfeiture of the policy until after notice of the company's intention to forfeit the same, and to support that contention a certified copy of the laws of the state of New York, passed in the year 1892, providing for such notice, was offered in evidence. The defendant, however, introduced in evidence that law as amended in 1898, which provides that such notice shall only apply to policies issued to persons residing in that state. The policy con-

tains no provision requiring such notice, but by its terms is automatically forfeited for nonpayment of premiums. The law invoked by the plaintiff having no extra-territorial force, this contention cannot be sustained. *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866.

It seems clear from the record that the policy lapsed on the 13th day of June, 1906, for the nonpayment of premiums; that when it lapsed there was an indebtedness to the company of $1,365; that the insurance benefits provided for in case of lapse were paid up or automatically continued insurance for such amount or time as the excess of the reserve at the time of the lapse over the indebtedness would purchase. The reserve at the time of lapse was $1,365, and precisely equaled the indebtedness of the assured to the company at that time. It appears from the record and the evidence, as it stood at the end of the trial, that there was no insurance on the life of the assured at the time of his death, and therefore the trial court erred in instructing the jury to return a verdict for the plaintiff. Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it must be enforced as made. *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452; *Swarts v. Siegel*, 54 C. C. A. 399; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

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FRED C. KOELLER, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MARCH 16, 1911. No. 16,341.

1. **Master and Servant: INJURY TO SERVANT: LIABILITY OF MASTER: RELEASE.** A railroad employee who has recovered a judgment in an action against the company in satisfaction of his damages for injuries caused by its negligence, and has received and accepted

the amount of his judgment, cannot recover benefits for such injury from the relief department of such corporation under an agreement of membership releasing the company from liability in case of such acceptance.

2. Cases Followed. *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44, *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, and *Clinton v. Chicago, B. & Q. R. Co.*, 60 Neb. 692, followed.

3. Case Distinguished. *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 786, distinguished.

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

*J. E. Kelby* and *Byron Clark*, for appellant.

*George W. Berge*, *contra.*

BARNES, J.

Action on a certificate issued to the plaintiff by the relief department of the Chicago, Burlington & Quincy Railway Company. It appears without dispute that the defendant maintains and conducts what is known as its "Voluntary Relief Department"; that the plaintiff, who was employed by the defendant in its railroad shops at Havelock, became a member of that department, and the certificate in question was issued to him on the 22d day of March, 1897; that he paid his dues and assessments thereon up to the date of his injury, which occurred while in defendant's service, and at that time he was a member of the department in good standing. By the certificate in question the defendant agreed, in case of sickness or injury, to pay the plaintiff 50 cents a day for 52 weeks and 25 cents a day thereafter during the continuance of his disability. A part of the plaintiff's agreement, which is contained in the certificate, reads as follows: "In case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any company associated therewith in the administration of their

relief departments. The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company, and all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and, further, in the event of the death of a member, no part of the death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent, of all claims against the relief department, as well as against the company and all other companies associated therewith as aforesaid, arising from or growing out of the death of the member, said releases having been duly executed by all who might legally assert such claims; and, further, if any suit shall be brought against the company, or any other company associated therewith as aforesaid, for damages arising from or growing out of the injury or death occurring to a member, the benefits otherwise payable and all obligations of the relief department and of the company created by the membership of such member in the relief fund shall thereupon be forfeited without any declaration or other act by the relief department or the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed."

On the 4th day of December, 1906, while working in the defendant's shops at Havelock, the plaintiff was struck upon the side of the head by the defendant's machinery, and by the wound inflicted thereby the sight of his right eye was permanently destroyed and he was permanently disabled. It further appears that the plaintiff brought suit against the defendant for the sum of $15,000 to recover for the injuries above described, and obtained a judgment in the federal court for the district of Nebraska against the defendant for the sum of $875; that the defendant paid the judgment and the costs of the action in full on the 7th day of June, 1907, which plaintiff accepted and received, and upon the following day commenced this

suit to recover the sum of $1,900 upon his benefit certificate above described. A trial resulted in a judgment for the plaintiff, and the defendant has appealed.

Defendant contends that, plaintiff having elected to sue for damages and having accepted the payment of his judgment obtained in that suit, the agreement contained in his certificate is a bar to his recovery in this action. On the other hand, plaintiff contends that his agreement is illegal and void as against public policy and is no defense to this action. The question of the validity of such contracts was before us the first time in *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645. There a member of the relief association agreed that, in consideration of the amounts paid by the company, the acceptance of benefits for injury or death should operate as a release and satisfaction of all claims for damages against the company arising from such injury or death which could be made by him or his legal representatives. He was killed in an accident upon the railroad. The beneficiary named was his widow, who accepted the benefit, and by an instrument in writing received it in full satisfaction and discharge of all claims or demands on account or arising from the death of said member. Subsequently, as administratrix, she brought suit for damages against the railroad company on behalf of herself and children. It was held that the deceased's conduct would not of itself waive a right of action; that neither the contract nor the acceptance of the money or release of liability by the widow operated to bar a right of action by the administratrix on behalf of the children; but that her voluntary acceptance of the benefit and release of the company did operate to bar any action for her own benefit. The question was again before us in *Chicago, B. & Q. R. Co. v. Bell,* 44 Neb. 44. In that case an employee of the railroad company, a member of a relief department, was injured through the negligence of the company. After his injury there was paid to him from funds of the relief department $60 on account of such injury. The employee accepted the

money, and then sued the railroad company for damages for negligently injuring him. It was held that he could not recover. In *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, it was held that such a contract did not lack consideration to support it; that the promise made by the employee to the relief department for the benefit of the railroad company was available to the latter as a cause of action or defense; that the contract was not contrary to public policy; that its effect did not enable the railroad company to exonerate itself by contract from liability for the negligence of itself or servants; that the employee did not waive his right of action against the railroad company, in case he should be injured by its negligence, by the execution of the contract; that it is not the execution of the contract that estops the injured employee, but his acceptance of moneys from the relief department on account of his injury after his cause of action against the railroad on account thereof arises. In *Clinton v. Chicago, B. & Q. R. Co.*, 60 Neb. 692, the precise question here presented was before the court, and it was held: "An employee of a railroad company who has accepted from it damages for injuries sustained cannot recover benefits for such injury from the relief department of such corporation under an agreement of membership releasing the company from liability in case of such acceptance." This rule was followed and approved in *Oyster v. Burlington Relief Department of Chicago, B. & Q. R. Co.*, 65 Neb. 789, and *Walters v. Chicago, B. & Q. R. Co.*, 74 Neb. 551. It thus appears that we are fully committed to the rule contended for by the defendant.

In support of plaintiff's contention, counsel cite *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 786, and argue that the opinion in that case declares the contract in question to be opposed to public policy, and in effect overrules our former decisions upon that question. We do not so understand that opinion. There the administratrix of a deceased employee of the Chicago, Burlington & Quincy Railroad Company, who was a member of its relief de-

partment, brought suit to recover damages under the statute for wrongfully or negligently causing the death of the employee. In the opinion upon rehearing it was held that the administratrix, who was the beneficiary of a deceased member, having received the benefit provided for in the certificate of membership, could not maintain an action to recover damage for herself caused by such death. It was further held that the receipt of such benefit would not bar her action as administratrix of the estate of the deceased for the benefit of her minor children. While the opinion states, by way of argument, that "the policy of our law is to furnish every citizen with speedy redress for any injury that he may receive in person or property, and a contract which essentially imposes a penalty upon seeking such redress is contrary to that policy," still the fact that the plaintiff had dismissed her action at law without prejudice and had not obtained or received any compensation by way of damages was the determining factor in that case. Again, it must be observed that all of our former decisions touching the question here presented were cited and approved by the writer of that opinion, excepting only the case of *Walters v. Chicago, B. & Q. R. Co., supra.*

Our attention is also directed to the case of *Miller v. Chicago, B. & Q. R. Co.,* 65 Fed. 305, 76 Fed. 439. In that case it was held by the federal court of Colorado that a contract like the one in question was void as against public policy, but the majority of the circuit court of appeals in affirming that judgment did so upon other grounds, and declared that the contract was not void as against public policy, and it appears that the affirmance was based on a failure to set forth the contract in the answer in such a manner as to make it a defense to the plaintiff's cause of action. In the case at bar that defect was eliminated by the answer and the evidence.

Finally, it appears that the plaintiff's contract does not deprive him of his action at law. It only requires him to make his election either to take the benefits pro-

vided by his certificate, or prosecute an action to recover all of the damages which are the result of his injury. Having made his election, there would seem to be no good reason why he should not be bound thereby. To hold otherwise requires us to overrule all of our former decisions on this question. We feel that we should not be called upon to adopt so radical a departure from our former views; and, if such contracts are to be declared void as against public policy, that declaration should come from the legislature, and not from the courts.

For the foregoing reasons, it seems clear that the district court erred in disregarding the provisions of the plaintiff's contract, and that upon the facts of this case the judgment should have been for the defendant. The judgment of the district court is therefore reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED.

LETTON, J., not sitting.

SEDGWICK, J., concurring.

This court was long ago fully committed to the holding that a receipt of all benefits provided for in the contract of the relief department of the defendant company is a complete bar to any action for damages arising from the same injury for which the relief was received, and also that a recovery at law and payment by the company of all damages caused by the injury complained of, and a receipt of such damages by the injured employee, is a complete bar to any claim upon the relief fund arising from the same injury. These holdings were put upon the ground of the express provision of the contract for relief benefits. Some of these decisions were cited in *Chicago, B. & Q. R. Co. v. Healy,* 76 Neb. 786, and it was there expressly said that it was not intended to overrule those former decisions. In the case last cited it was insisted by the company that the provision of the contract with the employee, "if any suit shall be brought against said

company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said relief department and of said company created by my membership in said relief fund, shall thereupon be forfeited," was to be construed literally and literally enforced. That was the question considered and decided in *Chicago, B. & Q. R. Co. v. Healy, supra.* In that case the plaintiff had brought a suit against the company for damages, but had dismissed the same without prejudice to a future action before final judgment, and it was thought that to enforce the foregoing provision of the contract under such circumstances would be enforcing a forfeiture in the nature of a penalty. This court had never gone so far as that, and so refused to enforce that provision of the contract with the construction contended for. It may be said that there is some reason for contracting on the part of the employee, that all damages that he has suffered on account of the injury having been paid by the company and received by him, the relief benefit provided for in the contract shall be considered to be thereby satisfied. This seems to be the idea of the recent legislation which provides that in case relief benefits have been paid and received by the employee that fact shall not be a bar to an action for the damages suffered, but such payments of relief benefits shall be considered as part payment of the damages suffered and may be offset in a suit to recover such damages. The force of our former decisions, from which we have refused to depart without action by the legislature, and in which it has been held that full payment and receipt of all damages will satisfy all claims upon the relief fund, has been much strengthened by the fact that the legislature, with full knowledge of these prior holdings, and while legislating upon the general subject, has refused to change the rule established by this court. Comp. St. 1909, ch. 21, secs. 4, 5. This rule, then, still remains and has application to this case, in which

the plaintiff has recovered judgment for damages suffered by reason of the injury, and has received full payment from the company. The reasoning, then, in *Chicago, B. & Q. R. Co. v. Healy, supra,* to the effect that a party cannot contract beforehand under penalty and forfeiture that he will not litigate a claim that may thereafter arise, must be considered as it was there intended. The intention was to so apply this ruling as to justify that holding that the mere commencement of an action for damages, which was dismissed without final judgment and without the receipt of any payment of damages by the plaintiff, would not work a forfeiture of claims upon the relief fund under their contract. If the rule which we have established that full payment and receipt by the plaintiff of a judgment recovered for damages will bar claims from the relief fund predicated upon the same injury is to be changed as unjust, it must be done by the legislature, and not by the court.

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JOHN LYNN, APPELLEE, V. OMAHA PACKING COMPANY, APPELLANT.

FILED MARCH 16, 1911. No. 16,291.

1. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISKS. Where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance.

2. ———: CONTRIBUTORY NEGLIGENCE. A servant, who has been induced by a master's promise to continue to work in an unsafe place, may do so without being guilty of contributory negligence and without assuming the risk of injury, so long as he may reasonably expect the master's promise to be kept, unless the danger is so obviously imminent and immediate that no reasonably prudent person would continue to work in that place. *Sapp v. Christie Bros.*, 79 Neb. 705.

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

*Greene, Breckenridge & Matters,* for appellant.

*Smyth, Smith & Schall, contra.*

LETTON, J.

In March, 1908, the plaintiff was in the employ of defendant in the hog-killing department of its packing house in South Omaha. In this department large numbers of men are employed. The evidence shows that after the hogs are killed the carcasses are taken from the vat in which they are scalded and suspended by the hind legs from a hook fastened to a grooved wheel which rolls upon an overhead track. During its progress along this track while thus suspended the carcass is cleaned, scraped, washed, and the entrails and head removed by different workmen, each of whom occupies a certain station and performs a certain assigned duty. The work is required to be rapidly performed, it being customary to kill and clean from 400 to 500 hogs an hour. One of the first operations after the hogs are scalded is to pass them through a scraping machine, where most of the hair is removed. From this machine the hog is rolled on a bench, where a man breaks or disjoints the neck bone and cuts the flesh and skin of the neck so that ordinarily thereafter the head is only attached by a small portion of flesh and skin. After a number of intermediate operations, the carcass in its progress reaches the tonguer, who stands in a pit about 3½ feet below the floor. This man cuts the head off and removes the tongue. The next men in line are the back shaver and belly shaver, and the next man beyond them is the man who removes the kidney fat from the inside of the hog. This is dropped into a large pan placed on the floor, about 4 feet wide by 8 or 9 feet long, and 8 or 9 inches high.

As the carcass travels along the rail, it passes over the center of this pan. Beyond this workman are the government inspectors, who stamp the carcass, and from them it passes directly into the cooling room. The plaintiff, Lynn, at the time of the accident occupied the position of belly shaver. After the hogs passed the tonguer, Lynn's duty was to scrape the remaining hair from the belly, and, if the tonguer had been unable to remove all the heads, to cut off the heads before the carcass reached the kidney fat cleaner. Ordinarily there was about 35 feet between the pit where the tonguer stood and the fat pan, and Lynn had all of this space in which to cut off the head while the hog was moving along the track. On the day of the accident, the man who had been regularly employed as "header," and whose duty it was to dislocate the necks and nearly behead the animals, was not working, and an inexperienced or inexpert man took his place. The result was that the number of heads which the tonguer was unable to remove as the hogs passed him was much increased, and it became necessary for Lynn to remove from 10 to 15 heads in the same space of time in which ordinarily he would be compelled to remove only one or two. The day before the accident the lard pan, under the direction of the foreman, had been moved in such a manner as to allow Lynn only about 10 feet in which to work, instead of 35, and shortening the time within which to remove the heads. On that day he told the foreman it was impossible to do the work in that space. The foreman replied: "Well, you can do it if you want to. There is space enough there." On that day few carcasses came down with the heads on.

Plaintiff testifies that on Saturday, the day of the accident, in the forenoon, there would be about one in 8 or 10 carcasses on which the head remained, but in the afternoon after the "header" was changed there were many more. He testifies as follows: "Q. Now, did you say anything to the foreman or did the foreman say anything to you about the removal of those heads? A. Well,

I was letting them go past, and he says, 'Get them off.' Q. He says what? A. I was shaving, letting them go past mostly, because of the small space. He says, 'Get them heads off, what you can of them.' Q. Was that in the forenoon or the afternoon? A. This was in the afternoon, about 3:30 I should say. Q. What did you say to him then when he told you that? A I told him I hadn't enough space to shave. Q. And what did he say then? A. 'Well,' he says, 'go ahead and do the best you can, I will fix that.' Q. Well, was the space in which you had to work increased or made larger that afternoon? A. No. Q. After he said that, did you continue to take off the heads of those that came down, or try to take them off? A. Yes, sir. Q. Did you receive any injury there that afternoon? A. Yes; I cut this left arm getting a head off. Q. Now, describe to the jury what you were doing at the time you received your injury. A. Well, I was shaving those bellies and cutting those heads off, all I could cut. The necks were not broken, and it was a very hard job to get a knife in between and cut a head off there because you had to stoop so low, and the pan was here. You couldn't step in the pan, that would be the limit, and I reached over this pan to cut the head off, that way (indicating), holding the head by the ear, this way, in this hand, and was cutting it, and my foot slipped and this knife came around with a swing and chopped these tendons off, cut them right across. Q. Now, at the time you received your injury, did you have hold of anything with your left hand? A. Had hold of the ear of the hog. Q. Had hold of the ear of the hog? What did you have in your right hand? A. The knife. Q. Now, where were you standing at that time with reference to this pan in which the lard was put? A. Well, reaching over the pan, holding the hog's head this way (indicating) to cut the head off. * * * Q. Tell the jury whether or not as you had hold of the ear of the hog at that time you were able to walk any farther south or follow the carcass any farther? A. I couldn't do it.

I couldn't go any farther. I had got to the limit. Q. Why couldn't you go any farther? A. I would step into the lard pan."

The witness also testified that. relying on the strength of the foreman's promise to attend to the arranging of the space, he continued in the work, although he knew it was dangerous on account of the lard pan being in the way. He also testifies that no definite promise was made as to the time when the working space would be restored, but that Moore said it would be done at the first opportunity; that this would be when the rail was stopped—that it might be in five minutes, or in an hour, or not until Monday. This testimony as to the manner of the operation, the complaint made by Lynn, and the promise by Moore is corroborated by other witnesses, and is not disputed; the defense introducing no testimony.

Defendant contends that the court should have instructed the jury to return a verdict in its favor. This contention is based upon the propositions that a servant engaged in a hazardous occupation assumes the risk of the injury to himself from all its obvious dangers, and that the bloody, slippery, greasy floor which was a necessary condition of the occupation caused plaintiff's foot to slip, and this was the proximate cause of the injury. If the evidence showed that the slippery condition of the floor alone and without the intervention of any other factor or element caused the plaintiff's foot to slip, and that this alone was the proximate cause of the injury, there might be ground for this contention, but the evidence convinces us that, while the slippery floor, no doubt, was one of the causes for the accident, it did not result from this condition alone. It was plainly expected of Lynn, and it was his duty, to make an effort to remove all the heads that he could. Carcasses were moving in front of him at the rate of seven or eight a minute, many of them with heads attached. He had only a space of about ten feet in which to work, his movements were necessarily made rapidly, he had no time to weigh and

consider the chances he might take by reaching a greater or a less distance over the lard pan to detach the head. He believed the condition was temporary, and was justified in relying upon the promise that the former space would be restored. The conditions were unusual for the reason that, on account of the incompetent and inexperienced "header," unheaded carcasses were coming in unusual and excessive numbers. We think the evidence required the submission of the question of defendant's negligence, and that the instruction was properly refused.

Complaint is made that the court erred in the statement of the issues and in its instructions concerning the issues. We believe it unnecessary to set forth the instructions verbatim. In substance, in addition to the usual instructions as to the burden of proof, preponderance of evidence, etc., the jury were told that, in order to recover, it was incumbent on the plaintiff to prove that the defendant was negligent in not providing him with a safe place to work; that he received the injuries complained of by reason of defendant's negligence in failing to remove the lard pan; and that this failure was the direct and proximate cause of the injury. They were also instructed that if they found that the space provided for plaintiff in which to perform his work was not reasonably sufficient to enable him to perform his work with reasonable safety, and that after he ascertained this fact he complained to the foreman, who promised that the space should be enlarged, and if they found that plaintiff continued to work in reliance upon this promise, then he was entitled to recover for any injury occurring by reason of the insufficient space or room in which to perform the work, unless they found that the danger was so open and obvious that an ordinary, careful, and prudent person would have refused to perform the same. They were further instructed that, even if the promise had been made, this alone would not make the defendant liable; that the evidence discloses that the plaintiff was working in a slippery, greasy place, and

among the risks which were inherent in his service was the risk that his feet might slip and slide in the grease and filth on the floor, and if they believed from the evidence that while in the act of beheading a hog the plaintiff slipped and lost his balance, and the slippery floor was the proximate cause of the injury, then the plaintiff was not entitled to recover, for the reason that he assumed the risk of the slippery floor. These instructions with the others given seem to present the issues fairly.

It is complained that the fifth instruction "does not submit the negligent insufficiency of the space as a question of fact, but it assumes that the space" was too small, and that the defendant was negligent. But the second instruction told the jury that it was incumbent on the plaintiff to prove that the defendant was negligent in not providing plaintiff with a safe place to work, and the fifth instruction in this respect is as follows: "You are instructed that if you believe from a preponderance of the evidence that on the day of the accident the space or room provided for the plaintiff in which to perform his work was not reasonably sufficient to enable him to perform his work with reasonable safety," etc. It will be seen that defendant's negligence was not assumed by the court, but whether negligence existed or not was left to be determined by the jury. The remainder of this instruction lays down the principle announced in *Sapp v. Christie Bros.*, 79 Neb. 701, 705. The syllabus to the latter opinion is: "A servant, who has been induced by a master's promise of repair to begin or continue to work with defective appliances, may use such defective appliances without being guilty of contributory negligence and without assuming the risk of injury from such defects, so long as he may reasonably expect the master's promise of repair to be kept, unless the danger from using such defective appliances is so obviously imminent and immediate that no reasonably prudent person would begin or continue to work with them."

Defendant contends that this principle is not applicable,

because in *Sapp v. Christie Bros., supra; Lee v. Smart,* 45 Neb. 318, and *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, the defect was not a matter in dispute; and, further, because the time in which Lynn expected the change to be made had not commenced to run. As to the first point, we are of opinion that the evidence clearly shows the curtailed space was insufficient, and the foreman virtually acknowledged this to be the fact by his promise to change. When we consider the work that was expected of plaintiff, his facilities for performing it, and the time and space allotted, we think the jury were justified in finding the place defective.

As to the second point, Lynn expected the change to be made as soon as convenient, and we think it clear that the time during which he continued in the employment after the promise was within a reasonable time for the promise to be made good. As he says, he did not expect the work of the gang to be stopped for him, but he did expect that the change would be made at the first convenient opportunity. It is unnecessary to consider the reasons for this principle. They may be found set forth in the extensive note to *Illinois Steel Co. v. Mann,* 40 L. R. A. 781 (170 Ill. 200); *Rice v. Eureka Paper Co.,* 174 N. Y. 385, 62 L. R. A. 611; *Swift v. O'Neill,* 187 Ill. 337; as well as in the opinions of this court above referred to. We think this case is within the rule.

The judgment of the district court is

AFFIRMED.

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GEORGE W. ABBOTT, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 16, 1911. No. 16,265.

1. Railroads: FIRES: EVIDENCE. In an action against a railway company for negligently causing or permitting fire to escape from its locomotives, evidence to the effect that the coal used therein

burned slowly and retained fire for a considerable length of time is relevant and material.

2. ———: ———: ———. In an action of that character, where the particular engine which caused the fire cannot be fully identified, evidence that about the time of the injury sparks and burning coals were frequently discharged from the defendant's engines while they were passing the plaintiff's property upon previous occasions is relevant and competent as tending to show habitual negligence and to make it probable that the plaintiff's injury proceeded from the same quarter; but, if the engine which emitted the fire is fully identified, evidence as to the condition or conduct of other engines is irrelevant and immaterial.

3. ———: ———: ———. In the trial of a case involving the alleged negligent setting out a fire by a railway company, if the charge is general and no attempt is made to compel the pleader to state the particular engine responsible for the fire, and no request is made to require the plaintiff to marshall his evidence so as to develop whether he depends upon proof that a particular engine or an engine which he cannot identify emitted the fire, the court may permit evidence to be received to show that about the time of the injury the defendant's engines while passing near the plaintiff's property frequently emitted sparks and coals of fire which lodged on or about said buildings, or so far distant from the railway track as that property was situated therefrom.

4. **Trial:** EVIDENCE: OBJECTIONS. In that event, an objection that no proper foundation has been laid for the introduction of the evidence is not sufficient to challenge the trial court's attention to the contention that the plaintiff has not introduced evidence tending to show that an unknown engine caused the fire.

5. **Railroads:** FIRES: EVIDENCE. "In an action for damages for negligently setting out a fire, the origin of the fire may be proved by circumstantial evidence." *Kearney County v. Chicago, B. & Q. R. Co.*, 76 Neb. 861.

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

*J. E. Kelby, F. E. Bishop* and *H. F. Rose*, for appellant.

*S. A. Holcomb* and *C. H. Holcomb, contra.*

ROOT, J.

This is an action to recover damages for the loss of a barn and several outbuildings destroyed by fire, which the plaintiff alleges was negligently kindled by the defendant. The plaintiff prevailed, and the defendant appeals.

There was no error in permitting the plaintiff to prove that Sheridan coal burns slowly and retains fire longer than bituminous coal. The testimony is undisputed that Sheridan coal is a lignite, and is used by the defendant in its locomotives on the division of the railway which includes the station of Broken Bow, where the plaintiff's property was located. These facts, while collateral, tend in some degree to sustain the plaintiff's contention that sparks emitted from the defendant's engine will retain fire while traversing a space equal to that intervening between the railway and the plaintiff's barn. *Blomgren v. Anderson,* 48 Neb. 240; *Farmers State Bank v. Yenney,* 73 Neb. 338; *Fitch v. Martin,* 84 Neb. 745; *Young v. Kinney,* 85 Neb. 131.

The assignment based upon the admission of testimony to the effect that about the time of the fire, and for some months prior thereto, the defendant's engines cast out sparks in the neighborhood of the plaintiff's barn, which were carried a distance equal to or greater than that intervening between said premises and the defendant's main track, presents a more serious question. The rule stated in 2 Shearman and Redfield, Negligence (5th ed.), sec. 675, appeals to us as reasonable: "And when the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon other occasions, at or about the time of the fire, before or after, is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same cause." If, however, the engine which emitted the fire is fully identified, then evi-

dence as to the condition of other engines, or that fire escaped therefrom, is irrelevant. In this case the pleader did not charge that any particular engine caused the fire, and no attempt was made by motion to compel him to make the petition more certain. Upon the trial the greater part of this evidence was received before the trial court was informed whether or not the fire was caused by a particular engine. Subsequently it appeared that, if one of the defendant's engines were responsible, it probably was a locomotive attached to an east-bound passenger train, No. 42, or an engine attached to a west-bound freight which left the station immediately after the passenger train departed eastward. No motion was made to compel the plaintiff to marshall his evidence so as to first introduce testimony tending to prove whether a known or an unknown engine caused the fire, nor was any motion made to strike out the testimony after it became evident that the freight engine was probably responsible for the conflagration. The defendant objected to this evidence for the alleged reason that a sufficient foundation had not been laid, but it does not appear that the objection was predicated upon the plaintiff's failure to testify that he did not know and could not prove that a particular engine set out the fire. For all the trial court was advised, counsel was assuming that the witness had not shown himself qualified to testify to the fact that the defendant's engines usually emitted sparks. Upon this theory the objection was properly overruled. We do not think that the trial court erred in receiving the evidence.

Since the verdict is for the plaintiff, we should consider the evidence in the light most favorable to him. The plaintiff's barn was south of the defendant's right of way, which extends east and west, and was 135 feet from the nearest track and about 200 feet from the main track. The fire was discovered about 2 o'clock P. M. About 1 o'clock Mrs. Abbott went to the barn to search for eggs, and she says no other person was in the building nor was there any fire therein at that time, and no one had occasion to

go there till after the fire. At 1:45 P. M. the defendant's freight train departed from the station. For some time prior thereto the engine had been used in the yards for local work, which would permit it to come within 135 feet of the barn, and a strong wind was blowing from the west and northwest. There were no doors or windows on the northern side of the barn, but the shingles were warped and loosened by the heat and prevailing drought, so that openings between them would easily admit sparks and cinders. The fire evidently was kindled in the haymow on the north side of the barn. All of these facts, considered in connection with the quality of coal consumed in the defendant's engines, and the further fact that there is no other reasonable explanation for the fire, tend to prove the plaintiff's contention. The defendant did not produce any member of either train crew, and we have no proof that the engines were carefully and prudently managed and controlled. There is therefore sufficient evidence to sustain the verdict. *Burlington & M. R. R. Co. v. Westover*, 4 Neb. 268; *Union P. R. Co. v. Keller*, 36 Neb. 189; *Rogers v. Kansas City & O. R. Co.*, 52 Neb. 86; *Kearney County v. Chicago, B. & Q. R. Co.*, 76 Neb. 861. The defendant's contention that the fire originated from another source was submitted to the jury, and their verdict is sustained by the evidence on this issue. The instructions are fair, the recovery is not excessive, and we find no error prejudicial to the defendant.

The judgment of the district court therefore is

AFFIRMED.

LETTON, J., not sitting.

WILLIAM P. CONN ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 16, 1911. No. 16,287.

1. **Railroads:** CONSTRUCTION OF ROADBED: LIABILITY. A railway company by acquiring a right of way also secures the right to construct and maintain a roadbed in a lawful and proper manner, and, if in so doing it does not unnecessarily or negligently injure its grantor or his successors in interest, it is not liable to them for injuries inflicted as an incident to that construction and maintenance.

2. **Waters:** CONSTRUCTION OF ROADBED: NEGLIGENCE. The mere fact that a railway roadbed interferes with surface water not flowing in any drain or watercourse will not sustain a finding of negligent construction in an action brought to recover damages for obstructing the flow of such water.

3. ———: ———: ———. In an action to recover damages for a railway company's alleged negligence in constructing its roadbed so as to interfere with the drainage of surface water, the jury should be instructed that if the roadbed did not obstruct the natural drains and watercourses through which accumulated surface water was wont to flow while the premises were in a state of nature, or if those drains were obstructed by the defendant, so long as it substituted an artificial way of equal capacity and efficiency, it was not negligent in constructing a solid, continuous roadbed for its railway.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

*J. E. Kelby* and *F. E. Bishop,* for appellant.

*Greene & Greene, contra.*

ROOT, J.

The plaintiffs allege that the defendant "negligently and carelessly threw up and built an embankment across said lands in such a manner as to deprive all of said lands to the east of said embankment of drainage facilities for surface waters which had theretofore been afforded by

the natural slope of said land southeast of the Nemaha river, and plaintiffs allege that defendant has negligently and carelessly maintained said embankments * * * to this time." No motion was filed to make the petition more definite and certain, and, under the general allegation of negligence, any evidence was relevant which tended to prove that the defendant had violated any duty it owed the plaintiffs with respect to the subject of the litigation. *Omaha & R. V. R. Co. v. Wright,* 49 Neb. 456; *Union P. R. Co. v. Vincent,* 58 Neb. 171. The defendant answered by way of a general denial, and pleaded that its embankment was properly and skilfully constructed with respect to the maintenance and operation of its railway "and also with regard to the drainage of surface and flood waters on the lands adjacent thereto, and that said railroad and embankment have remained in practically the same condition as constructed for more than ten years prior to July, 1907," etc. A general demurrer to this defense was sustained. Error is assigned, but not argued, with respect to this ruling, and it will not be further considered.

The evidence discloses that the plaintiffs' land is situated in the valley of the Nemaha river; that the defendant's railway is between the river and the plaintiffs' land, and is constructed upon an embankment elevated about four feet above the surface of the valley. The elevation of the land increases to the northward, and the general course of the surface water is south and southeast toward the river. A highway, also constructed upon an embankment, runs northwest and southeast immediately east of the plaintiffs' land. The evidence tends strongly to prove that before the railway was constructed a draw or ravine extended from the Nemaha northwestward to a point within the defendant's right of way and close to the southeast corner of the land described in the petition, and that it furnished a way for surface water which accumulated thereon. The evidence also tends to prove that the defendant constructed its grade across

this draw and provided no opening for the escape of water, but constructed a shallow ditch within its right of way north of and parallel to its railway eastward, and that the water thereby deflected eastward eventually flowed into a natural watercourse. At the point where the highway crosses the right of way there is a small culvert. The evidence tends to prove that this ditch, at the time of the alleged injuries, was choked by vegetation, and the culvert was insufficient to afford a way for the waters, but we find no allegation in the petition charging any neglect of duty concerning this ditch or the culvert.

In the sixth paragraph of its charge, the court informed the jury: "If you believe from the evidence that the defendant railroad company, in the construction of its roadbed across the land described in plaintiff's petition, failed to provide for the passage and discharge of such waters as naturally flowed across such roadbed, or which might be reasonably expected to so flow, and that defendant's said roadbed is so constructed as to dam the water and cause it to flow back over said land, and that plaintiff's growing corn was injured because of the negligent construction of its said embankment, then said defendant would be liable for such damages. * * * If, on the other hand, you believe from the evidence that injury to plaintiffs' crops * * * was not caused by the embankment upon defendant's right of way, or that said embankment was not negligently constructed, or that said embankment did not obstruct the natural flow of surface water, * * * then the plaintiffs would not be entitled to recover in this action."

The defendant's argument principally concerns its contention that the damages now sued for were within the contemplation of the parties at the time it acquired its right of way, that such damages were released by the conveyance or proceedings whereby that right was secured, and that, in any event, it has acquired by prescription the right to maintain the roadbed in its present condition.

The giving of the sixth instruction is also assigned as error, and the assignment is briefly argued. The plaintiffs contend that any interference by the defendant with the movement of surface waters, whereby their crops were injured, creates a liability on its part, and that the cause of action arose at the time of the injury.

In *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406, the general proposition that the common law rule with respect to the right of a proprietor to control surface water is announced. In that case the plaintiff alleged, but did not prove, that the railway embankment was negligently constructed, and it is said, in effect, that the fact that the defendant's embankment obstructed the passage of water which overflowed the plaintiff's land did not prove negligence. In *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897, it is held that every proprietor may improve his property by doing whatever is reasonably necessary for that purpose, and will not become answerable so long as he is not guilty of negligence. In that case the proprietor was negligent in leaving a depression in his lot and so situated that surface waters which accumulated therein percolated through the soil into a vault, and thence into his neighbor's ice house, and the lot owner was held liable for damages. In *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526, the common law rule is recognized, but tempered by an application of the doctrine that one should so use his own property as not to unnecessarily and negligently injure another, and, because a natural drain had been obstructed by the defendant, it was held liable for damages. In *City of Beatrice v. Leary*, 45 Neb. 149, the defendant had interfered with a natural outlet for accumulated surface waters and was held liable. In *Jacobson v. Van Boening*, 48 Neb. 80, the principle is again announced.

Subsequently, in a long line of decisions, unnecessary to cite, this court say that a proprietor may improve his premises in any proper manner, although he may thereby interfere with diffused surface water, without becoming

liable to his neighbor, provided he does not unnecessarily or negligently injure him. Of course, he has no right to gather surface water together and pour it, out of the natural course of drainage, upon his neighbor's premises. Nor, if surface water has reached a natural drain, whether a stream, ravine or draw, has the one proprietor a right to dam the way and change the course of the water so as to cause it to flow back upon or over another proprietor's premises. *Chicago, R. I. & P. R. Co. v. Shaw,* 63 Neb. 380. The defendant is not situated with respect to adjoining or nearby owners as would a person be who is not engaged in the business of a common carrier. The carrier's first duty is to the public; it must so construct and maintain a roadbed that it may safely transport the freight and passengers entrusted to its care. If in that construction it takes or damages the property of any person, it must pay just compensation therefor, and when that payment has been made, there should be no question of the carrier's right to enjoy the privilege for which it has paid. If no part of the citizen's property has been taken, but by reason of the construction or operation of the railway his property is injured, he may recover in an action therefor. In the absence of a grant binding all persons affected and to be affected thereby, this court does not recognize the right of a railway company to obstruct the channel of a natural watercourse or drain, but has said that a continuing duty is imposed upon the carrier to permit the water to flow therein as it did in a state of nature, or to provide another adequate way therefor. And, in case of a failure to perform that duty, the injured person's cause of action arises at the time of the injury. *Morse v. Chicago, B. & Q. R. Co.,* 81 Neb. 745.

But this court has not said that, because a railway company constructs a roadbed so that it will interfere with the flow of diffused surface water under ordinary conditions, it is negligent, or that thereby it unnecessarily injures the coterminous proprietor. Should the company pierce its roadbed and install culverts at points where water did

not in a state of nature accumulate and flow in a body, the lower proprietor would have his cause of action against the company for gathering surface water together and pouring it in a quantity upon his land. The evidence does not clearly establish the defendant's liability, so that it has just cause to complain of instructions that permit a recovery on other than lawful grounds. Instruction numbered 6, it seems to us, permits a recovery for conditions which the defendant had a right to bring about when it acquired its right of way, and that, considering the petition and the proof, the giving of that instruction is prejudicial error.

We think that the court should have given instruction numbered 5, requested by the defendant. Instruction numbered 5, given by the court on its own motion, is not an incorrect definition of negligence considered as an abstract proposition, but it may have misled the jury. "A reasonable man. guided by those considerations which ordinarily regulate the conduct of human affairs," might be ignorant of the first principles controlling railway engineering and construction, and might conclude that a free way for surface water, rather than the permanence of a roadbed, should be the controlling factor in the construction and maintenance of a railway. The jury should have been told that, in so far as the roadbed interfered with the flow of diffused surface water, it did not invade the plaintiffs' rights and no recovery could be based thereon, and that so long as the carrier did not obstruct the natural drains and watercourses through which the surface water complained of would flow, were the land in the state of nature, or if those drains are obstructed by the defendant, so long as it furnished a sufficient substitute therefor, it was not negligent in constructing a solid continuous roadbed for its railway.

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

REVERSED.

FAWCETT, J., not sitting.

JOHN F. REAMS, APPELLANT, V. ALBERT W. SINCLAIR, APPELLEE.

FILED MARCH 16, 1911. No. 16,346.

1. **Ejectment:** EVIDENCE: SUFFICIENCY. As a general proposition, the plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversary's.

2. **Courts:** JURISDICTION. The courts of Illinois have no authority by partition proceedings to transfer title to real estate in Nebraska.

3. **Estoppel:** RECITALS IN DEED. The recitals in a master's deed which purports to convey title to real estate in Nebraska, but executed in a suit prosecuted in the circuit court of Illinois, are not competent proof, against a stranger to the record and not in privity therewith, of the death of a person whose lands are sought to be conveyed thereby, or of any fact that might estop the legal representatives of such deceased person from asserting title to the land.

4. **Ejectment:** EVIDENCE: SUFFICIENCY. A plaintiff in ejectment, who has not established a *prima facie* right to the possession of the premises, is in no position to urge that the defendant is a trespasser.

APPEAL from the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*A. H. Byrum* and *G. J. Marshall*, for appellant.

*H. W. Short* and *W. C. Dorsey, contra.*

ROOT, J.

This is an action in ejectment. From a judgment rendered upon a directed verdict in the defendant's favor, the plaintiff appeals.

The petition contains the ordinary allegations with respect to the plaintiff's title and the defendant's wrongful possession. The answer is a general denial. The plaintiff by documentary evidence traced title from the

United States to Fred Smith. Over the defendant's objections the plaintiff introduced in evidence the record of a deed executed by W. R. Curren, master in chancery, in and for Tazewell county, Illinois, which purports to convey title to the plaintiff's grantor. There are recitals in this instrument to the effect that it was made in chancery proceedings pending in the circuit court of Tazewell county, in an action wherein Deitrich C. Smith, Habbe Velde, Luppe Luppen, as surviving partners of T. & H. Smith & Company and of the firm of Pekin Plow Company, and Carrie Smith, Susan Velde and Catherine Luppen were complainants, and Louise Smith, as surviving wife and administratrix of the estate of Frederick C. Smith, deceased, and others were defendants, and that in said proceedings definitely described tracts of land in Illinois, South Dakota and Nebraska were ordered sold by the master, etc.

The tract involved in this action contains 80 acres, of which 50 acres are cultivated; all of it is rough, and the defendant occupied it for about two years preceding the commencement of the action. Six months' written notice to quit was served upon the defendant before this action was commenced. There is no proof of the circumstances under which the defendant secured possession of the land, whether under a claim of right or by force of arms, nor to show whether Fred Smith, or any person by his authority, at any time occupied the premises. There is no proof other than the recitals in the master's deed that Fred Smith is dead, nor is there a scintilla of evidence that T. & H. Smith & Company or the Pekin Plow Company at any time had any interest in the land, or that Fred Smith held title thereto for these partnerships or either of them. Under these circumstances did the court err in directing a verdict for the defendant? The cause is submitted on the theory that the proceedings in Illinois were in partition. Upon that hypothesis the decree of the Illinois circuit court could not in itself affect the title to land in Nebraska.

In *Schick v. Whitcomb,* 68 Neb. 784, we held that partition proceedings are *in rem,* and that the courts of one state have no jurisdiction to partition lands lying within the boundaries of another. See, also, *Cartwright v. Pettus,* 2 Ch. Cas. (Eng.) 214, 22 Eng. Rep. (Reprint) 916; *Wimer v. Wimer,* 82 Va. 890; *Pillow v. Southwest Virginia Improvement Co.,* 92 Va. 144; *Farmers Loan & Trust Co. v. Postal Telegraph Co.,* 55 Conn. 334. If the suit in Illinois were prosecuted to distribute the assets of a partnership dissolved by the death of a partner, as seems possible from the recitals in the deed, and if Fred Smith held title to this land for the benefit of the firm, the legal effect of a decree rendered by a court having jurisdiction of all persons interested in the firm and of the legal representatives of Fred Smith, if he is dead, would be entirely different from that of a decree rendered in ordinary partition proceedings.

In the instant case there is no proof that any part of the consideration for the master's deed was paid to any heir, devisee or other legal representative of Fred Smith, nor were any circumstances brought to the district court's attention tending to prove that, by reason of the conduct of the owners of the land, they parted with their interest therein. It is not made to appear that the defendant holds under Fred Smith or his successors in interest. For all the record discloses, he may hold under a tax deed. In that event his title would flow direct from the state, independent of all estates theretofore vested in any person. In the condition of the record, the recitals in the master's deed did not bind the defendant. *Costello v. Burke,* 63 Ia. 361; *Miller v. Miller,* 63 Ia. 387. Since the plaintiff did not prove a *prima facie* title to the land or the right to the possession thereof, he is not in position to invoke the rule that any title is sufficient as against a mere trespasser. *Hammond v. Shepard,* 186 Ill. 235; *DeLand v. Dixon Power & Lighting Co.,* 225 Ill. 212. We find nothing in this record to take the case out of the general rule that the plaintiff in ejectment must prevail, if at all,

upon the strength of his own title, and not upon the weakness of his adversary's.

The judgment of the district court therefore is

AFFIRMED.

LETTON, J. not sitting.

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LEE CARD, APPELLANT, V. ROSALLIE J. MIX ET AL., APPELLEES.

FILED MARCH 16, 1911. No. 16,284.

Appeal: QUESTIONS OF FACT: REVIEW. Where material and relevant deeds introduced in evidence by plaintiff in a suit to quiet title are omitted from his bill of exceptions, the facts will not be considered on appeal for the purpose of passing on his assignments of error.

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

*Lee Card, pro se.*

*A. W. Crites, contra.*

ROSE, J.

This is a suit to quiet in plaintiff the title to two 80-acre tracts of land in Dawes county. The title to one tract was quieted in William M. Mix, defendant. The undivided three-fourths interest in the other tract was quieted in plaintiff, and the undivided one-fourth in Rosallie J. Mix, defendant. Plaintiff appeals.

A determination of the questions presented by plaintiff in seeking a reversal would require an examination of the facts disclosed by the evidence. The bill of exceptions shows on its face that a number of important deeds introduced in evidence by plaintiff have been omitted there-

from. These missing documents were both material and relevant, and without an examination thereof it cannot be said they do not contain recitals justifying the findings of the trial court. They cannot be examined because they are not in the bill of exceptions. Since the evidence on which the trial court acted is not all here, questions of fact cannot be examined for the purpose of passing on plaintiff's assignments of error. *Nelson v. Jenkins,* 42 Neb. 133; *Alling v. Fisher,* 55 Neb. 239; *Girard Trust Co. v. Paddock, ante,* p. 359.

AFFIRMED.

LETTON, J., not sitting.

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F. J. GENTRY, GUARDIAN, APPELLANT, V. SARAH A. BEARSS ET AL., APPELLEES.

FILED MARCH 16, 1911. No. 16,336.

**Election of Remedies: PROCEEDINGS IN ANOTHER STATE.** Where a guardian, without authority of court, sells a mortgage belonging to his ward, and afterward converts the proceeds to his own use, the ward, or the court and a new guardian for him, may elect to sue the defaulter's bondsmen for the full amount of the defalcation; and, if they do so, a court in another state may respect the election thus made and dismiss a subsequent suit by the ward to foreclose the mortgage on which the defaulter realized the money converted.

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

*Warren Pratt,* for appellant.

*N. P. McDonald* and *J. N. Dryden, contra.*

ROSE, J.

This is a suit to foreclose a mortgage for $1,000 on a residence property in the city of Kearney. When the mort-

gage was owned by Otto J. Worrell, a minor, his guardian, John B. Worrell, undertook to sell and transfer it to Edward J. Scott, and received therefor $1,010. Later the guardian converted to his own use the money thus obtained, and afterward absconded. F. J. Gentry succeeded him as guardian, and brought this suit on behalf of the ward to foreclose the mortgage, alleging that the sale to Scott was void. The defendants are Sarah A. and Sylvester Bearss, mortgagors, Frank E. and Anna L. Wilcox, subsequent purchasers of the real estate, and Edward J. Scott, purchaser of the mortgage. Each of the guardians named received his appointment from the probate court of Grant county, Oklahoma, and both of them and the ward reside in that state. The case has been twice tried in the district court. At the first trial, defenses that plaintiff had no legal capacity to sue and that Scott was the owner of the mortgage were sustained and the action dismissed. Plaintiff appealed to this court and procured a reversal, for the reasons that plaintiff's want of capacity to sue had been waived and that the sale to Scott was void as having been made without authority of court. The facts and rulings are more fully stated in the former opinion. *Gentry v. Bearss*, 82 Neb. 787. When the case reappeared in the district court the following facts were pleaded as a new defense: Under the statutes of Oklahoma the guardian, in the management of his ward's estate, is under the control of the county court, and pursuant to an order thereof plaintiff, before this suit was instituted, commenced an action in the district court of Grant county, Oklahoma, to recover from the defaulting guardian and the sureties on his bond the amount due from him to his ward, including the money received from Scott. That action is still pending. The second trial also resulted in a dismissal, and plaintiff has again appealed.

Plaintiff asserts that the ownership of the mortgage is the sole question in the case, that it was determined against defendants on the former appeal, and that con-

sequently the dismissal cannot stand. It is obvious, however, that a new defense has been interposed. In the former opinion it was observed: "It is not questioned but that plaintiff might have sued Worrell and his bondsmen, but the plaintiff has the right of election as to which course he will pursue, and it is not for defendants to dictate." *Gentry v. Bearss,* 82 Neb. 787. It is now insisted by defendants that plaintiff elected to pursue the bondsmen, that he is bound by that election, and that the present suit was properly dismissed. The Oklahoma statutes applicable to this inquiry are in the record. They show that the guardian, in the management of the ward's estate, is under the directions of the county court. *Gentry v. Bearss,* 82 Neb. 787; *In re Ross,* 6 Cal. App. 597, 92 Pac. 671. The evidence discloses that before the present suit was brought plaintiff was ordered by the county court of Grant county, Oklahoma, to bring an action on the bond of the former guardian for the full amount of his defalcation, and that the order was obeyed. That suit is pending in the district court of the county named. The petition therein alleges that the entire estate was squandered, and prays for judgment for $2,000. The trust funds in the hands of the defaulter were approximately $1,700. A witness testified, without objection, to plaintiff's admissions in connection with the bringing of both suits as follows: "He said that the guaranty company brought the suit. He knew nothing about it, but he wasn't certain whether they brought it in their own name or in his name, but he took no part in bringing the suit; that he had been instructed to sue the bonding company, and that was as far as his interests extended in the matter."

It therefore clearly appears that plaintiff, pursuant to the order of the court having authority to control his actions as guardian, sued the defaulter on his bond for the converted money received for the transfer of the mortgage. That the sureties are liable for such a defalcation on part of their principal is a well-settled proposition of

law. "Where a guardian illegally sells and transfers the property of the ward contrary to the act of assembly," say the court of appeals of Maryland, "without a previous order of the orphans' court, and converts the proceeds to his own use, it is no answer to an action on the bond by the ward, that under the act of assembly the sale itself is void and passed no title to the purchaser." *State v. Murray,* 24 Md. 310. A double recovery cannot be sanctioned. Plaintiff cannot recover from the sureties in a suit on the bond the entire sum of the defalcation and in addition foreclose the mortgage on which the defaulter realized $1,010 of the money converted. The ward, or the court and guardian for him, had the right of election. *McNeil v. Morrow,* Rich. Ch. Rep. (S. Car.) 172; *Bevis v. Heflin,* 63 Ind. 129; *Tealey v. Hoyte,* 3 Tenn. Ch. 561. What was done by the court having jurisdiction over the guardianship and by the present guardian amounted to an election to pursue the sureties

The trial court in the present case properly respected the election thus made, and the dismissal is

AFFIRMED.

LETTON, J., not sitting.

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JOHN W. INGLES, APPELLANT, V. CHARLES F. GROTHE, APPELLEE.

FILED MARCH 16, 1911. No. 16,344.

Appeal: CONFLICTING EVIDENCE. In an action at law, where no question of law is involved, and the evidence is conflicting and so evenly balanced that it would be sufficient to sustain a judgment either way, the judgment of the district court will not be disturbed on appeal.

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

*Hastings & Ireland* and *J. H. Grimm & Son,* for appellant.

*Price & Abbott, contra.*

FAWCETT, J.

Plaintiff alleges that he is the owner of the northeast quarter of section 9, township 7, range 3, in Saline county; that the defendant at many and divers times between October, 1905, and the 1st of November, 1907, "forcibly and illegally entered said premises, and without the consent of the plaintiff tore down and damaged his fences thereon, dug holes and ditches in the ground, ploughed, scraped and made embankments thereon, and hauled dirt and soil from said premises, and appropriated the same to his own use," to the great damage of plaintiff, etc. The answer is a general denial, coupled with the plea that defendant has an easement over plaintiff's land for a millrace used in connection with his water-power mill, and that all of the work done and soil removed was within the limits of said millrace, which defendant and his grantors have used for mill purposes ever since the year 1870. The reply admits the easement, but denies all the other allegations of the answer. A jury was waived, and trial had to the court. Defendant prevailed, and plaintiff appeals.

The case was tried in the district court upon the theory that defendant has an easement only for his millrace across plaintiff's land, and that he has no right to take the soil from plaintiff's land to repair his race upon other lands, but that within the limits of his race he can use the soil as he sees fit; and the contention, upon which a large amount of testimony was offered on each side, was as to the eastern or northern boundary of the race. If that boundary is as testified to by plaintiff and his witnesses, defendant was a trespasser, and plaintiff should have recovered. On the other hand if it is as testified to by

defendant and his witnesses, defendant was within the boundaries of his race, and the judgment of the district court is right. This is a law action. No controverted questions of law are involved. The evidence is in sharp conflict. As it appears in cold type in the record, it would sustain a judgment either way. The court saw the witnesses upon the stand, heard them testify, and in addition thereto personally viewed the premises. In such a case, we cannot substitute our judgment for that of the trial court.

The judgment of the district court is therefore

AFFIRMED.

LETTON, J., not sitting.

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ROLLIN EDSON DOOLITTLE, APPELLANT, V. CHARLES E. CALLENDER, APPELLEE.

FILED MARCH 16, 1911. No. 16,350.

1. **Contracts: VALIDITY.** Where a retail merchant enters into a contract with an advertising agency, which provides that the agency is to send to the merchant, weekly for a period of one year, one cut of a prescribed size, and copy of reading matter for use with each of said cuts, both the cut and the reading matter to be such as the advertising agency in its judgment thinks best to advertise the business of such merchant, for which the merchant is to pay a specified sum for each cut at a certain time, such contract is not void for lack of consideration, nor for want of mutuality.

2. ———: **BREACH OF CONTRACT: MEASURE OF DAMAGES.** And where such merchant continues to receive the cuts and reading matter specified in said contract without objection or complaint for a period of four months, and makes payment therefor, and then declines to continue the contract upon the sole ground that he has gone out of business and does not need any more cuts, he is liable to such agency for its damages sustained by reason of such breach of the contract.

3. ———: ———: ———. And in such a case the measure of damages would be the contract price, less whatever it would thereafter have cost such agency to complete the contract.

APPEAL from the district court for York county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

*France & France,* for appellant.

*W. L. Kirkpatrick* and *George M. Spurlock, contra.*

FAWCETT, J.

Plaintiff brought suit to recover an unpaid balance upon the following contract:

"The Art League, Cut Makers, 656 Broadway, New York. No. 2541. Book..... A Series. Any arrangement made with representative must be specified plainly on this order.

"Gentlemen: Send one cut (about 2 in. by 2 in., your A series) and copy of reading matter per week to use in this city only, both such as you think best to advertise the grocery business, for one year and after that until further notice. I will pay you fifty-five cents for each cut, at the end of the quarter they are sent. In consideration of the above, this exclusive right is given. The Art League agrees, upon accepting this, not to send any of the cuts sent under this agreement to any one else in the city mentioned, during the time.

"Dated, The Art League, Nov. 10, 1905. Per Jos. F. Taylor.

"C. E. Callender, (Name.)
"York, Nebraska. (Address.)"

Defendant prevailed, and plaintiff appeals.

Within a few days after the execution of the above contract, plaintiff began mailing, weekly, to the defendant the cuts and reading matter called for by the contract, and defendant continued to receive them without objection or complaint of any kind until February 6, following, when he wrote plaintiff acknowledging receipt of a

statement, and stating, "and before remitting for same would ask how much I must remit, and you discontinue after 10th this month. I do not need any more of them and shall not after that date. It is not necessary to say why, except that it is not to use something else instead." To this plaintiff replied February 15, stating that he could not afford to cancel the contract for anything less than 10 per cent. from the contract price. Plaintiff continued to mail the cuts and defendant to receive them without objection until the 30th of March, when defendant again wrote plaintiff, stating, "I am now out of business and need no more cuts. Discontinue sending them. I have paid for them to April 1st." Plaintiff continued thereafter to mail the cuts and reading matter until the end of the year, defendant refusing to take them from the post office. There is an entire absence of evidence to show that defendant ever at any time complained to plaintiff that the cuts and reading matter were not according to the contract, or assign any other reason for his failure to comply with his contract than the one stated in his letter of March 30, that he was then out of business and did not need any more cuts. In addition to that, defendant recognized the contract, and his obligation thereunder, by paying for the cuts which, he says, he received during the four months prior to his going out of business. In the light of these facts, defendant should not now be permitted to say that the cuts were of no value to him, nor that they were not made in every respect as provided for by the contract, nor that he made the payment referred to "in reliance upon plaintiff that he would thereafter more fully perform the terms of said instrument on his part to be performed."

We do not think the contract was void for lack of consideration, or for want of mutuality, as urged by defendant. The consideration on the part of plaintiff was that he would furnish one cut a week and copy of reading matter, both such as he might think best to advertise defendant's grocery business. For that defendant agreed

to pay 55 cents for each cut at the end of the quarter in which they were sent. We think the promise of each was a sufficient consideration for the promise of the other, and that there was no lack of consideration on either side. The fact that the contract provided that both the design of the cut and the wording of the reading matter were to be such as plaintiff might think best did not render the contract void. Plaintiff was in the advertising business, making a specialty of furnishing this kind of cuts and of reading matter to accompany the same, and, if defendant saw fit to make a contract to take cuts and reading matter for a year and to leave the design of the cuts and the wording of the reading matter to plaintiff's judgment, that was defendant's own concern. It may have been a departure in advertising for a business man in the city of York. It may have been an experiment, so to speak; but many a business man has greatly improved his business by departing from the beaten path. Such departure has often led to fortune; and the fact that defendant saw fit to make such a departure in the present case cannot be imputed to plaintiff as fraud. The fact that, if plaintiff failed to send the cuts and reading matter as agreed, defendant might have some difficulty in making proof of his damages sustained by reason thereof will not avoid the contract. Many such cases arise; but we are not aware that it has ever been held that for such a reason alone a contract will be held void. The contract is fair upon its face, was entered into by defendant without undue influence on plaintiff's part, was subsequently recognized by defendant for more than four months by the receipt of the cuts without complaint and by payment therefor. Plaintiff was at all times ready to perform his part of the contract, and we are unable to discover from the record before us any good reason why defendant should not respond in damages for his refusal to perform his part.

The evidence is conflicting as to how many cuts defendant had received at the time he wrote his letter of March 30. Defendant testified that he had only received

16. Plaintiff testified that he began sending the cuts on or about November 15, and that he sent one every week. If that be true, then plaintiff had mailed 20 cuts before defendant wrote his letter of March 30. Possibly the twentieth cut had not yet reached York, but it undoubtedly reached there before plaintiff received defendant's letter. Under the contract 20 cuts would be worth $11. Defendant had only remitted $8.25, so that he did not remit enough to pay for the cuts which had been shipped before his termination of the contract, if his letter of March 30 is to be construed as such termination. Plaintiff also testified that he received notice from the postal authorities about April 12, 1906, that defendant was refusing to take the cuts from the office, and that at that time he had expended all that was necessary to expend to fill the order for the entire year, except the sum of $3.60, and that therefore the difference between this $3.60 and the contract price for the full year would be the amount of plaintiff's damage for defendant's breach of the contract. This would seem to be a fair adjustment of the difference between the parties, and we think that, under the evidence in the record before us, plaintiff should have recovered that amount.

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

REVERSED.

LETTON, J., not sitting.

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EDWARD M. MALSBARY, APPELLEE, V. WARREN A. JACOBUS, APPELLANT.

FILED MARCH 16, 1911. No. 16,312.

1. Deeds: BREACH OF COVENANT: MEASURE OF DAMAGES. The measure of damages for a breach of covenant against incumbrances caused by an outstanding lease is ordinarily the value of the use of the land for the outstanding term.

2. ———: ———: ———. A warranty deed of real estate upon which there is a growing crop passes the interest of the grantor in the crop to the vendee, unless the crop is reserved. If there is a covenant against incumbrances in the deed, and a valid outstanding lease at the time of delivery of the deed, and the tenant is the owner of the crop, the grantee in the deed may waive his damages for failure to deliver him the crops, and sue his grantor upon the covenant against incumbrances, and if he does so his measure of damages will be the value of the outstanding term.

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

*C. G. Ryan,* for appellant.

*Harrison & Prince, contra.*

SEDGWICK, J.

The defendant sold to the plaintiff a farm in Hall county, and gave him a warranty deed with the usual covenant against incumbrance. He had before that time rented a few acres of the land to one Jobe, who had planted it in fall wheat, which was then upon the land. The deed was made and delivered in the winter season. The deed was made subject to an outstanding mortgage, but neither the deed nor the preliminary written contract between the parties mentioned the lease to Jobe. The plaintiff brought this action to recover damages for the breach of the covenant against incumbrance and obtained the verdict and judgment, from which the defendant has appealed.

The pleadings allege, and upon the trial it was conceded, that the lease to Jobe was valid and provided for payment of the rent in kind, and that Jobe had possession of the land under his lease and had paid to this plaintiff the rent stipulated in his lease. The question involved in the case is wholly as to the measure of damages. The plaintiff insisted that the measure of damages was the value of the growing crop of wheat at the time he received

his deed. The defendant insisted that the measure of damages was the value of the use of the land for the term during which it was withheld from the plaintiff. The court held with the plaintiff as to the measure of damages, and so instructed the jury, and this is the error complained of. We think in this ruling the trial court was wrong. There was some conflict in the evidence as to whether the plaintiff had notice at the time he received his deed of the outstanding lease and of the existence of the growing wheat upon the land. It is not necessary to determine this conflict, as in any event the ruling was wrong. If the plaintiff, as he contends, had no notice of the outstanding lease, he might afterwards accept the tenant as his tenant, and his deed would transfer to him the right to do so. If he accepted him as his tenant, and received the rent from him in accordance with the contract of lease, the question might still arise whether he had accepted it as full compensation for his damages. This might possibly depend upon circumstances and conditions which it is not now necessary to discuss. The plaintiff is now trying to recover the value of the wheat on the theory that defendant sold him the wheat with the land. Growing crops are a part of the land as between vendor and vendee, and if they belong to the vendor at the time of the sale, and there is no reservation, the title would pass to the vendee. It is conceded by the plaintiff, necessarily by the very form of his action, that the wheat at the time of the execution of the deed was not the property of the vendor; that the vendor had no title therein which he could transfer unincumbered to the vendee. The tenant Jobe had an interest in the wheat which this defendant could not transfer to the plaintiff. If the plaintiff had brought his action against the defendant for fraudulently selling him property in which he had no title and receiving from him the value thereof, he would be in a position to discuss the present question as to the measure of damages. He elected to bring a different kind of action. He alleged the convey-

ance and the covenant in the deed against incumbrance, and then alleged the incumbrance, and that Jobe had possession of the land and held it until the crops were removed; he did not allege that he took title to the wheat by his purchase; his petition must be construed to admit that Jobe was the owner of the wheat; he counted in his petition upon the breach of the covenant against incumbrances, and he cannot now avoid the usual rule of the measure of damages which is the value of the oustanding term. It was suggested in the argument at the bar that the deed having been executed in January, and the crop having been planted in the early preceding fall, so that the tenant's term would expire in much less than a year after the breach of the covenant against incumbrance, the rule that the rental for the unexpired term would be the measure of damages could not be applied in this case. In such case there would be ground for contending that, if the outstanding incumbrance deprived the plaintiff of the possession of the land for the crop season, the value of that possession would be the value for the use of the land for the crop season, and the evidence shows that the plaintiff in this case received from the tenant the full value for the use of the land for the entire crop season.

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

REVERSED.

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## CHARLES T. KNAPP, APPELLEE, V. JOHN S. REED, APPELLANT.

FILED MARCH 16, 1911. No. 16,335.

1. **Forcible Entry and Detainer.** The right to recover possesion of real estate by an action of forcible entry and detainer is not necessarily limited to cases in which the relation of landlord and tenant exists. *Gies v. Storz Brewing Co.*, 75 Neb. 698, distinguished.

2. **Partnership: POWERS: RENEWAL OF LEASE.** When a partnership is

carrying on business in premises which it holds under a lease, neither partner can, without the consent of the other, take a renewal of the lease in his own name and so exclude the other partner and secure the good-will of the business for himself. If one partner takes such renewal, it will inure to the benefit of both partners and each will have an interest in the new lease.

3. ———: DISSOLUTION: PARTNERSHIP RIGHTS: EQUITY JURISDICTION. Partnership is a relation of trust and confidence, and upon dissolution of the partnership, without an adjustment by the partners of their rights in the good-will of the business and in the premises which they hold under lease, it is the province of a court of equity to adjust such differences.

4. **Justice of the Peace:** JURISDICTION: PARTNERSHIP RIGHTS. A justice of the peace has no jurisdiction in an action of forcible entry and detainer to determine the rights of partners, upon discontinuing the partnership, in the leases which they hold or in the good-will of the partnership business.

5. **Partnership:** RENEWAL OF LEASE: FORCIBLE ENTRY AND DETAINER. If partners have been conducting a general real estate, brokerage and insurance business as copartners in leased premises, and one of the partners secures a renewal of the lease in his own name without the consent of the other, he cannot maintain an action of forcible entry and detainer to put the other partner out of the premises.

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

*Charles O. Whedon,* for appellant.

*Morning & Ledwith, contra.*

SEDGWICK, J.

The plaintiff and defendant had occupied the premises in controversy as a partnership in the name of Reed & Knapp under a lease from the owner. In the year 1908, while so occupying the premises, owing to a disagreement between them, it was found that the partnership must be dissolved, and each of the parties attempted to procure from their landlord a lease of the premises. The plaintiff, having procured such lease executed to him individually,

served notice to the defendant to quit the premises, and, he having neglected to do so, the plaintiff brought this action of forcible entry and detainer. The case, having been tried in justice court and appealed to the district court, was there tried with the jury, and verdict and judgment were directed in favor of the plaintiff. The defendant has appealed.

It appears that for some time prior to the year 1906 the defendant had been engaged in the real estate, brokerage and insurance business, and had occupied the premises under a lease with the owner. About the 1st of December, 1907, the plaintiff and defendant formed a partnership in the firm name of Reed & Knapp to continue said business, and as such partnership they leased the premises in question for the term of one year from the 1st day of December, 1907. In the spring of 1908 their landlord agreed to repair the office room by putting a steel ceiling thereon, and to renew their lease for three years from the date at which it expired according to its terms. The plaintiff testifies that this was upon condition that the partnership should paint the ceiling, and that they did perform this condition at the expense of the partnership of $25. The defendant testifies that the painting of the ceiling was optional with the partnership, and that after it was put on the partnership did cause the ceiling to be painted at the expense of from $12 to $25. Soon afterwards disagreements arose between the parties, and before the termination of the lease it became apparent that a dissolution of the partnership was unavoidable. On the same day each of the parties applied to the landlord for a lease of the premises, and the plaintiff finally succeeded in obtaining such lease in his individual name. The landlord, knowing of the dissension between the parties and that each partner was desirous of obtaining the possession of the premises, proposed to execute a lease to the one who would pay the largest rental. The plaintiff offered a larger rental than had been contemplated in the promise for the renewal of the lease, and he procured the lease in

his own name. The landlord for his further protection inserted the following provision in the lease which he executed to the plaintiff: "It is understood and agreed that the premises in question are now occupied by John S. Reed, and Charles T. Knapp, under a written lease from the lessor herein, which expires December 1, 1908, said lease running to John S. Reed and Charles T. Knapp, partners as Reed & Knapp; and it is also understood by the lessee herein that said John S. Reed is claiming an oral extension of said lease to Reed & Knapp, for a further period from December 1, 1908, claiming a partial performance of an agreement to extend said lease by virtue of certain repairs which said Reed & Knapp placed in said room. It is understood between the lessor and the lessee herein that the lessee, Knapp, accepts this lease with full knowledge of the above claim on the part of Reed, and accepts the same with such possession as he, the said Knapp, now has, and at his own expense, and in his own name, agrees to take such steps as he may deem proper to secure full possession thereof. In event it should be determined by court that there is in existence a valid oral lease to the firm of Reed & Knapp, then this lease shall be null and void, and lessor shall not be liable in damages to lessee by reason of the making hereof."

1. It is first contended in the defendant's brief that the action of forcible entry and detainer cannot be maintained unless the relation of landlord and tenant exists, and the case of *Gies v. Storz Brewing Co.*, 75 Neb. 698, is cited in support of that proposition. The first paragraph of the syllabus in that case is: "To authorize an action for forcible entry and detainer, the relation of landlord and tenant must be established between the plaintiff and defendant at the time the action is instituted." In that case the plaintiff was not the owner of the premises, and the question raised was whether the defendant was a tenant of the plaintiff or of the owner of the premises. It was recognized that that question must be determined as of the time when the action was begun, and the statement of

the law in the syllabus has reference to the time of the existence of the relation. If the plaintiff obtained the right from the owner to lease the premises, and did lease them to the defendant, and so became the landlord of the defendant, and he relied upon that relation for his right to recover possession, it would be necessary for the plaintiff to prove that this condition existed at the time this action was instituted, and that was the thought that was inaccurately expressed in the paragraph of the syllabus quoted. It was not intended to say that the action of forcible entry and detainer could not be employed except between landlord and tenant. Sections 1019 and 1020 of the code expressly provide for several distinct cases in which the action of forcible entry and detainer may be prosecuted and in which the relation of landlord and tenant does not exist. There is therefore no merit in the contention.

2. The controlling question in this case is as to the right of partners, upon the dissolution of a partnership, in the assets, privileges and good-will of the partnership business. The court instructed the jury to render a verdict for the plaintiff. If, therefore, there was evidence substantially conflicting upon a material issue, it must be considered that that issue is established by the evidence in favor of the defendant. For the purposes of this lease, then, we must consider that the partnership obtained the verbal agreement from the landlord to renew the lease for the further term of three years and to renew the ceiling, upon the condition that the partnership should pay a part of the expense of renewing the ceiling, and that the partnership complied with that condition at the expense of $25. The right to the renewal of the lease then became a partnership right. It appears that this right was necessary to preserve the good-will of the business which is shown to have been valuable. The partners had concluded to dissolve the partnership, but they had not separated, and there had not been any agreement between them in regard to the terms of the dissolution and the

right to the good-will of the business and the renewal of the lease. It is urged that this oral agreement to renew the lease for a term of three years was not valid so that it could be enforced as a legal right. It appears, however, that the landlord regarded it as valid and was ready and willing to renew the lease as he had agreed to do. It was only because of the trouble between the parties, which enabled him to exact a higher rental, that the thought occurred to him to do so. Under these circumstances could one of these parties accept a lease from the landlord for his individual use, and so obtain the good-will of the business and exclude the other party?

The defendant offered to prove that he established this business a good many years ago, and that in 1904 he employed the plaintiff, who had just finished his course in the law school, as clerk, and that later he gave the plaintiff a share of the profits of the business as compensation for his services, and still later took the plaintiff in partnership, giving him a third interest in the profits of the business, and, finally, formed a partnership with the plaintiff upon equal terms, and that during all of the time that the defendant had been in this business he had occupied the premises in question. This evidence, upon objection, was excluded by the court. In a proper action to try the rights of these parties, such evidence would appear to be material, but in this case it probably was unnecessary in view of the conditions shown by the evidence that was received. It appears that the rental of the premises had been continually $65 a month. The landlord was anxious to continue the tenancy upon those terms. He proposed a renewal of the lease for five years and for three years at that rental. There is no evidence that the use of the premises was worth more than that amount. The plaintiff, to procure this renewal of the lease, agreed with the landlord upon the rental of $1,000 a year, thereby paying a bonus of $220 for the first year to obtain this advantage. This is convincing evidence that the lease and good-will of the business were of substantial value. It must be

conceded that equity would ordinarily require that the partners should have the benefit of this value. No doubt a court of equity would have secured this benefit for the partners in a proper action at the suit of either party. As an excuse for having taken this lease in his own name to the exclusion of the defendant, the plaintiff urges that the defendant had attempted to make a similar contract in his own behalf. The defendant admitted this action on his part, and says that, because of his having established this business, and having been the leading partner while they were together, he thought he was entitled to this preference. If he was mistaken in this as a matter of law, his attempt to take what belonged to both parties did not transfer his right in the partnership to the plaintiff. The relation between partners is one of trust and confidence, and it is always held that neither can take advantage of his posession as partner to the prejudice of the partnership or any member thereof.

What, then, was the effect of the action of this plaintiff in taking this lease in his own name? This is the controlling question in this case, and we think that it is well settled by the authorities. The case of *Mitchell v. Read*, 61 N. Y. 123, was twice before the court of appeals of the state of New York, was thoroughly considered, and reviews many of the authorities. From this case it appears that there is but very little, if any, conflict in the authorities upon the general principle which must control in the case at bar. Upon its first appearance in that court it was said in the syllabus: "A lease so taken by one partner in his own name inures to the benefit of the firm, and the partner in whose name it is taken can be required to account to his copartners for its value. It is not material that the landlord would not have granted the new lease to the other partners or to the firm." The parties were copartners in conducting a hotel in the city of New York, under several leases which by their terms expired May 1, 1871. The copartnership also by its terms expired at the same time. Before the term expired the defendant

in that case, "without any notice of his intent to apply therefor, and without the knowledge of plaintiff, procured renewal leases, in his own name, of the premises for terms commencing at the termination of the partnership leases and of the partnership, which, upon discovery thereof having been made by plaintiff, defendant claimed were his property exclusively, and refused to recognize or acknowledge that the partnership or plaintiff had any right or interest therein." It will be noticed that the new term began at the expiration of the partnership and the expiration of the existing term. The plaintiff brought an action in equity to have the leases obtained by the defendant declared to have been taken for the partnership, and to have it adjudged that the defendant held them as trustee for the partnership. The lower court found that the defendant was the sole owner of the leases executed to him, and the plaintiff had no right, title or interest in them. It appears from the extract of the brief printed in the report that the plaintiff contended that the interest obtained in the lease by the defendant inured to the benefit of the firm, and that this right of the plaintiff did not depend upon whether the partnership had any right to a renewal of the lease. The defendant contended that the lease constituted no part of the good-will of the business of the partnership. The court stated the general rights of the partners in these words: "The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm." And then stated

the precise question before the court in these words: "It has been frequently held that when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease. It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation, and whether this contention is well founded is one of the grave questions to be determined upon this appeal." After a full discussion of the matter, it was determined that the rule applied in such a case. Two opinions were written, both of them interesting, and, without repeating the reasoning at length, we will quote briefly a few of the principles announced in the opinions that are applicable to the case at bar: "It has long been settled by adjudications that generally when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm, in the renewed lease, and, when the rule is otherwise applicable, it matters not that the new lease is upon different terms from the old one, or for a larger rent, or that the lessor would not have leased to the firm. The law recognizes the renewal of a lease as a reasonable expectancy of the tenants in possession, and in many cases protects this expectancy as a thing of value. * * * The principle which lies at the foundation of the decision of that and all other similar cases must be the one above stated, that the defendants in possession took advantage of their position to procure the new lease, and thus deprived the plaintiff of a benefit to which he, with them, was equally entitled. * * * 'It seems to be a universal rule that no one who is in possession of a lease, or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew the same for his own use only; but such renewal must be construed as a graft upon the old stock.' * * *

I therefore conclude that it makes no difference that these leases were obtained for a term to commence after the partnership, by its own limitation, was to terminate. I can find no authority holding that it does, and there is no principle sustaining the distinction claimed. The defendant was in possession as a member of the firm, and the firm owned the good-will for a renewal, which ordinarily attaches to the possession. * * * The general rule is so well settled that it would be a waste of time to refer to authorities. The text-writers on the law of partnership, without exception, assert the applicability of this rule of law to partnership transactions. * * * The rule under consideration is not confined to crown, church or college leases, but embraces those of every kind. The same principle appertains to all. * * * Though this is termed a 'tenant right' as between the lessee and the landlord, that is a mere phrase. It is a hope, an expectation, rather than a right. Such as it is, the trustee shall not take it to himself, but if it results in any substantial benefit he shall hold it for his beneficiary. * * * On principle, in many cases it is of but little consequence whether the partnership is dissolved or not before the renewal, since, if the former partners become tenants in common, the result is the same."

When the case was in court the second time (84 N. Y. 556), an additional point was stated in the syllabus, as follows: "The fact that a lease of premises, used by a firm for copartnership purposes, is to one of the copartners does not authorize him to take a renewal lease in his own name and for his own benefit; and a renewal will inure to the benefit of the firm." The principal question determined upon this second appeal of the case was whether, in an action brought by the partners who had been deprived of the benefit of the lease by the action of their copartner in taking a renewal lease in his own name, the plaintiff could recover the value of the good-will and leases as a part of the damages, and the court held that these were proper elements of damages in such an action. The

following statements of law may be found in the opinion of the court: "It is said to be a universal rule that no one who is in possession of a lease, or a particular interest in a lease, which is affected with any sort of an equity in behalf of third persons, can renew the same for his own use only; but such renewal must be considered as a graft upon the old stock. * * * That there is such a thing as good-will, which is a matter of value in such a business, is not to be denied, nor that it is a part of the assets of a copartnership in that business. Doubtless, some of it, as is suggested by the learned counsel for the defendant, grows from satisfaction of customers with the individuals composing the partnership. The manifestation of it is, however, so much attached to the place at which the business has been done, as that it enhances the value of the lease of the place to the partners jointly, or to any one of them. Hence, it has generally been held that, where a lease is partnership property, the good-will of the business enters into the value of the lease, and affects the amount of the purchase price. The good-will of the business of the testator and the defendant was a valuable matter in which they had a joint interest—it was a part of their joint property. There could be no just and equable division thereof between them without each got his share thereof. If his share was to be had by a sale of the joint assets, that good-will must then be sold, or he would not have his share, and to reach its full value it must go with the lease of the place." The court then holds that the renewed lease for the term which carried the good-will of the business with it ought to have been sold to the highest bidder, the partners being allowed to bid, and the court then used this language: "This is criticised, for that this suit proceeds on the ground that the defendant had no right to obtain the leases to himself to the exclusion of the testator, and that, if that ground be well taken, he would have no right to bid at the sale. Manifestly there is a difference between acquiring the leases from the landlord privily, to the wrong and harm of the cotenant and

copartner, and publicly bidding at a judicial sale of them with the sanction of the court, and on no more than equal terms with all others interested. * * * It is claimed that the good-will went with the sale and transfer of the property of the parties other than the leases. Grant that it is so. That does not preclude the plaintiff from an inquiry of what would have been its value had the leases accompanied the rest of the property."

We will not extend this opinion to refer to more than one other case of the many cited justifying this conclusion of the court. In *Johnson's Appeal,* 115 Pa. St. 129, the law is declared in the syllabus as follows: "A tenant's right of renewal, although it may not be enforceable against the will of the landlord, is a property or asset, incident to an existing lease. When a lease is held by a partnership, the chance or opportunity of renewal is in itself a distinct asset of the partnership, in which all the partners have an interest. One partner in a firm cannot therefore take a new lease, or a renewal of an existing one of the firm, in his own name, or for his own benefit, without being liable to account for it to the partnership. The dissolution of a partnership does not annul or change the relation of former partners in relation to the right of the renewal of a partnership lease. After the dissolution, the original leases remain partnership property, for the purpose of liquidation. The obligation of each partner to deal with them, not for his individual benefit, but for the common or joint interest, remains. Where, after the dissolution of a partnership, one of the partners secures for himself, without the permission of his copartner, a renewal of the premises in which the business of the partnership had been carried on, he will be compelled to account for the value of this renewal, in a settlement of the partnership business. If the parties fail to agree as to its value, it will be fixed by a master." It follows, then, that this new lease which the plaintiff took for these premises inured to the benefit of the partnership. A lease and possession constitute an interest in real estate. This was an

equitable interest and gave the right of possession of the premises to both partners equally. Neither party could summarily remove the other until these rights were adjudicated. They were partnership rights which are always held to be cognizable in a court of equity.

And, again, an action of forcible entry and detainer is a possessory action. The court must determine whether the plaintiff had the right to the possession of the premises and to exclude the defendant therefrom. In *Dawson v. Dawson,* 17 Neb. 671, which was an action of forcible entry and detainer, this court said: "To maintain that action the contest is limited to the naked right of possession of the premises. If the testimony shows that the defendant has an equitable interest in the premises, one that can be protected only by a court of equity, the action will not lie." The rule is that a justice of the peace has no jurisdiction to adjudicate a right of possession that depends upon an equitable interest in the premises. This renewal lease being in equity the property of both parties, one party has as much right to possession as the other. A justice of the peace cannot partition the matter and assign the lease to either party; he cannot authorize a sale of the lease allowing these partners, if they desire, to bid at the sale as a court of equity might do, nor apply in any way the general principles of equity to an adjustment of the controversy between the parties. In all of the cases cited, the actions were in equity to settle the rights of the contending parties. It is doubtful whether a case can be found where it was attempted to adjudicate such a question as was here presented in an action of forcible entry and detainer. The reason for this is plain. It is not necessary that a defendant should be able to establish by a preponderance of the evidence an equitable right to the possession of the premises in order to defeat the summary process of forcible entry and detainer. A justice of the peace cannot weigh and determine such evidence. It is sufficient if the defendant shows that he has in good faith an equitable claim of right of possession

which it is the province of a court of equity to determine and which is necessary to determine in order to adjudicate the right of possession. If the justice of the peace was without jurisdiction, the district court could not obtain jurisdiction by appeal.

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

REVERSED.

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## IN RE ESTATE OF MARGARET NORMAND.

JAMES F. NORMAND ET AL., APPELLANTS, V. LEVI NORMAND, APPELLEE.

FILED MARCH 16, 1911. No. 16,348.

1. **Courts:** COUNTY COURTS: APPEAL: TRIAL DE NOVO. When an action is appealed from a justice of the peace or the county court to the district court, it is to be tried *de novo* in the district court; this rule applies in probate proceedings.

2. ———: ———: ———: PLEADING. In such case the plaintiff may reply to an answer that alleges new matter in defense. In ordinary cases the district court may require issues to be made up and tried as in original actions begun in that court.

3. **Wills:** PROBATE: APPEAL: PLEADING. Upon appeal to the district court of a contest of probate of a will, if the parties agree that the cause shall be tried upon the original pleadings in the county court, and the court so orders, the contestants are not entitled to judgment upon the pleadings for want of a reply to objections filed in the county court. Under such an agreement of counsel the allegations of new matter, if any, in the objections to probate will be considered in this court as denied by the proponent.

4. ———: ———: EVIDENCE: TESTAMENTARY CAPACITY. When one of two subscribing witnesses to a will is deceased, and the other subscribing witness upon a trial of contest of probate of the will testifies to facts showing that the will was duly executed by the testatrix, but fails to testify as to the capacity of the testatrix, that fact may be established by other competent witnesses.

5. **Witnesses:** ATTORNEY AS WITNESS. When matters important to the litigation are peculiarly within the knowledge of the attorney

conducting the litigation, and there is danger of a failure of justice for want of such evidence, the attorney is justifiable in becoming a witness, and his testimony, if material and otherwise competent, will not be disregarded because he himself framed the questions to which his answers were given, when it appears that the most material part of his testimony was given in answer to questions propounded by the trial judge without objection at the time.

APPEAL from the district court for OTOE county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

*John C. Watson*, for appellants.

*D. W. Livingston, contra.*

SEDGWICK, J.

The will of Margaret Normand, deceased, was entered for probate in the county court of Otoe county, and from an order of that court admitting it to probate an appeal was taken to the district court for that county. Upon trial in that court a judgment was entered admitting the will to probate, from which judgment the contestants have appealed.

1. The first question presented is one of practice. In county court the contestants filed an objection to the probate of the will. When the case was docketed in the district court, no new pleadings were filed by either party, and an order was entered upon the journal that "this cause is set for trial on the original pleadings, by agreement of the parties." A few days afterwards the contestants filed a motion in the district court "that a judgment absolute be given by the court on the pleadings in favor of the contestants and against the proponent, because there is no reply filed to the answer and objection of the contestants." This motion was overruled, and the contestants excepted to the ruling thereon. A jury was impaneled, and the case proceeded to trial. The contestants thereupon objected to the introduction of any testimony

on the part of the proponent, "because the allegations in the answer are not denied or controverted." This objection was overruled and an exception entered. The contestants now insist that they were entitled to a judgment denying the probate of the will, because the allegations of their answer, not being denied by reply, were admitted.

When an action is appealed from a justice of the peace or from the county court to the district court, it is to be tried *de novo* in the district court, and this rule applies to appeals in probate proceedings. *Prante v. Lompe,* 77 Neb. 377. In such cases the plaintiff may reply to an answer which alleges new matter in defense. *Chicago, B. & Q. R. Co. v. Gustin,* 35 Neb. 86. This is the usual practice, and no doubt the trial court may require it to be followed in all ordinary cases. The objection filed by the contestants in the probate court, and which was treated by all parties as the answer in the district court, alleges six grounds of objection. "First. Said instrument is not executed as required by law. Second. Said instrument is not properly attested. Third. Said Margaret Normand, at the time alleged in said instrument, was not possessed of sufficient mental capacity to make a will, by reason of old age and ill health. Fourth. Said instrument was executed by said Margaret Normand by reason of improper and undue influence exerted upon her by Levi Normand, who is a devisee under said will, and said will is not the will of Margaret Normand, but of said Levi Normand. Fifth. The proceeding to probate said will was not published as required by law. Sixth. Said instrument is drawn contrary to law." The proponent by offering the will for probate necessarily alleges that the instrument is executed as required by law; is properly attested; and that the testator was of sufficient capacity to make a will. It will be seen that all of the objections entered to the probate are merely denials of the plaintiffs' allegations, unless it be the fourth objection. The allegation in the fourth objection, that the instrument was executed "by reason of improper and undue influence ex-

erted upon her by Levi Normand," is the only affirmative matter contained in the so-called answer. We think under these conditions it is not necessary to determine whether this allegation is a mere conclusion of law, or is a sufficient allegation of fact to constitute a defense against the probate of the will. It seems clear that, the parties having agreed to try the case upon the issue as presented in the lower court and certified to the district court, they cannot be heard now to object to that procedure. The probate court, upon such pleadings and without objection by either party, would properly have heard the evidence produced by both parties, and after appeal to the district court we think that it is clear that the parties might agree to so try the case in the district court, and, having so agreed, the motion of contestants for judgment because no reply was filed was properly overruled.

2. It is contended that the evidence is not sufficient to justify admitting the will to probate. The contestants offered no evidence. It appears that there were two witnesses to the will, and that at the time of the trial in the district court one of the witnesses was deceased. The other witness testified upon the trial. He testified that he signed the will as a witness in the presence of the testatrix, at her request, and in the presence of the other signing witness, and that she then declared the instrument to be her will. He did not testify that the testatrix was at that time of sound mind and competent to make a will. The lawyer who drew the will, and was also present at the time of its execution, testified as a witness upon the trial. If his evidence was competent, it is sufficient, with the other evidence offered, to admit the will to probate. His evidence is objected to as incompetent for two reasons. The statute provides: "If no person shall appear to contest the probate of a will at the time appointed for that purpose, the court may, in its discretion, grant probate thereof on the testimony of one of the subscribing witnesses only, if such a witness shall testify that such will was executed in all the particulars as required in this

chapter, and that the testator was of a sound mind at the time of the execution thereof." Comp. St. 1909, ch. 23, sec. 141. The next section provides: "If none of the subscribing witnesses shall reside in this state at the time appointed for proving the will, the court may, in its discretion, admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will, and, as evidence of the execution of the will, may admit proof of the handwriting of the testator, and of the subscribing witnesses." The objection, as we understand it, is that, as one of the subscribing witnesses was present and testified, and did not testify that "the testator was of sound mind," as provided in section 141, the court was not authorized to admit the will to probate. This is not the meaning of the section. If there is no contest, the uncontradicted evidence of one of the subscribing witnesses, testifying to all of the particulars which are required, may be sufficient without any other testimony, but it is not the intention of the statute to make the testimony of the subscribing witnesses the only competent testimony for that purpose. It might happen that none of the subscribing witnesses was able to testify as to the mental condition of the testator, and in such case, the due execution of the instrument having been proved, there is no doubt that the competency of the testator might be established by other witnesses.

The second objection is that the witness who testified to the competency of the testator was the attorney for the proponent who conducted the trial in his behalf. It is objected that when an attorney is interested in a matter of litigation it is unprofessional for him to become a witness in the litigation which he is managing and testify to important matters upon which the interest of his client must depend, and that for this reason the testimony of this witness ought to be disregarded. It sometimes happens that matters important to the litigation are peculiarly within the knowledge of the attorney conducting the litigation. When there is danger of a failure of jus-

tice for want of such evidence, the attorney is justifiable in becoming a witness. Such practice has been not uncommon in the trial courts of this state, and has never been considered unprofessional. This witness, as already stated, drew the will in question, and he was also present at its execution and was personally well acquainted with the testatrix. His evidence upon the vital issue mentioned was in answer to questions by the trial judge, and these questions were asked and answered without objection at the time. There was no objection to his testifying as a witness in the case, and we think his evidence was competent.

We have found no error in the record calling for a reversal, and the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

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WILLIAM C. MAY, APPELLANT, V. CITY OF GOTHENBURG ET AL., APPELLEES.

FILED MARCH 16, 1911. No. 16,351.

1. **Municipal Corporations: EXCLUSIVE FRANCHISES.** The legislature may by general law authorize cities and villages to grant exclusive franchises to public service corporations.
2. ———: ———. Cities and villages cannot grant exclusive franchises to public service corporations unless authorized by the legislature so to do.
3. ———: ———. The legislature of this state has not authorized cities and villages of less than 5,000 inhabitants to grant exclusive franchises to telephone companies to erect and maintain poles and wires and a general telephone system upon the streets and alleys and within the corporate limits of such cities and villages.

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

*E. A. Cook,* for appellant.

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

SEDGWICK, J.

The plaintiff asked for an injunction in the district court for Dawson county enjoining the mayor of the city of Gothenburg from signing an order granting telephone rights to the defendant Farmers Mutual Telephone Company, and enjoining the clerk of the city from causing the ordinance to be published, and enjoining the Farmers Mutual Telephone Company of Gothenburg from setting poles or stringing wires or otherwise establishing a telephone line or lines in the city, and enjoining the city of Gothenburg from passing any ordinance authorizing any person, persons, firm or corporation to erect or maintain a telephone system in the city for local telephone purposes. The defendants filed a general demurrer to the petition, which was sustained by the court, and the action dismissed. The plaintiff has appealed.

The petition alleges that in February, 1907, the village of Gothenburg by ordinance granted to the plaintiff the right to maintain and operate a telephone system in the said village; that the village, by reason of increase of inhabitants, has since become a city. The ordinance granting this right is set out in the petition, and it purports to grant "the exclusive use of the streets and alleys of the village of Gothenburg" for a specified term to the plaintiff for the purpose of erecting poles and placing wires thereon for local telephone purposes. The ordinance contains many provisions supposed to be beneficial to the city and the inhabitants of the city and to the plaintiff. It is not necessary to enumerate and discuss these provisions. The petition then shows that the city is about to enact an ordinance authorizing the defendant Farmers Mutual Telephone Company to establish a local telephone business in the city, and that the defendant, the telephone company,

is about to proceed to establish such system. The contention is that this is in violation of the contract between the plaintiff and the city, in that it interferes with the exclusive right of the plaintiff to establish and maintain a telephone system in the city during the existence of its contract. It is argued at large and very convincingly that a city, when acting in its corporate capacity and for its own benefits as a city, is bound by its contracts as an individual is bound, and that the proposed action of the city is a distinct violation of its contract with the plaintiff.

That the city is bound by its contract, as above stated, is not doubted. This, however, is always with a qualification that its contracts are within its power, and that any attempt on its part to contract beyond the power delegated to it is ineffectual, and the city cannot be be bound by such supposed contract. It will be seen that the whole question, then, presented in this case is as to the power of the city of Gothenburg to grant an exclusive right to establish and maintain a telephone system within the city. It is usually held that the legislature has such power. It is also held that the legislature may grant such exclusive privilege itself directly (in this state, of course, it must be by general law), or it may delegate such power to the city, and, when such power is delegated by the legislature to the city, its contract creating such exclusive privilege is binding upon it as are its other valid contracts. It is conceded that the legislature has expressly authorized cities of this class to grant exclusive franchises for certain purposes, but not for the purpose contemplated in this action. It was contended by the defendants upon the oral argument that, in the absence of an express grant by the legislature, such power does not exist, and many authorities are cited in the brief sustaining this contention. The plaintiff was given leave to cite further authorities upon his contention that the city may exercise such power without an express grant, and has cited as supporting his proposition: *New Orleans Water Works Co.*

*v. Rivers,* 115 U. S. 674; *City R. Co. v. Citizens Street R. Co.,* 166 U. S. 557; *St. Tammany Water Works Co. v. New Orleans Water Works Co.,* 120 U. S. 64; *Walla Walla City v. Walla Walla Water Co.,* 172 U. S. 1; *Illinois Trust & Savings Bank v. City of Arkansas City,* 22 C. C. A. 171. We do not find that any of these cases support the proposition, and some of them expressly hold to the contrary. The plaintiff makes a strong argument in his brief, and cites authorities supporting it, in favor of the policy of granting exclusive franchises to public service corporations in small towns and cities under careful regulation and control by the public authorities, but this question of policy is wholly for the legislature, and not for the courts. The legislature not having given cities of this class the power to grant exclusive franchises to telephone companies, the contract of the city in this regard is so far void, as beyond the power of the city. That being true, the power of the city to grant franchises to other companies cannot be doubted. The wisdom and policy of so doing are for the determination of the city council.

It follows that the judgment of the district court is right, and is

AFFIRMED.

LETTON, J., not sitting.

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MARY EDITH EGGLESTON, APPELLEE, V. GEORGE E. QUINN, APPELLANT.

FILED MARCH 16, 1911. No. 16,355.

Appeal: EVIDENCE: SUFFICIENCY. The only question presented upon this record is as to the sufficiency of the evidence to support the verdict. Upon examination of the evidence, it is *held* that there is not such a failure of evidence as to justify this court in setting aside the judgment.

APPEAL from the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*W. C. Dorsey,* for appellant.

*G. W. Prather* and *A. H. Byrum, contra.*

SEDGWICK, J.

The defendant has appealed from the judgment of the district court for Franklin county adjudging him to be the putative father of the plaintiff's bastard child. The case has twice before been in this court upon the defendant's appeal. The judgment was first reversed because of an error in the trial court in refusing to give an instruction requested by the defendant. *Quinn v. Eggleston,* 76 Neb. 409. The second time it was reversed because by one of the instructions of the court the burden of proof upon a particular issue was erroneously placed upon the defendant. *Eggleston v. Quinn,* 81 Neb. 457. Upon this appeal the defendant insists that the evidence is not sufficient to support the verdict. Upon both former appeals this court took occasion to say that the judgment was supported by sufficient evidence. It is now insisted that there was some additional evidence upon the last trial tending to show that the defendant was not the father of the child, and that the evidence therefore is not as convincing as upon the former appeals.

The plaintiff's testimony showed that these parties began their illicit intimacy early in the spring of 1903, and continued until about the 23d or 24th of December of that year. The child was born October 1, 1904. If the court assumes that the ordinary period of gestation is 280 days, that period began on December 25. If the court, in the absence of evidence, takes judicial notice of the usual duration of this period, it will also consider that in the course of nature this period not infrequently varies from the ordinary duration.

From about the end of the first week in November to the very latter part of December the plaintiff lived in several different families as a domestic. Upon her cross-

examination she was questioned severely as to the particular times of going from one family to another. From her answers to these questions and her testimony as to whether she was with the defendant while she was living at these respective places, it is argued that she herself has testified in this cross-examination to facts that render it impossible that her principal story can be true. She names various places where she says that they were together during the time that their intimacy continued, and testifies that they were together in the latter part of December, but admits that she cannot state what particular place it occurred during that month. This evidence is not so strong as to establish the necessary facts beyond doubt, but it must be remembered that this is a civil action, and only a preponderance of evidence is required. While the defendant denies that he was with the plaintiff at all in December, he does not deny the continuous frequency of their illicit relations during the period of several months. He merely says that these relations were discontinued about 30 days sooner than the plaintiff testifies. She testifies positively that she never had such relations with any man other than defendant, and there is no evidence that she ever did.

We think that the case was properly submitted to the jury, and, there being no error in the record, the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

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ADOLPH F. DIELS, APPELLANT, V. ALBERT R. KENNEDY, APPELLEE.

FILED MARCH 24, 1911. No. 16,356.

1. **Appeal: INTERLOCUTORY ORDER: WAIVER OF ERROR.** Where a litigant desires a review of an interlocutory order of the district court, it is necessary that an exception be taken thereto and that such

exception be shown by the transcript of the record. Ordinarily a failure to except is a waiver of the error, if any were committed.

2. **Pleading:** MOTION TO STRIKE. A portion of a paragraph of a petition, though inartistically pleaded, contained facts which were material to plaintiff's cause of action. Another portion of the same paragraph was not material. A motion to strike out the whole of the paragraph should not be sustained.

3. ———: PETITION: SUFFICIENCY. The petition, set out in substance in the opinion, *held* to state a cause of action, and the sustaining of a general demurrer thereto and dismissing the action was erroneous.

4. **Contracts:** BREACH: DAMAGES. "The general rule is that the party injured by breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach." *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910.

5. **Case Distinguished.** *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623, distinguished.

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

*Henry M. Kidder,* for appellant.

*J. E. Porter, contra.*

REESE, C. J.

This action was commenced in the county court of Dawes county. The suit went to judgment and determination in that court, and was duly appealed to the district court, where plaintiff filed his petition in numbered paragraphs in which he alleged: (1) That plaintiff was engaged in the business of manufacturer and wholesale dealer in flour, corn meal and feed, at Scribner; (2) that on or about the 13th day of March, 1908, the defendant entered into a written contract with plaintiff for the purchase by defendant from plaintiff of certain quantities of flour and corn meal of certain brands, specifically set out in the petition; (3) that defendant agreed to pay for

the same the sum of $581.05; (4) that plaintiff, depending upon said written contract, made up the flour and meal, having the same ready for delivery as per contract, and has at all times been ready to deliver the property in accordance and compliance with the conditions of the contract; (5) that on or about the 26th day of March, 1908, plaintiff received by mail a letter from defendant wherein defendant refused to perform the conditions of the contract and thereby repudiated and broke the same on his part; (6) that the cost to produce the flour and meal was $432, that the difference, "to wit, the sum of $149.05, is the profit accruing to the plaintiff on the said contract, completed by the parties thereto, and that because of" the breach thereof on the part of defendant the plaintiff lost the profit, "and is therefore damaged in the said sum of $149.05 in the item of certain profits lost;" (7) that the plaintiff is further damaged by the breach of the contract by defendant in the sum of $100, which consists of interest on money invested in the wheat and corn, $5, storage on the flour and meal, $30, expense and salary of salesman in procuring the contract, loss of time of plaintiff, and incidental expenses incurred because of the repudiation of the contract, $65; (8) that the total amount of plaintiff's damages is the sum of $249.05; (9) that the defendant refuses to pay the contract price of the flour and meal and refuses to pay the damages as alleged. (10) "Plaintiff alleges further that the amount claimed by him in his petition in the county court is $350, and that he amends in this petition to conform with the facts proved." There is a prayer for judgment for $249.05, with interest and costs.

After the filing of the petition, and after the expiration of the time fixed by law for answer, and no answer being filed, plaintiff filed a written motion for a default against defendant. The journal entries do not show any disposition of such motion, and therefore the contention of plaintiff that an error was therein committed cannot be noticed.

Defendant filed a general demurrer to the petition, and later asked leave to withdraw the same and file a motion to strike out certain parts of the petition. This was granted, and the action of the court is now assigned as error. There is no exception shown by the record, and, by failing to except, the error, if any, was waived. However, we can see no reversible error in this action of the court. The matter was within its discretion, and we can observe no abuse thereof.

Defendant then filed his motion to strike out the sixth, seventh and eighth paragraphs of the petition. The motion was sustained as to the sixth and seventh paragraphs, and to which plaintiff excepted and now assigns the ruling for error. As to the seventh paragraph there can be no question but that the ruling was correct. The items of damages therein set up were not recoverable. They constituted no valid claim or cause of action. As to the sixth paragraph, if plaintiff's contention as to his measure of damages is correct, the allegation that it cost him $432 to produce the flour and meal and his damages were the difference between that sum and the contract price was proper, and the ruling would be erroneous, and the paragraph should not have been stricken. The remainder of the paragraph, while in part argumentative, closes with the averment that he is damaged in the sum of $149.05. The motion is to strike out the whole. The record recites: "Whereupon the plaintiff in open court declines and refuses to make any amendments or additions to his said petition as the same remains with the paragraphs stricken as hereinbefore ordered, and the defendant now here refiles his demurrer to the said petition as it now stands." And the demurrer was sustained, to which ruling the plaintiff excepted. The demurrer was a general one that the facts stated in the petition did not constitute a cause of action. The action of the court in permitting defendant to refile the demurrer is assigned for error, but the question does not appear to have been raised in the district court.

The next contention is that the court erred in sustaining the demurrer. We have endeavored to set out briefly, but fairly, an epitome of the petition and record. That the petition is unskillfully drawn and of unnecessary length cannot be doubted. The record is poorly made up and is quite unsatisfactory, as such. Counsel should aid the clerks in writing up the records if they desire them to follow prescribed forms and save rights. Plaintiff elected to stand upon his petition without amendment, when plaintiff moved the court to dismiss the suit, which was done, and judgment for costs rendered against plaintiff. Our conclusion is that, in any view of the case, the action of the district court in sustaining the demurrer was erroneous. Even had the sixth paragraph of the petition been correctly stricken out, enough remained to constitute a cause of action for some damages, and the demurrer should have been overruled.

From the reading of the briefs it appears that the dispute is as to the correct measure of damages; the plaintiff claiming that the true measure would be the loss of profits accruing to him had defendant performed the contract, which would be the difference between what it cost plaintiff to furnish the flour and meal and the contract price, the difference being $149.05 with legal interest. This method of measuring damages is combated by defendant.

In *Kreamer v. Irwin*, 46 Neb. 827, it was alleged in the petition that a contract was entered into with Irwin by which Kreamer agreed to furnish the labor, material and tools to raise and level the floor of a store building belonging to Irwin, the price to be $100; that in pursuance of the contract he made all necessary preparation, going to great expense, and that Irwin, in violation of his contract, refused to allow him to perform the contract on his part. We held that the contractor's measure of damages was the profit he would have made on the contract had he performed it. The same was held in *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910; *Wittenberg v. Mollyneaux*, 55 Neb. 429, 60 Neb. 583; *Hale v. Hess & Co.*, 30

Neb. 42; *Russell v. Horn, Brannen & Forsyth Mfg. Co.*, 41 Neb. 567; *Schrandt v. Young*, 2 Neb. (Unof.) 546; *Parkins v. Missouri P. R. Co.*, 76 Neb. 242; Sedgwick, Damages (8th ed.) secs. 192, 613; Williston, Sales, p. 966 (sec. 64, clause 4).

The case of *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623, cited by defendant, is easily distinguished from the one now under consideration. In that case the question of the measure of damages was not involved. The purchaser of the goods had countermanded his order before shipment, as in this case, but the seller shipped the goods notwithstanding the countermand and sued for the purchase price. The holding was that the purchase price could not be collected, the purchaser having refused to accept the shipment, but that the action must be for damages. This suit is for damages, the measure of which is the difference between the necessary cost of production and the contract price, which would be the loss of profits.

The judgment of the district court is reversed and the cause is remanded, with leave to the plaintiff to amend his petition, should he elect so to do, and for further proceedings.

REVERSED.

ROOT, J., dissenting.

I do not concur in the majority opinion. The plaintiff alleges that he is a manufacturer of, and a wholesale dealer in, flour and meal, and that the contract sued on is in writing. A copy of this document is attached to and made a part of the petition, and is a simple order to the plaintiff to ship to the defendant specified quantities of certain brands of flour and meal, for which the defendant agrees to pay a definite price. The contract, if contract it be, is not signed by the plaintiff, nor is there any allegation in the petition that he accepted the order. The order is not for the manufacture of goods, but is a mere memorandum of purchase. There is no matter of inducement pleaded in the petition to take the case out of the ordinary

agreement to buy. It affirmatively appears that the order was countermanded before the day for delivery, and before any of the flour or meal was shipped, delivered or tendered. There is no allegation in the petition that the plaintiff could not sell the flour and meal on the market, that to do so would subject him to any extra expense, that his market was so limited that the defendant's countermand decreased the plaintiff's sales, or that the goods were worth less on the market than the defendant agreed to pay therefor. Under these circumstances the rule that the seller may recover profits lost because the buyer countermanded an executory contract of sale does not apply. In the event that the buyer thus countermands an order for the purchase of goods recognized as staple in the market, *prima facie* the measure of damages is the difference between the market value of, and the contract price for, the goods at the time of delivery. This rule has been recognized for many years by this court. *Dodge v. Kiene,* 28 Neb. 216; *Lincoln Shoe Mfg. Co. v. Sheldon,* 44 Neb. 279; *Funke v. Allen,* 54 Neb. 407; *Allen v. Rushforth,* 77 Neb. 840. The United States supreme court, the courts of last resort in 26 sister states, in England and in Canada so hold. The citations may be found in 35 Cyc. 592 *et seq.* See, also, 2 Mechem, Sales, sec. 1690; *Huguenot Mills v. Jempson & Co.,* 68 S. Car. 363, 102 Am. St. Rep. 673.

It is unnecessary to extend this dissent by a review of the authorities cited in the majority opinion. Not one case refers to a contract for the sale of a staple of commerce—goods that *prima facie* have a market value in every civilized community during any season of the year.

Plaintiff has pleaded no fact to take his case out of the general rule, and the judgment of the district court should be affirmed.

LETTON and ROSE, JJ., concur in dissent.

SOPHIE HENKEL ET AL., APPELLEES, V. WILLIAM BOUDREAU, APPELLEE; LEONEL BOURDEAU ET AL., APPELLANTS.

FILED MARCH 24, 1911. No. 16,366.

1. Appeal: CORRECTION OF VERDICT. In the trial of an action against dealers in intoxicating liquors for damages, in which they were sued jointly with their sureties, the jury agreed upon what their finding should be and returned with a written verdict, when it was filed by the clerk and the jury discharged from a further consideration of the case and for the term of court. Objection was immediately made to the form of the verdict, and within two minutes after its return and discharge of the jury, and before the jurors had left the courthouse, the court ordered the jurors to return to the jury box when it was discovered that the written verdict did not express the finding and agreement of the jury, and they were directed to return to their room and correct the verdict so as to conform to such finding and agreement. There was no showing that any juror had conversed with or been approached by any other person upon the subject of the verdict or the merits of the case. A second and corrected verdict was soon thereafter returned into court by the jury, upon which judgment was rendered. *Held*, under the provisions of sections 145 and 312 of the code, that, in the absence of a showing of prejudice, the judgment was valid and could not for that reason alone be reversed.

2. ———: ADMISSION OF EVIDENCE. The petition alleged the execution of the surety bonds by the defendant bonding company, which admitted the averment in its answer. This rendered it unnecessary to introduce the bonds in evidence on the trial. But the bonds were introduced, and admitted in evidence by the court over defendants' objection and exception. *Held*, That the admission of the bonds in evidence could work no prejudice to the defendant bonding company.

3. ———: DEFAULT: PRESUMPTIONS. One of the principal defendants duly served with summons made default, filing no answer or other pleading. The cause was tried on an amended petition filed after answer day. Subsequently a default was entered against the unanswering defendant. The original petition is not presented in the transcript, and the record does not show any change in the averments which could affect the rights or liability of the defaulting defendant. All presumptions being in favor of the regularity of the proceedings in the trial court, and no error being made to appear, the action of that court in entering the default cannot be reviewed.

4. Trial: ISSUES: INSTRUCTIONS. The petition contained the averment that the principal defendants were engaged in the sale of intoxicating liquors in the village of C., under a license granted by said village, at the time of the alleged sales of liquor. The answer admitted the existence of the license at the time. This rendered it unnecessary for the court to submit the question of the issuance and existence of the license to the jury, there being no issue upon that point.

5. Appeal: INSTRUCTIONS: HARMLESS ERROR. It is error for the court, in instructing a jury, to copy sections of the statute, where the section contains subjects not in issue nor proper to be presented to the jury, but the error is without prejudice if the issues on trial are clearly defined, and the embodying of the immaterial portion of the section could not in any way mislead the jury.

6. ———: ———: DISCRETION OF COURT. It is not customary for courts, in instructing a jury, to admonish them that it is not within their province to inquire into the propriety of existing laws, but to be governed by them. But this is within the discretion of the court and unless there is an abuse of that discretion a judgment will not for that reason alone be reversed.

APPEAL from the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*L. H. Blackledge* and *A. H. Byrum,* for appellants.

*M. A. Hartigan* and *W. H. Miller, contra.*

REESE, C. J.

This action was instituted in the district court for Franklin county by plaintiff in her own right and on behalf of her minor children, five in number, against the defendants William Boudreau, Liona Boudreau (afterward changed to Leonel Bourdeau), Frank Robbins, and the United States Fidelity & Guaranty Company; it being alleged in the petition in substance that the defendants were engaged in the sale of intoxicating liquors, as licensed saloon-keepers, in the village of Campbell, in that county, and the guaranty company as the surety upon their several bonds. It is alleged that August Henkel, the husband of plaintiff and father of her minor children,

was, prior to the injury complained of, a prosperous and successful farmer and provided well for the maintenance and support of plaintiff and their children; that for more than a year prior to the 14th day of January, 1908, the defendants had each sold and supplied to the said August Henkel intoxicating liquors until he had become an habitual drunkard, and on that day they each sold and furnished such liquors to him until he became helplessly intoxicated, and in seeking to return to his home, some 6 miles distant, with a team and loaded wagon he was unable to manage the team, when they ran away with him, throwing him out of the wagon, crushing and mangling his right arm to such an extent as to require that it be amputated near the shoulder, which was done, whereby he became a cripple for life with greatly impaired health, and thus rendered unable to maintain and contribute to the support of the family as he had theretofore done, whereby plaintiff and the children in whose behalf the suit was brought were damaged in the sum of $15,000, for which judgment was demanded. Separate answers were filed by Robbins, Leonel Bourdeau and the guaranty company, which, in substance, admitted the licensed character of defendants, the suretyship of the guaranty company, the injury to August Henkel, and denying all other averments of the petition. Defendant Leonel Bourdeau presented the additional averment that he was not sued by his correct name, and pleaded his true name. William Boudreau made default, failing to file answer or other pleading. A jury trial was had, the jury were instructed, and retired for deliberation on the 25th day of March, 1909. On the next morning they returned into court with a verdict.

One of the principal contentions on this appeal is upon the authority of the court to render judgment for the amount for which the said judgment was entered. The journal entry shows that at 9 o'clock A. M. the jury returned their verdict finding " 'for the plaintiffs and against the defendants William Boudreau, Leonel Bourdeau, and the United (States) Fidelity and Guaranty Company of

Baltimore, Md., and assess the amount they have and recover of and from said defendants and each of them at the sum of $2,000,' * * * which verdict was received and read in open court and the jury discharged by the court from the case and for the term. Afterward on the same day at 9:02 o'clock A. M., upon the attorneys for the plaintiff challenging the form of the verdict, the aforesaid jurors by direction of the court were recalled into the box, and after certain inquiries by the court and answers by one or more of the jurors, all of which were taken down by the reporter, said jurors, by direction of the court, were sent back to the jury room with instructions, which were given orally, to insert the total amount they find the plaintiffs entitled to recover, and said jurors retired in charge of the bailiff, and afterward on the same day at 9:07 o'clock A. M. returned into court with a verdict for plaintiffs and against William Boudreau, Leonel Bourdeau, and United States Fidelity & Guaranty Company for $4,000, in words and figures as follows." The verdict is set out in the record, but as it is similar to the former one, with the exception of the amount of damages assessed, it need not be here copied. As the jury did not find against Robbins, judgment of dismissal was entered in his favor. The action of the court in recalling the jury and receiving the second verdict was duly objected and excepted to. Separate motions for a new trial were filed, overruled, and judgment was entered against the three defendants jointly for $4,000. They appeal, contending that the court erred in recalling the jury, resubmitting the case to them, receiving their second verdict and entering judgment thereon.

There is a sharp conflict between the affidavits in support of the motions for a new trial and the record. We find no affidavits submitted by plaintiffs prior to the ruling on said motions. It is quite clear that some of the jurors had left the jury box and mingled with those who were on the floor of the courtroom, and one affiant states that he saw some of the jurors on the lower floor of the

building. In the bill of exceptions it is recited: "Thereupon (after the receipt of the first verdict) the court informed the jury that they were discharged, * * * and, while the jurors were in the courtroom and the hallway of the courtroom, counsel for plaintiffs challenged the form of the verdict; and thereupon said jurors were summoned again to the jury box by order of the court. The verdict was again read to them and they were again asked if that was their verdict," the attorneys for both parties "being present in open court, and made no objection at that time to the proceedings and the instructions of the court to the jury." The foreman of the jury sought to make an explanation to the court, but the court interrupted him, and stated that the verdict must be for the whole amount plaintiffs should recover. The foreman then stated that they "understood it was each of them $2,000." The court then informed the jury that the whole judgment would run against each; that, if the verdict was "not the amount you find the plaintiffs are entitled to, you take your verdict and retire with the instructions to your jury room, and put in whatever amount you find the plaintiffs are entitled to." The foreman: "The whole amount?" The court: "The whole amount." The jury retired to their room and returned the second verdict, upon which the judgment was rendered. That the procedure was irregular there can be little doubt, but we think there can be no reasonable question but that the last verdict corresponded with the actual finding and agreement of the jury. The difficulty was that, for want of proper direction, perhaps, they believed they were to find separate verdicts against each of the principal defendants, and did not understand that the verdict should be for the gross amount of damages found. The length of time intervening between the return of the first verdict and their recall precludes the idea that any one could have tampered with any member, and thus succeeded in producing an agreement differing from that made before the return of the first verdict. Many cases are cited by defendants

holding that no correction could be made after the receipt of a verdict and discharge of the jury. This was the inflexible rule of the common law, and, had not the rule of procedure been made more liberal by our code provisions, we would be bound to follow that ancient line of practice. It is to be noticed that, in what are called the code states, many of those rules have been modified and changed, as by our own code, which in section 145 provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." And section 312 of the code provides: "No exception shall be regarded, unless it is material, and prejudicial to the substantial rights of the party excepting." Since the jury had agreed upon the $4,000 as the assessment of damages, and their verdict had failed to correspond with that agreement, there was no error or prejudice in their recall and their correction of the verdict. *Cohen v. Sioux City Traction Co.*, 141 Ia. 469; *Fearnley v. Fearnley*, 44 Colo. 417; *Nolan v. East*, 132 Ill. App. 634; *Rogers v. Sample*, 28 Neb. 141; *Levells v. State*, 32 Ark. 585; *Brister v. State*, 26 Ala. 107. There is no evidence of any improper action or conversation by any juror, or that any person approached them or spoke to them upon any question involved in the case, or of the case itself. There was nothing said by the court, or by counsel, which could in any way tend to influence the jury as to the amount for which the verdict should be returned. No prejudice being shown, the action of the court must be held valid.

It is contended that the court erred in the admission of the bonds alleged to have been executed by the defendant guaranty company. We are persuaded that the objection is without merit. The answer of that company admits that it is a bonding company, "and that on or about April 9, 1907, it executed with and for William Boudreau, Leonel Bourdeau and Frank Robbins, respectively, as

principals, three several bonds in the sum of $5,000 each, containing the conditions and obligations substantially as set forth in the exhibits A, B and C to said amended petition." The exhibits referred to are copies of the bonds attached to the petition. This being an admission of the execution of the bonds, their introduction in evidence, even if unnecessary, could work no prejudice.

It is also insisted that the court erred in entering a default against William Boudreau, the ground of contention being that the amended petition was filed after answer day and no notice was given of the filing thereof. The original petition is not a part of the transcript, and it is impossible for us to ascertain what it contained and whether there was any change of allegations as against that defendant or not. Therefore the merits or demerits of the contention cannot be determined. The precipe filed in this court designates Leonel Bourdeau and the United States Fidelity & Guaranty Company, only, as appellants. It may be doubted if, under rule 13 of this court, William Boudreau is a party to this appeal.

Objection is made to instruction numbered 2, given by the court on its own motion. This instruction stated the issues in condensed form, informing the jury of the facts upon which the burden of proof rested upon the plaintiffs. In the issues stated the court did not inform the jury that it was incumbent on plaintiffs by a preponderance of the evidence to prove "the issuance of the license and the delivery and approval of the bond." As we have already seen, there was no issue as to the execution of the bonds to be submitted to the jury; the fact being sufficiently admitted. The petition, while not to be recommended as a model, contained the allegation that the defendants were engaged in the sale of intoxicating liquors in the village of Campbell "under a license granted by said village, its board and officers" at the time of the alleged sales and injury, and the answers of the principal defendants admit that during the year in which the cause of action arose they were engaged in the sale of liquors at the place

named "under a license granted by the board of trustees of said village." This rendered it unnecessary for the court to submit the question of the issuance of the licenses to the jury, there being no issue upon that subject.

Instruction numbered 6 is complained of. By that instruction attention is called to the particular section of the statute by number, and the section is copied, being section 7168, Ann. St. 1909. This section contains provisions not applicable to the case on trial, and those provisions being copied into the instruction is claimed to have been prejudicial error. That this method of instruction cannot in all cases be approved must be conceded. If a section of the statute contains no provisions other than those to be applied to the case in hand, there can be no reasonable objection to its being copied into the instruction; but where, as in this case, the section is broader in its provisions than the issues, it should not, as a general rule, be copied in its entirety. It was not proper to copy that part of the section referring to injuries inflicted by intoxicated persons upon the person or property of others, and to that extent the instruction fails to meet approval. But this is not enough to require a reversal of the judgment. It must appear that the error resulted in prejudice to the defendants. We are unable to perceive how the instruction could have that effect. True, there was no question of that kind involved in the case, but the true issue was so clearly presented to the jury by the evidence and other instructions of the court as to leave no ground for any presumption that the jury were in any respect misled thereby.

A portion of the seventh instruction given by the court is sharply criticised by defendants. We can find no objection to the statement of law governing the case, as contained in the instruction, and therefore do not copy that portion. After so stating the law, the instruction continues: "It is not for you, gentlemen of the jury, to inquire into and consider the propriety of the law in force in this state relative to the sale of intoxicating liquors, under

which this action is brought. The law as it now stands on the statute books of this state should be enforced, and if from all the evidence you believe that the plaintiffs are entitled to recover, as explained in these instructions, then you should find for the plaintiffs and against any and all of the defendants contributing to the intoxication of August Henkel, if you find he was intoxicated at the time of his injury, without regard to what your personal view may be as to the propriety or wisdom of the law on this subject in force in this state." That portion of this excerpt which contains the admonition to the jury to lay aside their personal views as to the propriety of our laws was, possibly, not necessary, as juries, as a general rule, fully understand their duties and obligations in this regard. The necessity for such admonitions may sometimes exist. Of this the court must be the judge and exercise his discretion, and, unless there is an abuse of that discretion resulting in prejudice, reviewing courts cannot interfere. While this cautionary instruction may not have been necessary, we are unable to see where or how it could have worked any prejudice to defendants. It was clearly the duty of the jury to lay aside their personal views and return a verdict in accordance with the law and evidence. This in substance was the direction of the court. True, it might have been stated in a much more condensed form, if necessary to be referred to at all, but that fact could not require a reversal of the judgment.

The action of the court in giving other instructions and in refusing to give instructions requested by defendants is criticised in the briefs and arguments of counsel, but upon a review of all such we can detect no sufficient reason for disturbing the judgment.

The vital issues in this case were few, yet the record shows that 27 instructions, including those requested by plaintiffs and defendants, covering 16 typewritten pages of the transcript, were given to the jury, involving many repetitions and the copying of a number of sections of the statute. We are unable to see why the whole of the law

pertinent and proper to have been given might not have been condensed to within reasonable bounds, without repetition, and more easily of comprehension by the jury. "Instructions in a case should be few in number and should present to the jury the law applicable to the issues in the case in simple language and terse sentences." *City of Beatrice v. Leary*, 45 Neb. 119. But a judgment will not be reversed because of the number of instructions given to the jury by the trial court, unless it clearly appears that prejudice results therefrom. *Omaha Street R. Co. v. Boesen*, 68 Neb. 437.

There being no reversible error shown by the record, the judgment of the district court is

AFFIRMED.

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ADDISON MOORE, APPELLEE, V. JOHN STURM, APPELLANT.

FILED MARCH 24, 1911. No. 16,364.

1. **Trial:** REMARKS OF JUDGE. Remarks of the district judge while impaneling the jury set out in the opinion, and *held* not to constitute reversible error.
2. ———: INSTRUCTIONS. An instruction on the measure of damages, couched in language which would be construed by ordinary minds to accord with the well-settled rule governing that question, will not be presumed to be misleading.
3. **Appeal:** ADMISSION OF EVIDENCE. Where a ruling on the admissibility or competency of certain evidence is reserved, and the evidence is afterwards excluded, and the jury are instructed to wholly disregard it, its tentative reception does not, under ordinary circumstance, require a reversal of the judgment.
4. ———: EVIDENCE: REVIEW. A party cannot predicate error upon the exclusion of evidence offered by him if it is finally received and considered by the jury.
5. Evidence examined, and found to be sufficient to sustain the verdict, and that the verdict was not excessive.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

*George A. Adams,* for appellant.

*W. B. Comstock, contra.*

BARNES, J.

Action by John E. Moore as next friend of the plaintiff, his minor child, for damages for an assault and battery. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the defendant, a man about 68 years old, assaulted the plaintiff, who at that time was about 3 years of age. The injuries complained of consisted of a broken collar bone and certain bruises upon his person.

The defendant's first contention is that the district judge, by certain remarks while the jury were being impaneled, committed reversible error. It appears that one Rudd, during his *voir dire* examination, stated, in substance, that owing to his sympathy for children he felt that he was disqualified; in other words, that he could not render a fair and impartial verdict. Defendant challenged the juror for cause, and thereupon the court said: "I am going to sustain the challenge, but I don't do so because I think it is proper to do it. We have plenty of jurors here, and we can undoubtedly impanel a jury and get jurors without any feeling. There is no doubt in my mind but what this juror could give a fair verdict. I haven't any doubt that Mr. Rudd could give a fair verdict. His sympathy for the child is not probably any greater than any other human being's. As long as we have plenty of jurors in the room, I will sustain the challenge." By the juror: "Judge, don't you think, when a person is the father of a family of three children, that it would influence him?" By the court: "I think, if you comprehended the import of the question, you would not stultify yourself by saying that you could not be fair. It is equivalent to saying that you could not conscientiously do your duty. I think you are a fair man and could and would do your duty." Thereupon the juror was excused.

It is claimed that the foregoing statements were prejudicial to the rights of the defendant and resulted in an excessive verdict. We think this contention is without merit. We are unable to see how the statement of the presiding judge, that in his opinion the juror could render a fair and impartial verdict, could result in prejudice to any one. The defendant's argument on this point is neither convincing nor persuasive. It also appears that the matter was thought to be of little importance at the time it occurred, for counsel did not propound the same or like questions to the other members of the jury. We therefore conclude that the remarks complained of are not of sufficient importance to require a reversal of the judgment.

Defendant's second contention is that the court erred by instructing the jury as follows: "No. 4. If you find from the evidence in favor of the plaintiff, you will find such an amount of damages as will compensate him for the injuries received. You will allow him no speculative damages by way of punishment, but such as are compensatory. You may take into consideration the character of his injuries, whether permanent or temporary. You may consider such pain and suffering as was occasioned by the injuries, and all the facts and circumstances shown in evidence bearing upon the damages suffered." Defendant's argument is that the instruction speaks only of speculative damages, and not of punitive damages or smart money, and that the court did not instruct the jury that the plaintiff could not recover punitive damages by way of smart money, although such an instruction was requested. It is also contended that the word "such" as used in the instruction refers to the adjective "speculative," and not to the noun "damages." We do not so understand the instruction. To us it seems clear and plain that the jury were informed that they were not to allow the plaintiff speculative damages, but only such as were compensatory. This is the construction that any ordinary man would place upon the language of the instruction. We think this

question should be ruled by *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 756, where a like question was presented and the language used was held not to be misleading.

It is also contended that the court erred in permitting the defendant to prove the value of the physician's services in treating the plaintiff's injuries. It is true that during the trial it was stated that the expense incurred for such services was $100. This was objected to, the ruling was reserved, but finally the testimony was excluded, and the jury were instructed not to take that matter into consideration in arriving at their verdict. Therefore the record on that question is without error.

Error is also assigned for the exclusion of evidence offered for the purpose of impeaching a witness for the plaintiff, but an examination of the record discloses that that evidence was finally received, and the whole matter was before the jury for their consideration.

Finally, it is suggested that the verdict for $500 is excessive. A careful examination of the evidence satisfies us that the injuries complained of were severe; that the plaintiff, at the time of the trial, had not fully recovered from the effects of the assault, which the jury found the defendant had made upon him.

The case seems to have been fairly tried, and the evidence sustains the verdict. The record contains no reversible error, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

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GEORGE T. STEPHENSON, TRUSTEE, APPELLEE, V. CHARLES M. MURDOCK ET AL., APPELLANTS.

FILED MARCH 24, 1911. No. 16,380.

1. Appeal: AFFIRMANCE. Where, upon the trial *de novo* of a suit in equity brought to this court on appeal, an independent investiga-

tion of the pleadings and the evidence contained in the bill of exceptions results in a judgment which accords substantially with the conclusions reached by the trial court, the findings and judgment of that court should be affirmed.

2. Limitation of Actions: ADVERSE POSSESSION: NOTICE. The statute of limitations does not commence to run in favor of one claiming an interest in real estate until he has taken possession thereof, or has exercised such dominion over the premises as amounts to notice to the real owner of his adverse claim.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

*E. O. Kretsinger* and *C. M. Murdock,* for appellants.

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

BARNES, J.

Action in the district court for Gage county for accounting as to certain property held in trust, and for a decree to sell the same for the payment of the sum found due the plaintiff in the matter of the trust estate. The plaintiff had the judgment, and the defendants have appealed.

It appears that on the 3d day of December, 1892, the property now in question, together with certain other real and personal estate, was owned by one Samuel Wymore, Sr., who at that time conveyed the same in trust to Charles M. Murdock, Arthur A. Murdock, and Joseph Pasko, and took their notes therefor in the sum of $8,819.50; that soon thereafter Wymore left his home in Gage county and established his residence in the state of Nevada; that no payments were made on the notes above mentioned, and the same were renewed from time to time; that in the month of December, 1892, Wymore returned to Gage county for the purpose of disposing of his property and settling up his accounts with the defendants above named; that, being unable to sell or otherwise dispose of the property in question, he conveyed the same, or so much thereof as the defendants had not already dis-

posed of, to the defendants Charles M. Murdock and Arthur A. Murdock by warranty deed, with a written agreement from them that they were to sell the real estate for him, pay the taxes which had become delinquent thereon, and remit the remainder to him, which was to be applied to the payment of the notes above mentioned; that in 1896 the notes were again renewed; that in March, 1899, Wymore returned to his former home in Gage county, and, no account having been rendered to him as to the disposition of the proceeds of his property theretofore conveyed to the defendants, the notes were again renewed, and, although some of the property had been disposed of and a considerable portion of the real estate had been sold for the nonpayment of taxes, Wymore entered into a written contract with the Murdocks (Pasko having died after conveying all of his interest in the property to them) by which it was provided as follows: "It is mutually agreed by and between all parties to this agreement that the list of lands and town lots, improved and unimproved, and nine head of horses and mares and contract of E. H. Chaffin and Sherman L. Wymore for property sold and not fully paid, a list of all which is hereto attached and made a part of this agreement; that said * * * property and the title to said real estate shall be held in trust by said Charles M. Murdock and Arthur A. Murdock, but handled in common by the parties to this agreement, for sale, exchange, improvement, cultivation and rent, and the proceeds from said sale, rents and exchange to be applied to the payment of the delinquent taxes due on said property and the payment to said Samuel Wymore, Sr., in the aggregate amount due on said three notes above mentioned, $8,729.56 without interest, and after said amount shall have been paid and settled in full then the residue and balance of all property, real or personal, or proceeds from said business, if any, to be held in common or sold, and the proceeds divided equally between the first and second parties to this agreement as they may elect. It is further agreed that neither of the

parties to this agreement shall make any charge for their time and labor in transacting any business for the firm or in settling or collecting notes and accounts due Samuel Wymore, Sr., individually, separate and apart from the firm or company business."

It appears: That the first thing done by the Murdocks after the deeds above mentioned were executed was to mortgage Wymore's home place for $500 to one E. H. Amber. The mortgage was renewed from time to time and finally paid off by Samuel Wymore himself in 1903. In the meantime, although the Murdocks were in possession, control and management of the property, no taxes had been paid thereon. That when Wymore gave Charles M. Murdock the money with which to pay off the mortgage above mentioned, with the instruction from Wymore to take an assignment of the mortgage in his favor, Murdock disobeyed the instruction and had the mortgage released. It further appears that, although the legal title was in the Murdocks, they at all times admitted that they held the property in trust; that Wymore depended on the Murdocks to carry out the terms of the written contract, sell the land, pay the taxes, and turn over to him the amount that had been agreed upon, to wit, $8,729.56 without interest. It seems to be conceded that they did neither of these things. When Wymore ascertained the facts in relation to their mismanagement of his estate, he commenced this action. Thereafter, being old and in failing health, he conveyed the property to one George T. Stephenson as his trustee for the purpose of prosecuting this action for and in his behalf; that after the testimony was taken, but before the judgment complained of was rendered, Wymore died, and the action proceeded in the name of the trustee. When the case was finally argued and submitted, the trial court found the facts in substance as above stated, and made an accounting between the parties. It was found that there was due to the plaintiff of the proceeds of the Wymore estate the sum of $6,086.71; that Wymore had paid certain taxes and incurred certain expenses

in the management of the estate, amounting to $277.70, which was included in the amount found due as above stated, which was declared to be a lien on the remaining portion of the real estate. A decree was entered providing for the sale of the remainder of the property which had not theretofore been disposed of by the Murdocks, and it was ordered that the proceeds be applied, first, to the payment of the taxes, and that the remainder be paid over to the plaintiff as the trustee of Wymore's estate.

Defendants' first contention is that the district court erred in finding that there was $6,086.71 due and unpaid to the plaintiff as trustee for Samuel Wymore under the contract of March 29, 1899. This contention has compelled us to review the entire evidence contained in the bill of exceptions. This we have done, and we are satisfied of the correctness of the accounting made by the district court. In fact, we adopt his findings as to the amount due as our own. It may be said in passing that, if called upon to determine that amount in the first instance, we might have made it larger than the sum found due by the district court; but, on the whole, we are satisfied with the correctness of that portion of the decree.

Defendants' second contention is that the court erred in holding that Glen E. Murdock was not the *bona fide* owner of that portion of the estate which he had obtained from his father, Charles M. Murdock, by and through the intervention of the Lincoln Land Company. We have examined the evidence upon this question, and are satisfied that Glen E. Murdock never paid any consideration for this property; that he was not a purchaser of it in good faith, and therefore the trial court was right in finding that the property in equity still belonged to Wymore.

It is also contended that the statute of limitations had run in favor of Glen E. Murdock at the time this action was commenced. It appears, however, that he never placed the conveyance by which he claimed title upon the records of Gage county; that in 1899, when the contract in question was entered into, there was nothing of

record which showed that Glen E. Murdock had any interest whatsoever to any portion of the property mentioned in the schedule attached to that contract, and it is conceded that at that time he had reconveyed the tract of land in question to his father; that in making the contract it was agreed, understood and conceded by all of the defendants that the land now claimed by Glen E. Murdock was still a part of Wymore's estate. He made no claim to the property at that time, and having given no notice of his present claim, either actual or constructive, he is not entitled to invoke the protection of the statute of limitations.

A vigorous attack is made upon the good faith of Stephenson, the trustee and present plaintiff in this action; but, the Murdocks having been decreed to have no further interest in the property in question, such an attack is entirely beside the mark. At this stage of the case, no one can complain of the actions of the trustee, except the heirs of the Wymore estate.

A careful examination of the whole record satisfies us that the judgment of the district court was right, and it is

AFFIRMED.

ROSE, J., not sitting.

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LESTER HARLAN MASON, APPELLEE, V. IDA E. ROWLEY ET AL., APPELLANTS.

FILED MARCH 24, 1911. No. 16,993.

Judgment: CONCLUSIVENESS. A judgment of the district court, having jurisdiction of the subject matter and all of the necessary parties in an action to quiet title, and from which no appeal has been taken, is binding and conclusive as to the rights of the same parties in a subsequent proceeding by which it is sought to partition the land in question in such former action.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*J. G. Thompson* and *W. J. Furse,* for appellants.

*Field, Ricketts & Ricketts, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Harlan county in a partition suit confirming shares in, and directing sale of, a quarter section of land situated in that county. The action was commenced by Lester Harlan Mason against George W. Holmes, who was in possession, and all others who have or claim to have an interest in the premises. By the judgment, of which complaint is made, it was declared that the plaintiff and William G. Mason were each the owners in fee simple of an undivided one-fifth of the land in question, subject to an estate for life of the defendant Nancy E. Mason; that the defendant Holmes was the owner in fee simple of an undivided three-fifths of said real estate, subject to the life estate aforesaid, of which he was also the owner; that the defendant James G. Thompson has a lien on the undivided one-half of whatever interest the Mason heirs may have or receive; that the plaintiff was entitled to the partition of the premises; and one Thomas W. Carroll was appointed referee to make such partition. All of the defendants except George W. Holmes and wife excepted to the decree, and have prosecuted this appeal. The only question presented for our determination is: Have the defendants Ida E. Rowley, Henry L. Mason and Effie I. Harroun each an undivided one-fifth interest in the land in question, subject to the life estate above mentioned.

It appears that in 1881 one William B. Mason, a resident of Harlan county, died, leaving a widow and five children, of which the last above named were three. At the time of his death he, with his family, occupied the

land in question herein as a homestead. Early in 1883 the widow, as administratrix, pursuant to a license obtained from the district court for that county, sold the land to pay the debts of the decedent's estate, and she and the several heirs, then minors, surrendered possession thereof to the purchaser. Defendant Holmes, by mesne conveyances, holds under the purchaser at that sale, and he and his grantors have held possession thereunder claiming title from 1883 until 1906, when defendant Holmes brought suit against the several parties to quiet his title as against the widow and the heirs of William Mason, who are the defendants in this case. The five Mason heirs answered, alleging the homestead character of the land, and prayed that they might be decreed to be the sole owners thereof, subject to the life estate of Nancy E. Mason, and that their title thereto be quieted and confirmed in them. Nancy E. Mason answered and claimed an estate in the premises for life. The trial court in that action found for all of the defendants, except the widow. An appeal was taken to this court, where it was held that so much of the decree of the trial court as granted any relief to the defendants Rowley, Henry L. Mason and Effie I. Harroun was erroneous; that as to them the action should have been dismissed, and the title to three-fifths of the land in controversy should have been quieted in the plaintiff Holmes. Thereupon, the cause was remanded, with directions to the trial court to enter a judgment in accordance with the opinion. See *Holmes v. Mason,* 80 Neb. 448.

When that cause again came on for hearing before the district court upon the mandate, that court rendered judgment therein as follows: "This cause coming on to be heard upon this .... day of ....., 1908, on the mandate of the supreme court, and the court being fully advised in the premises, and it being made to appear from the mandate that the decree of this court as to the defendants Nancy E. Mason, Lester Harlan Mason and William G. Mason was in all things affirmed, and as to the defend-

ants Ida E. Rowley, H. L. Mason, and Effie I. Harroun the decree of the court was reversed, with costs, in favor of the plaintiff, and said cause was remanded, with directions to enter decree in accordance with the opinion of the supreme court. It is therefore ordered, adjudged and decreed that an undivided two-fifths of the northwest quarter of section seventeen (17), township two (2), north of range eighteen (18), west of the 6th P. M., be and the same hereby is quieted and settled in the defendants Lester Harlan Mason, and William G. Mason, subject to an estate therein in the plaintiff, George W. Holmes, for the life of the defendant, Nancy E. Mason, and subject to the right of J. G. Thompson, as his interest appears under contracts with said defendants. And it is further adjudged and decreed that the plaintiff is entitled to the exclusive use and enjoyment of the land above described to the exclusion of all of the defendants during the life of the defendant Nancy E. Mason, and that the title to an undivided three-fifths of the above described premises be and the same hereby is quieted in the plaintiff George W. Holmes, as against all the defendants, and that plaintiff recover costs of the supreme court, as against the defendants, Ida E. Rowley, Henry L. Mason and Effie I. Harroun, and that in this court each party pay his or her own costs."

To that judgment no exceptions were taken. and it was approved as to form and substance by counsel for both parties. No appeal was prosecuted therefrom and no motion was ever made to modify it in any respect. That judgment responds to the issues made by the pleadings, for in that action the only issue between Holmes, on the one hand, and Rowley, Harroun and Henry L. Mason, on the other, was, who was the owner of the fee title to the land in question, subject to the use of the premises for the life of Nancy E. Mason. That court had jurisdiction to try the title to the land in question, subject to the interest of the life tenant, and it expressly quieted and settled three-fifths of that title in George W. Holmes as

against Rowley, Harroun and Henry L. Mason. That was all the interest claimed by the defendants last named in that action. The parties to that suit and those in the instant case were the same, and the judgment there rendered is binding and conclusive upon all of them. Therefore by the adjudication of a court of general jurisdiction three-fifths of the remainder in fee of the land in question herein was quieted and settled, and is now in the defendant George W. Holmes as against Rowley, Harroun and Henry L. Mason. To say that those parties had any interest in the land when the present partition suit was commenced is to ignore that judgment. If Rowley, Harroun and Henry L. Mason had no interest in the property when this action was commenced, they were not necessary parties to this suit. They no longer had any share in the property; they had no interest in the title; and therefore the decree of the district court in this case was correct. In fact, it was the only judgment which that court could have lawfully rendered.

This view of the matter renders a decision of any of the other questions presented by counsel for the appellants wholly a work of supererogation. The judgment of the district court was right, and is

AFFIRMED.

FAWCETT, J., not sitting.

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## IN RE ESTATE OF WELLS WILLITS.

## JOHN M. WILLITS, APPELLANT, V. ROBERT EARLE CONKLIN ET AL., APPELLEES.

FILED MARCH 24, 1911. No. 16,236.

1. **Wills: CONSTRUCTION: WORDS OF LIMITATION.** The rule that words of limitation shall be applied to the death of the first taker without issue during the life of the testator is extremely technical in its character, and does not apply where there are any indica-

tions, however slight, that the testator referred to death subsequent to his own demise.

2. ———: ———: SURVIVORSHIP. The general rule is that the period of time to which survivorship relates depends upon the intention of the testator, rather than upon technical language used in a particular clause in a will.

3. ———: ———: EQUITABLE CONVERSION. Where power is given to an executor to convert the real estate into money, and he is directed to pay the proceeds over to the guardians of certain minors during their minority, a court of equity will decree that an equitable conversion of the real estate of the testator took place, and that the estate should be distributed as personal property in accordance with the terms of the will.

4. ———: ———: ESTATE BEQUEATHED. A testator devised and bequeathed all his property, real and personal, to A and B, two grandsons, share and share alike, and provided that in case of the death of either his share should revert to the other. He also gave power to the executor to sell the real estate, and directed that the proceeds should be paid to the lawful guardians of the minor grandsons and held in trust "until each attain his majority when he shall have his share." *Held*, That the period of distribution limited the survivorship, and that the gift took effect at the testator's death, with a gift over to the survivor upon a contingency terminable at the attainment of majority.

5. ———: ———: ———. *Held, further*, That since A attained his majority before his death, the contingency by which his title might be divested and B substituted became impossible, and B thereafter had no interest in the one-half of the estate given to A.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*John Everson, C. M. Miller* and *C. C. Flansburg*, for appellant.

*J. G. Thompson* and *Gomer Thomas, contra.*

LETTON, J.

In 1899 Wells Willits and Rachael C. Willits, husband and wife, resided in Harlan county, Nebraska. In that year Mrs. Willits died, leaving her husband and her only

son, Ed L. Willits, surviving. In 1882 Ed L. Willits was married to his first wife, Blanche Conklin, who died in 1887, leaving as the only issue of the marriage a son, Lee C. Willits, born July 4, 1886. In 1898 Ed. L. Willits was married to Rebecca Metz. The only issue of this marriage was John M. Willits, who was born May 14, 1902, and is still living. On October 8, 1903, Ed L. Willits died intestate, leaving surviving him his sons, Lee C. Willits and John M. Willits, and his widow, Rebecca M. Willits. His father, Wells Willits, died on November 13, 1903. From the time his wife died, in 1899, until the time of his death, Wells Willits lived in the family of Ed. L. Willits. He was an invalid, having suffered from locomotor ataxia for years, and was virtually on his death bed when his son died. About two weeks after his son's death he executed a will, which was duly probated. The executor named in the will qualified, sold the personal property and real estate, and paid a portion of the proceeds in equal sums to the guardians of the respective minors before Lee C. Willits reached his majority. Lee C. Willits died on the 23d of September, 1907, after attaining his majority. He left a will by which his property was bequeathed to the defendants, Robert Earle Conklin and Mary E. Conklin.

The present controversy arose upon the final distribution of the proceeds of the estate of Wells Willits. Upon the final report of the executor being filed in the county court, John M. Willits by his guardian filed a petition in that court praying for a construction of the will, that the money paid by the executor to the guardian of Lee C. Willits be recovered back, and in substance that he be declared the owner of the entire estate. The county court held in substance that one-half the estate vested in each of the grandchildren, and directed the payment of the proceeds to the guardian of John M. Willits and the executor of the estate of Lee C. Willits, respectively. On appeal to the district court this judgment was affirmed, and the judgment is now before us for review.

The point at issue is the construction which should be

placed upon the second and third paragraphs of the will, which are as follows: "I give, devise and bequeath all my property both personal and real of which I may die possessed to my grandsons, Lee C. Willits and John M. Willits, share and share alike. In case of the death of either of the above named grandsons, his share of my estate to revert to the other.

"I give and confer upon the executor, to be hereinafter named, and acting under this will, full power and authority, by public or private sale, as he shall deem expedient, to make sale of all real estate of which I may die possessed and do all needful acts to convey title to the purchasers thereof. The proceeds of such sales to be turned over to the lawful guardians of my grandsons, above named, and held in trust by said guardians, until each attain his majority when he shall have his share."

The question presented is: What right in the property did Lee C. Willits possess at the time of his death? Was it an indefeasible vested estate, or did all the property devised to him "revert to the other" grandson on the happening of that event? The surviving grandson takes the position that on the death of Lee C. Willits at any time the entire estate passed to him, and that the legatees of Lee took nothing by his will. He contends that the intention of the deceased was to divide his estate equally between his two grandchildren and to prevent the diversion of the property to the heirs or legatees of either, and that the proper construction to be placed upon the will is that, "*whenever* the first legatee dies, whether before or after the testator, the other shall take; or it means that, if one dies before some contingency which the testator then had in his mind, the other shall take all; or it means that, if the first is prevented from taking by dying during the lifetime of the testator, the other shall be substituted for him." On the other hand, the defendants contend that the contingency referred to in the will was death before the death of the testator, and that in any event the estate of Lee C. Willits became absolute upon his arrival at 21 years of age.

The general rule is that, where there is a legacy to a person absolutely, and a provision that in case of his death the estate shall revert to another, the contingency referred to is the death of the first taker before the death of the testator; but special circumstances will prevent the application of this general rule. In *Schnitter v. McManaman*, 85 Neb. 337, it is said: "The rule that the words of limitation shall be applied to the death of the first taker without issue during the life of the testator is said to be extremely technical in its character, and does not apply where there are indications, however slight, that the testator referred to death subsequent to his own demise." In *Britton v. Thornton*, 112 U. S. 526, Mr. Justice Gray says: "When indeed a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. 2 Jarman, Wills, ch. 48; *Briggs v. Shaw*, 9 Allen (Mass.) 516; Lord Cairns in *O'Mahoney v. Burdett*, 7 L. R. H. L. 388. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator. *O'Mahoney v. Burdett*, above cited; 2 Jarman, Wills, ch. 49."

It is elementary that in the construction of a will it is the duty of the court to effectuate the intention of the testator if it can be ascertained, and in order to ascertain this intention the court should place itself as nearly as possible in the position of the testator, and consider not only the particular clause of the will which is in dispute, but the whole instrument. *McCulloch v. Valentine*, 24 Neb. 215; *Chick v. Ives*, 2 Neb. (Unof.) 879; *Yoesel v. Rieger*, 75 Neb. 180; *Lewis' Estate*, 203 Pa. St. 219; 30

Am. & Eng. Ency. Law (2d ed.) 666; *Albin v. Parmele*, 70 Neb. 740.

Appellant bases much of his argument upon the provision that, in case of the death of either grandson, his share "shall revert to the other," but we think he places too much stress upon this phrase, and does not give sufficient consideration to the other provisions of the will.

Coming now to a consideration of the whole instrument: The will first devises and bequeaths all the testator's property, both real and personal, to the grandsons, share and share alike. This language clearly conveys a vested interest upon the death of the testator to each grandson. The next provision is that, in case of the death of either grandson, his share shall revert to the other. Standing alone, these two provisions would, under the general rule, apply to death before the death of the testator, but, as we shall see, there are other clauses which must be taken into account. The next paragraph empowers the executor to sell and convey all the real estate, and further directs: "The proceeds of such sales to be turned over to the lawful guardians of my grandsons, above named, and held in trust by said guardians, until each attain his majority when he shall have his share." While this provision does not expressly direct the executor to convert the real estate into money, it is apparent that it was the intention of the testator that the land should be sold and the proceeds paid during the minority of the grandsons, otherwise the provisions for payment to the guardian would be useless, and the direction that each shall have his share at majority would also be without force. 1 Jarman, Wills (6th ed.) 558; *Chick v. Ives, supra.* The direction in this clause that the proceeds shall be held in trust for each grandson until his majority, *"when he shall have his share,"* seems to us to be of great importance in the ascertainment of the testator's intention. From the circumstances at the time the will was made it is evident that he knew and realized his condition, and that the possibility of his living until either

grandson reached the age of 21 years was beyond his most sanguine hope. He was an aged man, his wife was dead, he was suffering from a fatal disease and required constant care and attention. In his ailing and stricken condition he had just sustained the loss of his only son. He believed that his days were numbered, and so expressed himself. Placing ourselves as nearly as we can in his position, we think it clear that the contingency of the death of either of his grandsons before his own was not within his contemplation. By the terms of the will the money is placed beyond the reach of either until he reaches majority. If he die before majority, the fund which is then in the hands of either the executor or guardian must pass to the other grandson. It was evidently in the testator's mind that until each grandson arrived at man's estate it was improbable that he should have issue of his own and thus perpetuate the family name. He desired to take reasonable precaution that his property should remain in the family. We cannot think that it was his purpose to divert the estate conferred upon one grandson from the children of such grandson, or that the other should receive the whole estate. We think it was his intention that the period of distribution should limit the survivorship, and that the executory gift over to the surviving grandson was limited by its terms to that period.

The language of Lord Hatherley in *O'Mahoney v. Burdett,* 7 L. R. H. L. (Eng.) 388, 403, in discussing the second and fourth rule in *Edwards v. Edwards,* 15 Beav. (Eng.) 357, is peculiarly applicable: "So again, I apprehend, in another class of cases, many of which were cited before us, which have been decided since *Edwards v. Edwards,* one of them having been before myself; in those cases where the court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole

estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any farther trust, and on the other hand that a subsequent event, namely, a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise. The courts have held that that was unreasonable. In the case I have alluded to it was a trade, which was directed to be carried on by the executors until the son attained a certain age, when the trade (and not the trade only, but other property as well) was to be handed over to him, and then there was what appeared to be a divesting executory devise in the event of his dying without issue. I held in that case, and I should be disposed to hold the same again if a similar case came before me, that the time was evidently pointed out when the final and complete distribution was to be made, and that the executory devise must be held to be referred to that time, because it was impossible to call the property back again and hold that the executory devise was then to take effect after there had been that full and complete distribution of the funds." As Vice-Chancellor Wood, the same judge decided *Dean v. Handley,* 2 Hem. & Mill. (Eng.) 635, where there was a gift in remainder and a gift over upon a contingency determinable at the period of distribution. Mr. Hawkins in his treatise on Wills (2d. ed.) *254, deduces the following rule from the cases: "Where there is a bequest to one person, and *'in case of his death'* to another, the gift

over is construed to take effect only in the event of the death of the prior legatee *before the period of payment* or distribution, unless an intention appear to the contrary. *Cambridge v. Rous,* 8 Ves. Jr. (Eng.) 12; *Ommaney v. Bevan,* 18 Ves. Jr. (Eng.) *291; *Home v. Pillans,* 2 Myl. & K. (Eng. Ch.) 15." See also 2 Jarman, Wills (6th ed.) *1602, *1609, *1610; Theobald, Wills (Can. ed.) 681, 685; *Lewis' Estate,* 203 Pa. St. 219. We find it unnecessary to cite or consider at length all the cases an examination of which has aided us to reach this conclusion. Most of them may be found collected and examined in an exhaustive monographic note to *Smith v. Smith,* 25 L. R. A. n. s. 1045, 1145 (157 Ala. 79).

We are of opinion that the gift took effect at the testator's death, with a gift over to the survivor upon a contingency terminable at the attainment of majority, which was the period of distribution.

The contingency by which the title of Lee C. Willits might be divested and the other grandson substituted became impossible on Lee attaining his majority; after that time the appellant had no interest in the half of the estate given to the first taker.

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

AFFIRMED.

REESE, C. J., dissents.

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IRA E. HENDERSON ET AL., APPELLEES, V. HENRY E. WEIDMAN, APPELLANT.

FILED MARCH 24, 1911. No. 16,329.

1. **Damages, Measure of: INJURY TO PERSONALTY.** Compensation for mental suffering of the injured party is a legitimate element of damage in actions for trespass to property, where the unlawful act is inspired by fraud, malice, or like motives. But, in cases where the wrong consists in the taking or destruction of personal

property without fraud, malice, or other aggravating circumstances, the measure of damage is compensation for the plaintiff's loss.

2. Attachment: EXCESSIVE DAMAGES. The evidence in this case considered, and *held* to show that the damages are excessive.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed on condition.*

*E. E. Spencer* and *John E. Lowe*, for appellant.

*C. O. Whedon, J. A. Brown* and *J. T. Allensworth, contra.*

LETTON, J.

This is an action to recover damages for the malicious attachment of the household goods of the plaintiffs, who are husband and wife. The defendant is a merchant at Havelock to whom the plaintiffs were indebted in a small sum. On the 10th day of June, 1910, they intended to remove to Utica, Nebraska, and their household goods were packed and taken to the station at Havelock for shipment to that place. The next day they went to Utica and rented a house. Soon after they were notified that their goods had been attached by the defendant. They immediately returned to Lincoln and employed an attorney to act for them in the suit. The goods were held until the last week in July, when they were released from the lien of the attachment. Plaintiffs did not return to Utica, but the husband found employment in Lincoln, where they have since resided.

The affidavit for attachment was defective, and the goods seized were specifically exempt. These being the facts, the attachment proceedings were unwarranted, and the plaintiffs are entitled to recover from the defendant their actual damages sustained. The case was tried to a jury, who returned a verdict in the plaintiff's favor in the sum of $808.12.

A number of errors are assigned, but the principal contention is as to the allowance of damages for mental suffering and humiliation, the defendant insisting that the evidence is not sufficient to sustain a verdict in this respect. As we have seen, the plaintiffs had left Havelock before the goods were attached and never resided there afterwards. The only testimony in the record in respect to mental suffering or humiliation is as follows: The plaintiff Henderson testifies: "Q. You may state what, if any, effect on your feelings the attachment suits had, the attaching of your household goods, with reference to humiliation and mental anguish? A. Well, it was a whole lot. It would make any man—. Q. Just finish your answer, go on and finish your answer. A. Like any other man would feel, to have the last thing he had taken. Q. State whether or not it was a source of humiliation to you? A. It was. Q. Was it a source of mental worry and anguish? A. It was." Mrs. Henderson's testimony in this respect is: "Q. Well, state what effect the attachment of these goods had upon your peace of mind and feelings in the matter? A. I should think it would hurt any woman's feelings if somebody had taken the last thing she has, even to her clothes. It would be trying to anybody's feelings. Q. Did it have that effect upon your feelings? A. It did." The question as to how far compensation for mental suffering may be allowed in cases of trespass to personal property is considered in *Murray v. Mace,* 41 Neb. 60, and it is there held that in a case where the unlawful act is inspired by fraud, malice, or like motives, mental suffering is a legitimate element of damage. "But in cases of trespass, where personal property is taken and carried away, in the absence of fraud, malice, or other aggravating circumstances, the measure of damage is compensation to the plaintiff for his loss, which is, as a rule, the value of the property with such incidental damage as is shown to be the natural and proximate result of the wrong charged. *Brown v. Allen,* 35 Ia. 306; *Woolley v. Carter,* 7 N. J. Law, *85; *Hopple*

*v. Higbee,* 23 N. J. Law, 342; *Cushing v. Longfellow,* 26 Me. 306; *Sims v. Glazener,* 14 Ala. 695; *Woodham v. Gelston,* 1 Johns. (N. Y.) *134; *Felton v. Fuller,* 35 N. H. 226; *Coolidge v. Choate,* 11 Met. (Mass.) 79; *Meagher v. Driscoll,* 99 Mass. 281. It is believed that no precedent can be found in the reports for the allowance of damage on account of injury to feelings in actions of this character." This was a forcible entry and detention case. *Jensen, Juhl & Hensen v. Hallam,* 51 Neb. 192, was an action for a malicious attachment, and while the former case is not mentioned in the opinion the principle therein stated is followed. The evidence in both of these cases as to mental suffering is fully as strong as that in the case at bar, but this court in each instance refused to permit the verdict to stand as to this element of damage. In both cases, however, the verdict was sustained for the amount of actual damage proved, but the plaintiffs were required as a condition of affirmance to remit the amount of judgment in excess thereof. We are convinced that this case is ruled by these decisions. No malice or ill will was proved. The testimony indicates the attachment suit was begun as a result of erroneous advice given the defendant by the justice of the peace. The costs and expenses which seem to be proper elements of damage sustained by the plaintiffs amount to the sum of about $100.

If within 40 days from the time of the filing hereof the plaintiffs shall file in this court a remittitur of all in excess of that sum, together with interest at 7 per cent. thereon from the date of judgment, the judgment of the district court will be affirmed, otherwise it will be reversed and the cause remanded for further proceedings; each party to pay his own costs in this court.

JUDGMENT ACCORDINGLY.

EDMUND ERB, APPELLANT, V. LAURA C. MCMASTER ET AL., APPELLEES.

FILED MARCH 24, 1911. No. 16,381.

**Husband and Wife:** ANTENUPTIAL CONTRACT: ESTOPPEL. Plaintiff entered into an oral antenuptial contract to release all claim to the real estate of his intended wife on the payment to him of $1,000 after her death. The contract was reduced to writing and signed by both after marriage. Afterwards he was paid $330 on the contract by his wife in her lifetime, and she provided for the payment of the remainder of the $1,000 by her will. *Held*, in this an action for partition, in which he seeks to assert his marital rights in and to the real estate of his wife without regard to the contract, and without offering to return the money paid him, that he cannot thus accept and retain the benefits of the contract and at the same time maintain an action based upon the ground of its invalidity.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

*E. O. Kretsinger* and *Schwind & Orr*, for appellant.

*Sackett, Brewster & Spafford* and *L. W. Colby, contra.*

LETTON, J.

This is an action in partition in which the plaintiff as surviving husband of Eliza M. Erb, deceased, prays for a decree establishing in him a one-fourth interest in the real estate of which she died siezed; that the same might be partitioned and a homestead set apart to him.

Plaintiff and Eliza M. Erb were married on January 6, 1901. Both had been previously married. Before marriage an oral agreement was made between them respecting the interest each should have in the other's property. This agreement was reduced to writing after the marriage, and is as follows: "Beatrice, Neb. The following articles of agreement, between Edmund Erb, husband, and Eliza M. Erb, wife, were entered into and signed voluntarily by each one respectively. It is agreed on the

part of the husband that he waives all right to any property, either real estate or personal, of his wife, except the sum of one thousand dollars, which shall be paid to him in the event the wife dies first. Eliza M. Erb, wife, hereby waives all right of dower in real estate or personal property owned by her husband, Edmund Erb. (Signed) Edmund Erb. Eliza M. Erb. Done this 7th day of January, 1901. Beatrice." On February 17, 1908, the plaintiff was paid $330 on the contract by his wife, and in return gave her the following receipt: "Received of Eliza M. Erb the sum of three hundred and thirty dollars on contract at marriage. Edmund Erb." Mrs. Erb died on the 24th of December, 1908. She left a will which was executed on December 31, 1907. The will provided that the husband should receive the sum of $1,000, to be paid to him within one year after her death, which bequest was made a charge upon certain real estate. After payment of the $330 above referred to, Mrs. Erb executed a codicil to the will, which recites: "Since signing and executing the foregoing will, I have advanced to my husband, Edmund Erb, to apply on the provision made for him in the second paragraph of this will, the sum of three hundred and thirty dollars, and it is my will that said sum shall be deducted from the amount made a charge on the real estate devised to Howard and Helen Heath in the third paragraph of this will, and that said real estate be now charged with the sum of six hundred and seventy dollars, and that said Edmund Erb have from my estate, as provided in said paragraph three, one thousand dollars, less the amount of said advancement, of three hundred and thirty dollars, or six hundred and seventy dollars, which shall be taken and received by him in lieu of any and all interest which he may have in my estate either by reason of being my husband, or by reason of any agreement in writing entered into by and between us, nuptial or antenuptial, and said sum shall be taken in satisfaction of any such agreement." The will and codicil were duly probated and allowed.

The plaintiff contends that the contract is void under the statute of frauds, and that if void there has not been such part performance as to take it from under the provisions of the statute. The defendants plead the validity of the contract; that there has been sufficient part performance to render it enforceable; that by the acceptance by plaintiff of the $330 paid him under the contract, and its retention, he ratified the same and has waived his right to any of the property except the $670 bequeathed him as due on the contract. They further plead that he is estopped by the foregoing facts from asserting any right to inherit and from maintaining this suit.

We find in the appellee's brief what purports to be a portion of the opinion of the trial court. The language accords so fully with our own views that we insert it here as an expression thereof: "The parties not only intermarried pursuant to the contract, but, as long as the wife lived, both she and her husband, the plaintiff, believed they had a valid contract, and acted upon and treated it as such. The wife lived and died in that belief, and paid out her money and made her will accordingly. Plaintiff accepted $330 of her money, and gave a written receipt acknowledging that he received it on said contract, and still keeps and retains said money and makes no offer to return it. It was not until his wife's death that he doubted the validity of the contract, which he wrote with his own hand. The court is of the opinion that good faith and common honesty require that he should still abide by the contract, now that she is dead. In good conscience he is estopped to do otherwise. The part performance which will take an oral contract out of the statute is such conduct as will amount to an equitable estoppel against the party who would resort to the statute to defeat the oral agreement. *Brown v. Hoag*, 35 Minn. 373; 4 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1409. Plaintiff's wife, relying upon the antenuptial agreement, married the plaintiff, paid a large sum of money to plaintiff, which he otherwise would not have received until after

her death, made her will disposing of the rest of her property to those whom she desired to have it, and then died, thus putting it out of his power to put her in the position that she would have occupied had he not induced her to do such things, relying upon said contract; and, while admitting the contract, he now seeks to repudiate it by invoking the statute of frauds. It seems to me it would be a fraud upon the dead as well as the living to permit him to do so."

No offer is made in the petition to return to the personal representative of the deceased (who is a party to the suit) the money paid on the contract. A tender was made at the argument in this court, which was too late to be effectual. Mrs. Erb disposed of her property, and died with the knowledge that plaintiff had accepted the benefit of the contract by the receipt of the money paid him thereunder. She cannot change this disposition, and the other party should not be permitted to do so. The money was paid plaintiff in lieu of his interest in the real estate, and its acceptance and retention bars him in equity. Even if the contract were wholly invalid, which we do not decide, under these circumstances the plaintiff is estopped to allege its invalidity. Bigelow, Estoppel (3d ed.) 574. The following cases illustrate this principle as applied to differing facts: *Ayres v. McConahey,* 65 Neb. 588; *Hobbs v. Nashville, C. & St. L. R.,* 122 Ala. 602; *Field v. Doyon,* 64 Wis. 560; *William Deering & Co. v. Peterson,* 75 Minn. 118; *Poole v. Lowe,* 24 Colo. 475, 52 Pac. 741; *Smith v. Sheeley,* 12 Wall. (U. S.) 358; *United States v. Lamont,* 155 U. S. 303; *Daniels v. Tearney,* 102 U. S. 415.

We find it unnecessary to consider the other points presented.

The judgment of the district court is

AFFIRMED.

NORTH PLATTE LAND & WATER COMPANY, APPELLANT, V. E. A. ARNETT ET AL., APPELLEES.

FILED MARCH 24, 1911. No. 16,293.

1. Landlord and Tenant: LEASE: IMPLIED COVENANTS. The owner of semiarid land, by executing a contract of lease therefor and granting the right to use an appurtenant water privilege, impliedly covenants that he will do nothing to interfere with the tenant's quiet enjoyment of the real estate or of the water privilege during the term.
2. ———: ———: WITHHOLDING WATER RIGHTS: LIABILITY. And in such a case, if the landlord controls the ditch which is the source of supply for the leased premises, and without just cause will not permit water to flow into the main lateral which feeds the lateral extending to the leased land, he is liable to the tenant for resulting damages.
3. ———: ———: ACTION FOR BREACH OF COVENANT: INSTRUCTIONS. And if, in an action between the landlord and tenant, the evidence is undisputed concerning the contract of lease, the landlord's wrongful conduct and the resulting damages, and a verdict in the tenant's favor responding to the issues is amply sustained by the evidence, the judgment should not be set aside because the court submitted the contract to the jury for their construction.

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

*J. G. Beeler,* for appellant.

*Wilcox & Halligan, contra.*

ROOT, J.

This is an action upon two promissory notes. The defendants prevailed, and the plaintiff appeals.

The notes were executed in consideration for a contract of lease for a tract of semiarid land served by an irrigation system which is owned by the North Platte Irrigation & Land Company, a corporation. The lease also gave the defendant E. A. Arnett, the tenant, "permission to use one and one-half water right contract North Platte canal;

subject, however, to the exact terms and conditions of the water contract for said premises." The defendants pleaded that the land was leased for agricultural purposes, and was useless for that purpose unless irrigated; that the plaintiff controlled the irrigation canal, and, although there was an abundance of water therein, the landlord without cause wilfully and negligently failed to furnish water for the tenant's use. Damages exceeding the amount of the notes were demanded.

The plaintiff admits in its reply that there was an abundance of water in the river and in the main canal, and the testimony is undisputed on this point. It was the duty of the ditch rider to turn water into the laterals, and he was under the plaintiff's control during those seasons. The evidence is without conflict that repeated requests made by the tenant to the ditch rider for water during the irrigation seasons and complaints made to the plaintiff's superintendent were unheeded, and practically no water was available for the leased land, and that, by reason of the premises, his growing crops were stunted and seriously injured. The defendants were not in default, and no cause is shown or excuse given for the plaintiff's conduct. The jury evidently allowed the defendants damages to the extent of the notes.

The plaintiff's brief is principally devoted to a discussion of the alleged error resulting from an instruction which submits the construction of the contract of lease to the jury. The contract should have been construed by the court, but it does not follow that its failure to do so is prejudicial error. The testimony adduced by the defendants is practically undisputed, and discloses that the plaintiff should not recover. Without the exercise of the water privilege which is appurtenant to the land, crops could not be successfully grown upon the leased premises. When the landlord leased the land with the privilege of the water right, it impliedly agreed that, so far as it was concerned, the tenant should not be disturbed in the quiet enjoyment of the premises, including the use of

the water privilege. *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 471; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340.

Since the plaintiff controlled the canal and the headgates through which the water must have been conducted into the lateral for the tenant's use, and since the plaintiff would not permit water to flow therein, the tenant was as much interrupted in the quiet enjoyment of the privilege for which he had paid as though the plaintiff had ejected him from the land. The penalty imposed by the verdict for this gross abuse of power is responsive to the issues, and is no more than compensatory for the injuries inflicted. So, upon the entire record, the error is not prejudicial to the plaintiff.

The judgment of the district court is

AFFIRMED.

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CHARLES F. STANLEY, APPELLEE, V. ANDREW HERMANSON, APPELLANT.

FILED MARCH 24, 1911. No. 16,367.

1. **Boundaries: LOCATION.** If the location of section and quarter section corners as established by the government surveyors can be ascertained, those corners will control the boundary between coterminous quarter sections of land.
2. ———: ———. If the government corners are obliterated and their location cannot be established by witnesses who know the site thereof, other competent evidence relevant to the issue may be considered.
3. ———: ———. In that event, in establishing a boundary between coterminous quarter sections within the interior of a township, surveys according to the government field notes from known government corners, both north and south and east and west of the corner in dispute, so as to locate the contested corner on a line with other corners on both of those lines and to give each owner an equal amount of land, should ordinarily be preferred to a survey which does not commence at a known or conceded government corner and gives to one owner much more land than is accorded the other.

APPEAL from the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*L. H. Blackledge,* for appellant.

*A. H. Byrum, contra.*

ROOT, J.

The plaintiff is the owner of the northeast quarter of section 27 and the defendant owns the northwest quarter of section 26 in the same town and range, so that the eastern boundary of the plaintiff's tract is the western boundary of the defendant's land. This action is in equity to enjoin the defendant from destroying a fence constructed by the plaintiff upon what he contends is that boundary. The defendant also prays for affirmative relief and for damages for the destruction of his fence by the plaintiff. The defendant demanded and was given a jury trial upon the issue of fact as to the location of the boundary in dispute. The jury and the court found in the plaintiff's favor, and from the judgment rendered the defendant appeals.

As we view the record, there is one controlling issue to be determined, and that is whether the evidence sustains the jury's special finding that the "Hussong," and not the "Ashby" or the "Sutton," survey corresponds with the government survey of the north and south line between these sections. Surveys were made in the neighborhood of this land in 1883 by Mr. Sutton, in 1892 by Mr. Houtz, in 1895 by Mr. Sutton, and in 1900 and 1901 by Mr. Ashby. Each of these surveyors at the time of his survey was county surveyor of Franklin county. The record of these surveys in evidence is far from perfect, in that in some instances the field notes were not recorded, and in no case can we ascertain the method used to determine the initial station. In April, 1905, in October, 1907, and in November, 1907, Mr. Hussong, the county sur-

veyor, also surveyed the line in question. The record of these surveys is not in evidence, but Mr. Hussong testified from his field notes. During the time this suit was pending in the district court, Messrs. Obering and McReynolds, county surveyors of Webster and Nuckolls counties, respectively, surveyed the disputed boundary, and their testimony is in the record. Some 14 witnesses, other than the litigants and the surveyors, also testified.

The township wherein the litigants' farms lie was surveyed by the government in 1863. It appears from the recitals in the field notes of this survey that the government surveyors set a limestone at the quarter corner between sections 34 and 35, one mile south of the southern end of the disputed boundary, a like stone at the northwest corner of section 35, one-half mile north of the first monument, and a limestone at the quarter corner between sections 2 and 3, three and a half miles north of the northern end of the disputed boundary. According to the field notes, each intermediate quarter section and section corner was marked by pits, a mound, and a charred stake. It seems to be conceded that the government corner between sections 34 and 35 and in the township line is visible, and was used by the respective surveyors in running their lines. The government stone at the northwest corner of section 35 seems to have disappeared, and the point where it was set is not satisfactorily established by the evidence. Hussong is the only witness who testified to having advised himself by reference to the government field notes before commencing his survey. The testimony with reference to the so-called government corners does not refer to their physical characteristics, whether pits or mounds were visible, or the relation the pits bore to each other or to the elevation of the mounds, nor is any reference made to a charred post or other like evidence of the attempt of the government surveyors to perpetuate the corners. The line north and south across the township is over rough territory and the soil is sandy; some parts of it are described in the government field notes as

"worthless." The government field notes of the survey across the north side of sections 34, 35, 26, 27, 22 and 23 are not in evidence, but it does appear from measurements made that, if the Hussong survey shall be accepted as accurate, the length of the northern boundary of section 26 will be equal to the like boundary of section 27, whereas if the Sutton or Ashby surveys, the line surveyed by Obering and McReynolds or the line contended for by the defendant is adopted as coincident with the government survey, the distance across the northern side of section 26 will be greater by some 16 rods than the distance across the northern side of section 27. No such discrepancy should appear in the lines of the interior sections of a township, and, unless it clearly appears that a mistake was made by the government in surveying its land, the court should not adopt those lines as correct. The evidence does not establish the government corner at the northwest corner of section 26 by reference to any monument, but the corner must be located by a process of deduction from other facts which are to be ascertained from a consideration of conflicting evidence.

The Ashby and Sutton surveys are supported by the testimony of Frank Chagnon, who in 1882 homesteaded the southwest quarter of section 14. He contends that at that time a government corner was visible at the southwest corner of his homestead, and that it was evidenced by a stone and a stake. The witness does not refer to pits or mounds at this corner, nor to the character of the stake to which he testifies. According to the field notes, the government surveyor did not deposit a stone at this corner, nor does it appear by whose hand this monument was erected. If it is adopted as correct, the effect will be to extend the southern line of section 14 about 16 rods beyond a mile. There is no proof of a survey by a county surveyor so early as 1882, the patents for the respective quarter sections were not introduced in evidence, the litigants have not produced the plat prepared by the surveyor general of the survey of this township, and it seems

unreasonable to presume that the government surveyors in establishing the corners of these interior sections should err so grossly as they did if the Sutton-Ashby surveys coincide with the government survey. There is some evidence that by repeated and extended surveys Mr. Ashby satisfied himself that the Chagnon corner was correct, but it seems to us that the evidence preponderates in favor of a finding that the Chagnon corner is not in line with the known government corners to the north and the south in that township. Of course, wherever the government corners were established, there they must abide, but in the instant case the proof does not show the existence of those monuments at any point along the disputed boundary. It therefore becomes necessary to establish, as near as may be from all the proof before us, the points where those monuments were located. Those corners cannot be located to an absolute certainty, but approximately they can be. A consideration of all of the evidence convinces us that the jury and the district court in finding in favor of the Hussong survey were as near right as it is possible to find from the mass of evidence in the case. At any rate, this survey locates the boundary in line with the government quarter corner to the north and the like corner to the south, where the stones planted by the government surveyors have remained undisturbed, and accords to each coterminous owner practically an equal area in their respective quarter sections. It is difficult to convince the understanding that either litigant should receive more or less. *Woods v. West*, 40 Neb. 307.

The judgment of the district court, therefore, is

AFFIRMED.

## BYRON REED COMPANY ET AL., APPELLANTS, V. CITY OF OMAHA, APPELLEE.

FILED MARCH 24, 1911. No. 16,376.

1. **Municipal Corporations:** SPECIAL ASSESSMENTS: RELEVY. Chapter 15, laws 1903, which purports to cure irregularities in special assessments levied in cities of the metropolitan class subsequent to March 15, 1897, and authorizes the taxing officers to relevy those assessments, does not by its own force deprive the officers of authority to relevy special assessments levied prior to that date.
2. ———: ———: APPEAL: PROCEDURE: ISSUES. The procedure in the district court on appeals from orders made by the board of equalization in metropolitan cities is the same as on appeals from a judgment of a justice of the peace. The parties should file pleadings, and may introduce any competent evidence relevant to the issues, which should be the same as those joined before the board.
3. ———: ———: RELEVY: LACHES. If the taxing officers of a city of the metropolitan class fail for more than ten years to relevy a special assessment after it has been adjudged invalid, or after other like assessments in the same district have been adjudged invalid for a reason that will control all the assessments levied at the same time, the delay will estop the city from relevying the assessment upon lots that have been transferred subsequent to the date the original assessment was levied, unless for some lawful reason the owner of the property is estopped to avail himself of the defense of laches.

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

*Charles Haffke*, for appellants.

*H. E. Burnam, I. J. Dunn* and *J. A. Rine, contra.*

ROOT, J.

The district court for Douglas county, upon an appeal of several property owners from an order of the board of equalization of the city of Omaha, and an ordinance relevying a special assessment levied in 1888 to pay the cost of constructing a sewer, adjudged the relevy valid. The property owners appeal.

The case was evidently tried in the district court upon the evidence contained in a bill of exceptions settled and allowed by the board of equalization. The evidence is unsatisfactory in some respects, but it proves that the sewer was constructed and the original levy made in 1888. At this time the appellants' real estate constituted part of an undivided tract within the boundaries of the sewer district. According to an account kept by the comptroller, sufficient of the special assessments levied in the sewer district have been paid to balance the charges for warrants drawn against the levy plus a charge for fees and $14.53 transferred to a sinking fund. This account also contains an entry: "Taxes canceled, $282.75," and "taxes uncollected, $56." The aggregate of the contested levy is $282.75. The evidence tends to prove that each appellant purchased his property subsequent to the original levy. In 1905 the city council by resolution requested the city treasurer to give a description of all lots and tracts of land within the city upon which special assessments had been levied and subsequently canceled, and directed the city engineer to prepare and report plans for the reassessment of this real estate. The order of the board of equalization recites that, in making the relevy appealed from, it finds that benefits have been bestowed as shown by the levies prepared by the city engineer. Unless we should presume from the proceedings that the special assessment first levied upon the Ittner tract, out of which the appellants' lots were carved, has been canceled, there is no proof in the record of that fact; nor is there any proof that the assessment was canceled by a judgment of the court, or that the legality of all the assessments levied in the sewer district in 1888 was demonstrated by a judgment involving an assessment against some tract of land not owned by any of the appellants. Independently of the proceedings referred to, there is no proof that the original assessment laid against the Ittner tract has not been paid. Under these circumstances should the district court have adjudged the relevy valid?

The original assessment was doubtless made by virtue of sections 60 and 78, ch. 10, laws 1887, which authorized the mayor and city council to create sewer districts within the city; to construct sewers and to pay the cost thereof by the levy of special assessments upon the lots and lands within the district, and also authorize a relevy of all assessments declared void or concerning which a doubt existed. Section 94 of the act of 1887 in general terms also gave the city taxing officers authority to relevy general taxes and special assessments which could not be collected because of any error or irregularity in the original proceedings. Section 78 of the charter was amended by chapter 13, laws 1889, so as to omit all reference to the relevy of an assessment, but the mayor and city council have at all times since the enactment of chapter 10, laws 1887, had authority, more or less general in its terms, to relevy special assessments which have failed because of any irregularity or omission on the part of the taxing officers. The exercise of that authority with respect to sewer assessments has been approved in *Mercer Co. v. City of Omaha,* 76 Neb. 289, and in *Richardson v. City of Omaha,* 78 Neb. 79. In 1903 the legislature by chapter 15, laws 1903 (Comp. St. 1909, ch. 12*a*, sec. 250) provided that all defects, whether jurisdictional or otherwise, in all special assessments levied in cities of the metropolitan class, subsequent to March 15, 1897, were cured and the taxing officers were authorized to relevy all those uncollected assessments. This act was held valid in *Gardiner v. City of Omaha,* 85 Neb. 681. The appellants contend that the construction given this act in the *Gardiner* case deprives the taxing officers of authority to relevy an assessment levied prior to March 15, 1897. The sole question argued and determined in *Gardiner v. City of Omaha, supra,* was whether the classification made by the legislature in enacting the statute, *supra,* was valid, or whether that classification was so unreasonable and capricious as to bring the act within the condemnation of section 15, art. III of the constitution, which provides, among other things,

that the legislature shall not pass local or special laws incorporating cities or changing or amending their charters. The act cures defects in special assessments, and vests the taxing officers with greater authority than can be found in the city charter, but does not purport to repeal the charter provisions or to prohibit the taxing officers from proceeding thereunder. However, it evidences the legislative thought that metropolitan cities should act with reasonable celerity in relevying special assessments.

It is unnecessary to say just how far the legislature may proceed within constitutional limits in devising and providing a procedure for the collection of special assessments to reimburse the state, or any of its subdivisions, for money expended in the construction of public improvements which specially benefit the property assessed. Where, however, that authority is delegated to a municipality, it should act with some reasonable degree of promptness, or the defense of laches may be interposed by a property owner who purchased his holdings subsequent to the original levy and under such circumstances that he is not estopped to set up the defense of laches. If the city having the authority to act fails to do so for ten years after a special assessment has been declared void, or for ten years after the invalidity of all special assessments levied for a particular improvement has been demonstrated by a judgment in a suit maintained or defended by the owner of one or more lots in the district, it should not be permitted, over the objection of an individual who acquired title subsequent to the original levy, to exercise that authority.

The defense of laches is recognized in Hamilton, Law of Special Assessments, sec. 828, and in *State v. District Court,* 68 Minn. 242, and was applied to defeat a reassessment in *City of Olympia v. Knox,* 49 Wash. 537. The legislature by the enactment of chapter 15, laws 1903, recognized the principle, and, while that act does not control this case, it is important in determining the latitude

that should be accorded the city in analogous cases. In saying this we do not overlook the statement in the charter to the effect that special assessments shall constitute a perpetual lien upon real estate affected thereby, but a void assessment is not a lien upon the property it purports to encumber. Neither do we forget that in *Mercer Co. v. City of Omaha, supra,* we held that the statute of limitations does not apply to the relevy of a special assessment. In that case the proceedings to relevy were instituted within ten days after the assessment was adjudged void. The defense of laches was not discussed in that case, nor could it have been maintained upon the reported facts.

We do not desire to be understood as holding or suggesting that a relevy made by the taxing officers of a metropolitan city more than ten years after the original levy was made should be held void if collaterally attacked.

The proof is not so clear that we should definitely dispose of this case, nor is it specific enough to sustain the judgment appealed from. If, upon a retrial of the case, it shall appear that the special assessments levied in 1888 to pay for constructing the sewer in district No. 79 were adjudged invalid more than ten years preceding the date, in 1905, when the council by resolution initiated the proceedings for a relevy of the contested assessments, and that the appellants did not own their holdings when the original assessment was made, there will be proof of such laches as should defeat the relevy, unless there is proof of some facts or circumstances sufficient to avoid the defense of laches.

The city charter contemplates that, on appeals to the district court from orders entered in cases of special assessments, pleadings will be filed and issues joined as on appeals from judgments of justices of the peace. In the case at bar a petition, but no answer, was filed. We do not think the city intended to confess the allegations in the petition, but it should have answered. The case was

evidently tried by the district court on the theory that an answer had been filed, and the case has been considered on that theory in this court. The statute gives the right to appeal, and consequently either litigant in the district court may introduce any competent evidence relevant to the issues.

We have not overlooked the other subjects discussed in the briefs, but it is not thought necessary to discuss or determine them upon the evidence before us.

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

REVERSED.

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THOMAS MCLANE, APPELLEE, V. OLLIE M. MCLANE, APPELLANT.

FILED MARCH 24, 1911. No. 16,378.

1. **Pleading: SUFFICIENCY ON APPEAL.** If a petition is not attacked until after an appeal to this court, it should be liberally construed for the purpose of sustaining the judgment.

2. **Divorce: PETITION: SUFFICIENCY.** The petition in this case is sufficient to sustain a decree divorcing the plaintiff from the defendant.

APPEAL from the district court for Richardson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

*Edwin Falloon,* for appellant.

*Reavis & Reavis, contra.*

ROOT, J.

This is an appeal by the defendant from a decree of divorce. No bill of exceptions of the evidence is presented, but the defendant contends that the facts stated in

the petition are not sufficient to give the court jurisdiction or to justify a decree of divorce.

The plaintiff, in a petition filed March 15, 1909, alleges that "he has been a resident of Richardson county, Nebraska, for more than six months preceding the filing of the petition." The plaintiff also in effect further alleges that about September 1, 1907, and for two years prior thereto, the parties resided in Kansas City, Missouri, and about the last named date the defendant induced him to visit his sister in Richardson county, and subsequently, without just cause, refused to permit him to return home, but threatened him with arrest should he do so, and thereafter, solely because of his physical condition, abandoned and cruelly refused to care for or nurse him, although he was in failing health and unable to procure by his own efforts the necessities of life.

The petition was not assailed in the district court, but the defendant answered, admitting the marital relations, and denying all other allegations. Under the circumstances of this case the positive allegation of six months' residence in Nebraska should prevail over any inconsistent inference that may be drawn from other statements in the petition.

So, also, concerning the alleged acts of cruelty, the evidence may have disclosed that the plaintiff while sick and destitute was, without cause or excuse, wantonly and cruelly abandoned by the defendant, excluded from his home and thrown upon the charity of his relatives or of the public, and thereby his morbid physical condition aggravated. The evidence may have exhibited such a condition brought about by the deliberate wrongful conduct of the defendant as to bring the case clearly within the rule announced in *Ellison v. Ellison*, 65 Neb. 412, and reaffirmed in *Preuit v. Preuit, ante*, p. 124, and in *Myers v. Myers, ante*, p. 656.

The petition should be liberally construed for the purpose of sustaining the judgment. *Latenser v. Misner*, 56 Neb. 340; *Sorensen v. Sorensen*, 68 Neb. 483; *Western*

*Travelers Accident Ass'n v. Tomson,* 72 Neb. 674. In our opinion in the condition of the record the petition sustains the decree.

The judgment of the district court, therefore, is

AFFIRMED.

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## IN RE ESTATE OF MARY A. GRAY.

## ROBERT E. NEITZEL, APPELLANT, V. HARRIET E. PURCHASE ET AL., APPELLEES.

FILED MARCH 24, 1911. No. 16,320.

1. **Wills:** PROBATE: CONTEST: INSTRUCTIONS. In a contest over the probate of a will, it is error to instruct the jury their verdict will be that the instrument offered for probate is not the will of decedent, if they find she did not sign it, where the evidence is insufficient to sustain such a finding.

2. ———: ———: WITNESSES: PRIVILEGED COMMUNICATIONS. In a contest over the probate of a will, between the person therein named as an executor or a legatee and the heirs at law of decedent, section 333 of the code, forbidding the disclosure of privileged communications, does not prevent a physician from testifying on behalf of either side of the controversy to the mental condition of testatrix, though the information which enables him to do so was acquired solely in his professional capacity, while attending her during her last illness.

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

*McGilton, Gaines & Smith* and *T. A. Hollister,* for appellant.

*Byron G. Burbank* and *John C. Wharton, contra.*

ROSE, J.

In this suit the will of Mary A. Gray, deceased, is contested. It was dated and witnessed at her home in Water-

loo, Douglas county, October 31, 1907, and she died at the same place November 8, 1907. Robert E. Neitzel was named in the will as an executor and is the proponent. The principal legatee is Electa A. Teal, with whom testatrix lived at the time of her death. They were relatives by marriage, but not by blood. When proponent presented the will to the county court of Douglas county for probate, the heirs at law of testatrix, who are contestants, made a number of objections, among which are the following: Testatrix was not of sound mind when she pretended to execute the will. She did not sign it. She did not execute it. In undertaking to make the will she was unduly influenced by Electa A. Teal. The county court overruled all the objections and admitted the will to probate. Contestants appealed to the district court where a trial resulted in a verdict in their favor. From a judgment reciting that the instrument offered for probate is not the will of Mary A. Gray, deceased, proponent has appealed to this court. The real controversy is between the heirs at law and the principal legatee.

In substance the trial court instructed the jury: Your verdict will be that the instrument offered for probate is not the will of decedent, if you find from the evidence she did not sign it. This is assigned as error, on the ground there is no evidence to sustain such a finding. The argument of proponent on this point seems to be conclusive. The attestation clause is in due form, and it was signed by the following witnesses: Helen B. Gould, a neighbor of testatrix; Anna Buman, a professional nurse who attended her during her last illness; Harvey D. Kelly, an attending physician; Robert E. Neitzel, cashier of the Bank of Waterloo. At the trial each of these persons testified to having signed the attestation clause as a subscribing witness at the time and place stated in the will, and that Mary A. Gray, in the presence of each of them, signed the will. Anna Buman further testified: "Mrs. Gray wrote her name first, and I was asked to write mine, and the rest followed me." She also

testified: "We signed immediately after she signed her name;" and further: "Mrs. Gray asked me to sign the will." The testimony of all the subscribing witnesses was of like import. In addition each testified, after showing the proper qualifications, that at the time the will was signed testatrix was of sound mind. The evidence of her testamentary competency is uncontradicted. Contestants made no effort to prove that testatrix did not sign the will, except by H. B. Waldron, who was an officer of the Citizens State Bank of Waterloo. She had formerly been a depositor of his, and her last business transaction with him occurred March 2, 1906, when she transferred by check from his bank to the bank of which proponent was cashier a balance of $3,538.89. Waldron produced the check on the witness stand and identified the signature of the drawer as that of testatrix. In qualifying himself to express an opinion on the genuineness of her signature, he stated, in answer to a question, that he knew "the signature of Mary A. Gray *in the usual transaction of her affairs.*" The will was then submitted to him, and he was asked whether the signature was that of Mary A. Gray, and answered: "It is not her signature." On cross-examination he was asked: "You do not say that she did not write the name that appears there?" His reply was "No, sir." He was not present when the will was signed, and his opinion, in connection with the signatures themselves, is the only proof on that subject, outside of the testimony of the subscribing witnesses. The facts showing the reasons for a difference in the appearance of the signatures on the two instruments were fully shown by uncontradicted evidence. The check was drawn March 2, 1906, when testatrix was an active woman. More than a year later she fell and was fatally injured by the breaking of a bone. She had been an invalid five months when she signed her will October 31, 1907, and she was reclining in an invalid's chair at the time. Her nurse had given her long-distance glasses, instead of her reading glasses, and for that reason she could not see

well while signing her name. According to his own testimony, Waldron's last business transaction with testatrix occurred March 2, 1906, and there is nothing to indicate that he took into account the changed conditions when he expressed the opinion that the signature to the will was not hers. His testimony was applicable alone to earlier times and circumstances. When all the facts are considered, his opinion does not contradict the direct and positive testimony of the four subscribing witnesses that testatrix signed the will in their presence October 31, 1907. There is nothing to impeach these witnesses or to discredit their testimony. The original check and the will itself are in the record, and the signatures themselves contain no indication that either is not genuine, when the changed conditions and difference in time are understood. The evidence is wholly insufficient to sustain a finding that the will was not signed by testatrix, and that question should not have been submitted to the jury. Proof that testatrix was of sound mind and that the will was duly executed is also uncontradicted. These questions, likewise, were erroneously submitted to the jury.

Proponent offered to show the mental condition of testatrix by Dr. James C. Agee, who was called as a witness, but the trial court rejected his testimony on the ground that the information which enabled him to testify on that subject was acquired by him in his professional capacity, while he was attending her as a physician during her last illness. This ruling is assigned as error. To sustain the trial court, contestants invoke the statutory provision that no physician "shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Code, secs. 333, 334. The question presented by the record may be stated in this form: In a contest over the probate of a will, between a legatee or an executor and the heirs at law of testatrix, may the

latter's physician testify to her mental competency, over the objection of such heirs, where the information which enables him to do so was acquired solely in his professional capacity, while attending her during her last illness? The code provides that the patient may waive the privilege, or protection of the statute, but there is eminent authority for the doctrine that the right of waiver cannot be exercised by any one else, and that testimony of the physician as to the mental competency of his deceased patient should be excluded under the circumstances of this case. *In re Will of Hunt*, 122 Wis. 460; *In re Estate of Van Alstine*, 26 Utah, 193; *Auld v. Cathro*, 128 N. W. (N. Dak.) 1025, and cases cited; *In re Estate of Nelson*, 132 Cal. 182. This court, however, has held that the statutory right of waiver extends to "the personal representative of a deceased person." *Parker v. Parker*, 78 Neb. 535. May one class of representatives, in a contest over the probate of a will, waive the privilege to the exclusion of another class, where the respective rights of the disputants depend on the mental condition of a deceased person? Does the statute permit heirs at law to require a disclosure on part of the physician, if his patient was insane, and suppress the truth, if mentally competent? No such intention can be found in the statute or in the reasons for its enactment. If heirs at law, to protect the property of their ancestor from an insane act and to obtain their own rights under the statute of distributions, may require a physician to testify to the condition of his patient's mind, there is no reason why a legatee or an executor may not also call upon him for the purpose of protecting the will and a legacy under it. Having held in the case last cited that the right to waive the statutory privilege extends to the personal representative of a deceased person, consistency and justice require a construction which permits an executor or a legatee to compel a physician to testify to the mental condition of his patient, when that question is involved in a contest with the heirs over the probate of the patient's will. Though the courts

of the country are divided on this question, the construction here announced has frequently been adopted under similar statutes. *Thompson v. Ish,* 99 Mo. 160, 17 Am. St. Rep. 552; *Denning v. Butcher,* 91 Ia. 425; *Winters v. Winters,* 102 Ia. 53; *In re Walker's Will,* 128 N. W. (Ia.) 386; *In re Estate of Shapter,* 35 Colo. 578; *Olson v. Court of Honor,* 100 Minn. 117. The courts, however, have authority to protect the memory of deceased persons from objectionable disclosures. *Denning v. Butcher,* 91 Ia. 425.

For the errors discussed, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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ABBOTT BRADY ET AL., APPELLEES, V. CENTRAL WESTERN RAILROAD COMPANY, APPELLANT.

FILED MARCH 24, 1911. No. 16,371.

Fraudulent Conveyances: PARTIES IN PARI DELICTO. When a conveyance is made between parties equally at fault, for the purpose and upon an agreement to perpetrate a fraud, the courts will not assist either, but will leave them where they have placed themselves. But when they are not *in pari delicto,* and he who is seeking an advantage from the fraudulent conveyance was the moving party who induced the same, the other, if comparatively innocent, will be relieved.

APPEAL from the district court for Phelps county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*T. E. Brady,* for appellant.

*Hamer & Hamer, contra.*

SEDGWICK, J.

This action was brought in the district court for Phelps county to cancel a deed given by these plaintiffs to the defendant Central Western Railroad Company, conveying a quarter section of land in that county. The trial court

entered a decree as prayed, and the defendant has appealed.

The defense is that the deed was fraudulent; that the plaintiffs had before that time leased this farm for a period of three years or five years, with the condition in the lease that if the farm was sold before a certain date named the lease should be canceled; and that this deed in question was made for the purpose on the part of the grantors and grantee to defraud the lessee. The defendant relies upon the principle that, when a conveyance is made and received for the purpose and upon the fraudulent agreement to perpetrate a fraud, the courts will not assist either party, but will leave them as they find them.

It appears that a few days before this conveyance was made a party of men, representing themselves as surveyors for the defendant company, came to these premises and made, or pretended to make, a survey of a line of railroad which was to extend from Holdrege, in Phelps county, to Kearney, in Buffalo county. Soon afterwards one Nelson called at the home of the plaintiffs and represented that he was the general manager of the defendant company, and that the station of the proposed railroad would be located on or near the plaintiffs' land, and that one Norton, who was with Nelson, was there for the purpose of buying lands which would become very valuable on account of the building of the proposed railroad, and by these and other representations, which it is not necessary now to recite, induced these plaintiffs to believe that the price of land in that vicinity would be rapidly advanced, and that farms could immediately be sold at a high price. Mr. Brady testifies that he told Nelson about the outstanding lease, and that Nelson informed them that a paper could be made that would avoid the lease. It is doubtful which party first suggested making such a paper, but it is clear that Mr. Brady was led to believe that his farm could be soon sold at a very high price, and that it would be all right to execute some sort of a paper from which it could be made to appear that the farm had in fact been sold before the time limited in the lease.

This Mr. Nelson undertook to accomplish, and without any suggestions as to what sort of a paper would be executed he appeared at the home of the plaintiffs the next morning, accompanied by a notary public, with the deed in question already drawn, and also a deed from the defendant company to Mr. Brady which Nelson had executed as general manager of the company. The plaintiffs were easily induced to execute the deed in question, upon the representation that they should have the deed of the company which was already executed, and so be entirely secure. It is now conceded that the deed executed by Mr. Nelson as manager of the company was worthless because Mr. Nelson was not authorized to execute it. The deed in question was put upon record, and afterwards when the plaintiffs had learned that fact there was placed upon record the deed executed by Mr. Nelson. No consideration was paid to the plaintiffs for the land, and the defendant relies solely upon the mutual fraud of the plaintiffs and Mr. Nelson in attempting to defraud the lessee in the supposed lease. The lease was not put in evidence, and the evidence in regard to the supposed condition of the lease is very uncertain. The trial court found that the deed in question was procured by the fraud and imposition of Nelson, and we are satisfied that the finding is justifiable. If it could be found from this evidence that there was a valid condition in the supposed lease that would be defeated by the execution of this deed, and that this deed was executed for that purpose on the part of the plaintiffs, and so received by the defendant, and that it was therefore fraudulent on the part of all parties connected with it, still it is apparent that the parties were not *in pari delicto*. The idea of making a deed originated in the mind of Nelson. He evidently saw from the beginning that he might reap an advantage from it and is now attempting to do so.

The judgment of the district court is right, and is

AFFIRMED.

EMMA ELIZA SUTORIOUS, APPELLEE, V. GUY STALDER, APPELLANT.

FILED MARCH 24, 1911. No. 16,379.

1. **Bastardy: COMPLAINT: VERIFICATION: WAIVER.** The statute requires that, upon complaint of bastardy on oath or affirmation made to a justice of the peace, "the justice shall take such accusation in writing, and thereupon issue his warrant." Comp. St. 1909, ch. 37, sec. 1. A complaint verified before a notary public is insufficient, but if no objection is made until after the hearing before the justice, the objection is waived.

2. **Trial: INSTRUCTIONS: CREDIBILITY OF WITNESSES.** The trial court is not required to instruct the jury which witness is the most credible.

3. ———: ———. Requested instructions stated in the opinion are found to have been properly refused, and certain instructions given are not found to be prejudicially erroneous.

4. **Bastardy: AMOUNT OF SUPPORT.** The condition and ability of the defendant in bastardy proceedings should be considered in determining the amount that he should be required to contribute toward the support of the child.

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

*Burkett, Wilson & Brown* and *E. Falloon*, for appellant.

*Reavis & Reavis, contra.*

SEDGWICK, J.

Upon a jury trial in the district court for Richardson county, the defendant was found guilty of being the father of the plaintiff's bastard child, and judgment was entered accordingly. He has appealed to this court.

1. In the beginning of the trial the defendant objected to any evidence being received because the original complaint filed with the justice of the peace was sworn to before a notary public. This objection was overruled, and this is the first ground urged for reversal. The statute

provides that, upon complaint of this character on oath or affirmation made to a justice of the peace in this state, "the justice shall take such accusation in writing, and thereupon issue his warrant." Comp. St 1909, ch. 37, sec. 1. The complaint should be taken by the justice and the oath or affirmation administered by him. Filing a complaint with the justice, verified before a notary public, is not a compliance with the statute. In *Richards v. State,* 22 Neb. 145, it was held that an information charging embezzlement and filed in the district court, verified before a notary public, was irregular, and it was said that such oath must be taken before a judicial officer, but the court added: "It may be, however, that the plaintiff has waived that objection by pleading to the information." The case at bar is a civil action. It has some of the characteristics of a criminal proceeding. The complaint and warrant are for the purpose of securing the attendance of the defendant, and to enable the justice to enforce such settlement as the defendant may make with the plaintiff, if they agree upon a settlement, and enforce a compliance with the statute on the part of the defendant. No objection to this complaint was made before the justice, and the record shows that the plaintiff was sworn as a witness before the justice in the presence of the defendant and his attorneys, and that her allegations were reduced to writing by the justice and were by him certified to the district court. If this was not a substantial compliance with the statute, the defendant has waived the irregularity by appearing before the district court without having made any objections before the justice of any supposed defect in the proceedings there.

2. Section 5 of the bastardy act (Comp. St. 1909, ch. 37) provides that "on the trial of the issue the jury shall, in behalf of the man accused, take into consideration any want of credibility in the mother of the bastard child; also any variations in her testimony before the justice and that before the jury; and also any other confession of her, at any time, which does not agree with her testi-

mony, on any other pleas or proofs made and produced on behalf of such accused person." The defendant requested the court to give an instruction to the jury which embraced substantially these provisions of the statute, and then contained the following words: "If you believe, from the evidence, that her statements are conflicting, then her testimony is not of equal credibility with that of the defendant, and you cannot find a verdict in her favor, unless this want of credibility is overcome by other reliable evidence." This instruction was refused, and of course properly so. It was not the province of the court to tell the jury which witness was the most credible, or under what circumstances the testimony of one witness would not be of equal credibility with another.

3. Defendant complains of the refusal of the court to give another instruction requested by him, but the substance of this instruction, so far as it was proper to be given to the jury, was contained in instructions given by the court upon its own motion. The instruction as requested would have been erroneous. It contained the statement that the jury must not only find that the plaintiff's testimony was true, but that in addition "the testimony adduced in favor of the complainant is of such a character that it preponderates and overcomes the testimony of the defense." This is not a correct statement of the law. If the jury found that the plaintiff's testimony is true as it is contained in this record, they should find the verdict in her favor.

The court was right in refusing to instruct the jury that the plaintiff "is financially interested in the result of this case, and you will take into consideration this interest." Of course it is true that the plaintiff was financially interested in the case, and so was the defendant, and the court properly instructed the jury to take into consideration any interest that any witness had in the result of their verdict, and that was all that the court was required to do.

The defendant's fourth request was as follows: "You

are instructed that neither the filing of the complaint in this action, nor the defendant's arrest and being bound over to this court, nor yet the birth of the child raises any presumption of the defendant's guilt." It surely is not prejudicial error to refuse to instruct such commonplaces as these.

In the fifth request the court was asked to tell the jury that "she must not only overcome any inconsistent statements that she may have made, but in addition thereto she must satisfy the jury, by a preponderance of the evidence, that the charge contained in the complaint is true." If the plaintiff proved the guilt of the defendant by a preponderance of the evidence, she has done all that it was necessary for her to do. It would be misleading to infer to the jury that there was or might be something in addition for the plaintiff to do.

The tenth request of the defendant was as follows: "The court instructs the jury that, if they believe from the evidence that the only evidence tending to prove the guilt of the defendant is the testimony of the prosecuting witness, Emma Sutorious, and that her testimony on any material point is untrue, then the jury is at liberty to disregard her whole testimony." This form of instruction appears to have been approved by the supreme court of West Virginia in a prosecution for rape (*State v. Perry*, 41 W. Va. 641); but it was wholly unnecessary in this case. The court had instructed the jury on its own motion upon this point. If the testimony of plaintiff was the only evidence tending to prove the guilt of the defendant, that fact would not change the rule, and would not add anything to the instruction, but might be misleading.

The eleventh request for instruction was as follows: "The court instructs the jury that, if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, Emma Sutorious, then they should scrutinize her testimony with care and caution." The jury should scrutinize the testimony of every witness with care and

caution, and especially if that witness was shown to have a direct interest in the litigation. The instruction given by the court covers this point.

The defendant complains that in the statement of the case the court neglected to instruct the jury as required by section 5 of the act. It is better to comply with the provisions of this section in a separate instruction, and this was done in this case.

The court defined what is meant by a preponderance of the evidence as follows: "To determine the question in this case, by the preponderance of the evidence is meant that you are to put all the evidence in favor of the plaintiff on one side of the scale, all the evidence in favor of the defendant on the other side of the scale, and whichever side makes down weight has the preponderance of the evidence. If a witness says something you are satisfied in your sound judgment is not the truth, then you are entitled to disregard it; and it is for you to determine how much weight shall be given to the testimony of any witness. It is for you to determine, in case of a conflict of evidence, what witness tells the truth and where the truth lies. You are not to determine it arbitrarily or through prejudice, but weigh it over carefully and consider it carefully, and take into consideration all the circumstances, all the evidence in the case, and then it is for you to determine what the truth is, and how much weight, or how little you should give to any witness." This instruction is complained of. It is not in the usual form of an approved explanation of the preponderance of the evidence. It might in some cases confuse the jury, but we cannot believe that, in connection with the other instructions given, the jury were misled thereby.

Complaint is made of misconduct of plaintiff's counsel in their argument of the case to the jury. It does not appear that any objection to the language used by counsel was made at the time, and we do not find that the attention of the court was called to any supposed prejudice arising therefrom. So far as we have observed, the attention

of the trial court was first called to this matter in affidavits filed upon a motion for new trial. This objection therefore was waived.

It is contended that the judgment is excessive. In this contention we think there is some merit. The order of the court was that the defendant pay to the plaintiff, $1,400, being $100 per annum for 14 years. In ordinary cases this would not be unreasonable. It might in some cases be inadequate. The defendant was a boy under 18 years of age. He had inherited $1,200. He earned his living as a farm hand. The amount that he would be required to pay each year toward the support of this child would be at least one-half of his entire earnings. The order is therefore modified so as to require payment of $75 per annum, and, as so modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

ROSE, J., not sitting.

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## ALBERT C. GRIMES V. STATE OF NEBRASKA.

FILED MARCH 24, 1911. No. 17,035.

1. Jury: RIGHT TO TRIAL BY JURY: WAIVER. In an action upon a city ordinance in which the penalty is a fine only, the defendant upon appeal to the district court may waive a jury, and consent that the cause be tried before the court upon the evidence taken before the police magistrate and preserved in the record.

2. ———: ———: ———. If such stipulation has been improvidently made, under a mistake of facts, to the prejudice of the defendant, the court might allow the stipulation to be withdrawn upon proper showing, and if the defendant, under advice of competent attorneys, goes to trial before the court without objection, he will be held to have waived a jury for the trial of his cause.

3. Municipal Corporations: POLICE MAGISTRATE: JUDGMENT: VALIDITY. When a prosecution for violation of a city ordinance is tried in police court, appealed to the district court by defendant, and afterwards brought to this court upon petition in error, it is

too late to object in this court for the first time that the police magistrate lost jurisdiction because judgment was not pronounced in police court until five days after the cause was tried and submitted.

4. ———: ———: DISQUALIFICATION OF JUDGE: WAIVER. In a prosecution for violation of a city ordinance, upon appeal to the district court from the judgment of the police magistrate, if the defendant, knowing all the facts in regard to the supposed disqualification of the judge, states in open court that he has no objection upon that ground, he cannot afterwards avail himself of such objection in this court.

5. ———: EVIDENCE. The evidence is found to be sufficient to support the judgment.

ERROR to the district court for Gage county: JOHN B. RAPER and LEANDER M. PEMBERTON, JUDGES. *Affirmed.*

*Hazlett & Jack*, for plaintiff in error.

*Grant G. Martin, Attorney General*, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

The defendant in the court below, who is plaintiff in error here, was tried in police court in the city of Beatrice and found guilty of selling liquor to a minor, contrary to an ordinance of that city. He was at that time a licensed saloon-keeper. The defendant appealed the case to the district court for Gage county, and was there tried before the two judges of that district, and again found guilty, and sentenced to pay a fine of $25 and costs of the prosecution. He has brought the case here for review upon petition in error.

1. The appeal was docketed in the district court on the 3d day of November, 1910, and on the 18th day of that month the defendant entered into a written stipulation with the attorney for the state, in which it was stipulated that the case should be tried before the court without a jury upon the testimony taken in the trial of the court below, as shown in the transcript which was attached to the

stipulation. It was also stipulated that, in addition to the evidence in the transcript, the defendant might testify in his own behalf, "the same as he could have done in the court below." The case was then tried by the two judges without a jury, and this is the first ground urged for reversal. The attorneys for the defendant, who have brought the case to this court, suggest in their brief that they did not represent the defendant until after the stipulation was filed by him, and that the attorney who did represent him in the former proceedings was a young member of the bar with little experience in his profession, and that the attorney for the state was a responsible and successful lawyer, and that the record shows that there was no proper defense made for the defendant in the police court. These suggestions, we suppose, are made as tending to show that the defendant should not be bound by his stipulation to waive a jury and submit his cause to the judges. It appears, however, that the next day after the stipulation was filed in the district court the cause was called for trial, and these attorneys who now represent the defense were present in court appearing for the defendant, and made no objection to the trial proceeding without a jury, and made no attempt to withdraw the stipulation that had been filed the day before. The stipulation must be considered as the voluntary stipulation of the defendant under advice of competent counsel.

It is next insisted that defendant in such prosecution cannot waive his right of trial by jury, and that therefore the findings and judgment of the court are erroneous. This contention has been determined by this court in an early decision, in which it is said that ordinances of a city are made "in the exercise of their legitimate police authority for the preservation of the peace, good order, safety and health of the inhabitants of the corporation, and relate, generally, to minor acts not embraced in the public criminal laws of the state, and need not be tried by a jury, their speedy enforcement being usually necessary to accomplish the purpose of their enactment. They

are not included within the provisions of the constitution." *Liberman v. State,* 26 Neb. 464; *Foley v. State,* 42 Neb. 233.

2. It is said that the judgment of the police court is void because the case was tried and submitted, and then adjourned for five days and then decided. This matter does not appear to have been called to the attention of the district court. This objection does not accurately state the condition of the record. The record shows that the case was tried before the police court on the 6th day of October, 1910, that the evidence was taken on that day, and that the trial was adjourned to the 7th day of October at 9 o'clock, and then without any adjournment argument was heard upon the 9th day, and was taken under advisement by the consent of the parties and continued to the 11th day of October, when judgment was rendered. It is suggested in the brief of the state that the date, October 9, is a clerical error, and the proceedings were all had on the 7th day of October. However that may be, on the 11th day of October, to which the case was adjourned, the parties were all present, and no objection was made to the proceedings then had, and it is too late now to raise this question in this court for the first time.

3. It is said in the brief that one of the judges who heard the case was disqualified; that he had before the trial declared himself disqualified and refused to act. The record contradicts this assertion. It does not show that any objection was made to the qualification of the judge before the trial, although it appears that defendant and his attorneys were fully aware of all of the supposed grounds of objection, and the record affirmatively shows that before the trial in open court, in the presence of the defendant and his attorneys, the judge inquired if there was any objection to his sitting in the case, and that the attorneys for defendant both stated they had no objection. It is proper to add that the great confidence that this court has in the two judges who heard this case is not disturbed, but rather confirmed, by this record.

4. It is finally contended that the evidence is not sufficient to support the judgment of the district court. There is considerable evidence in the record tending to show that the defendant many times instructed all of his assistants not to sell to minors, but there is also evidence that the defendant himself was present when such sales were made to minors, and there is some evidence that he advised this particular sale which is the subject of this complaint. A large number of witnesses were examined and the evidence is quite conflicting, but it sufficiently supports the judgment.

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48. An exception is necessary to a review of an interlocutory order. *Diels v. Kennedy* ..... 777

49. Recall of jury to correct verdict *held* not ground for reversal in view of secs. 145, 312, of the code. *Henkel v. Boudreau* ..... 784

50. Where on a trial *de novo* on appeal in equity the conclusion accords with that of the trial court, the judgment will be affirmed. *Stephenson v. Murdock*..... 796

**Appearance.**

1. Defendant waives all defects in the original summons by a general appearance in an action. *Haner v. Palmer* ..... 438

2. A general appearance by defendant confers jurisdiction. *Newell v. Newell* ..... 705

**Assault and Battery.**

1. Evidence in an action for assault *held* to sustain verdict for plaintiff. *Moore v. Sturm* ..... 793

2. Verdict of $500 for assault on child *held* not excessive. *Moore v. Sturm* ..... 793

**Attachment.**

Verdict of $800 for unlawful attachment of household goods *held* excessive. *Henderson v. Weidman* ..... 813

**Attorney and Client.** See JUSTICE OF THE PEACE, 1.

1. Where a client discharges his attorney without just cause, he may recover the reasonable value of his services. *Shevalier v. Doyle* ..... 560

2. Pleading in an action by an attorney against a client *held* sufficient after judgment to sustain a recovery on a *quantum meruit*. *Shevalier v. Doyle* ..... 560

**Bankruptcy.**

1. A garnishment of funds of an insolvent within four months of the time he is adjudged a bankrupt is dissolved by the bankruptcy proceedings. *Hall v. Chicago, B. & Q. R. Co.*, 20

2. Bankruptcy laws of congress *held* binding upon state courts as well as federal courts. *Hall v. Chicago, B. & Q. R. Co.* ..... 20

3. Proceedings of federal court adjudging one a bankrupt *held* a defense to enforcement of judgment of state court against a garnishee rendered within four months of filing of debtor's petition in bankruptcy. *Hall v. Chicago, B. & Q. R. Co.* ..... 20

**Banks and Banking.**

1. Payment by a bank of a check drawn on it does not constitute it a holder within the negotiable instruments law (Comp. St. 1909, ch. 41, sec. 30). *Aurora State Bank v. Hayes-Eames Elevator Co.* ..... 187
2. After payment by a bank of a check drawn on it, it cannot thereafter put it in circulation and create a liability thereon against its maker or prior indorser. *Aurora State Bank v. Hayes-Eames Elevator Co.* ..... 187

**Bastardy.**

1. In a bastardy action, rulings on the admission and exclusion of certain evidence set out in the opinion *held* not erroneous. *Kramer v. Weigand*..... 392
2. Though a complaint of bastardy verified before a notary public is insufficient under sec. 1, ch. 37, Comp. St. 1909, if no objection is made until after the hearing, the objection is waived. *Sutorious v. Stalder*..... 843
3. Certain instructions given *held* prejudicially erroneous. *Sutorious v. Stalder* ..... 843
4. Certain requested instructions *held* properly refused. *Sutorious v. Stalder* ..... 843
5. Judgment *held* excessive. *Sutorious v. Stalder* ..... 843
6. In bastardy, *held* that there was not such failure of evidence as to justify setting aside the judgment. *Eggleston v. Quinn* ..... 775

**Bills and Notes.** See BANKS AND BANKING.

1. Where a maker of a note executed it with a blank for the name of the payee, and delivered it with directions as to its use, which were disregarded, *held* that it could not be enforced against the maker, under sec. 14, ch. 41, Comp. St. 1905. *Hartington Nat. Bank v. Breslin*..... 47
2. In a suit on an unpaid, past due note, *held* error, under the evidence, to refuse to direct verdict for plaintiff. *Piper v. Neylon* ..... 253
3. Petition *held* to allege ownership of notes. *Banking House of A. W. Clarke v. Ward* ..... 526
4. Certain evidence *held prima facie* evidence of ownership of certain notes and securities. *Banking House of A. W. Clarke v. Ward* ..... 526

**Boundaries.**

1. Where government section and quarter section corners can be ascertained, they will control the boundary between coterminous quarter sections of land. *Stanley v. Hermanson* ..... 823

**Boundaries—*Concluded.***

2. Where government corners cannot be established by witnesses who know the site thereof, other competent evidence may be considered. *Stanley v. Hermanson* ..... 823
3. In establishing a boundary between coterminous quarter sections within a township, surveys from known government corners will be preferred. *Stanley v. Hermanson*.... 823

**Bridges.** See COUNTIES AND COUNTY OFFICERS, 1-4.

**Brokers.**

1. Broker *held* not entitled to recover commission in an action on contract. *Clark v. Davies* ..... 67
2. A real estate broker suing and solely relying on a special contract for his commission cannot recover upon a *quantum meruit*. *Clark v. Davies* ..... 67
3. When an owner authorizes several brokers to sell land, the broker who actually effects the sale is entitled to the commission. *Higinbotham v. McKenzie* ..... 323
4. A broker's claim to commission cannot be defeated because owner's wife refuses to join in a deed. *Bell v. Stedman*... 625

**Burglary.** See INDICTMENT AND INFORMATION, 1.

1. Evidence *held* to sustain a conviction of burglary and grand larceny. *Johns v. State* ..... 145
2. Allegation in information charging burglary under sec. 48 of the criminal code, that the building was entered during the night season, is surplusage and need not be proved. *Schultz v. State* ..... 613
3. One who breaks and enters a mill building with intent to steal *held* guilty of burglary, though there is no personalty therein. *Schultz v. State*..... 613
4. The testimony of one witness may sustain a conviction of burglary, though accused denies the offense. *Schultz v. State* ..... 613
5. In a prosecution for burglary, instruction as to an alibi *held* properly refused. *Schultz v. State* ..... 613
6. On an information for burglary with the use of explosives, it is necessary to prove the use of explosives. *Morrison v. State* ..... 682
7. Accused may be convicted of the crime of burglary with explosives on circumstantial evidence alone. *Morrison v. State* ..... 682
8. Evidence *held* to support conviction of burglary by the use of nitroglycerine. *Morrison v. State*..... 682

**Burglary**—*Concluded.*

9. On a trial for burglary, *held* competent to prove that an article found at the scene of the crime immediately after the burglary was discovered was the property of accused. *Morrison v. State* ..... 682

10. Sentence for 30 years to penitentiary for burglary upheld. *Morrison v. State*..... 682

**Carriers.**

1. A carrier of live stock cannot, by contract with a shipper, relieve itself from liability for injury or loss resulting from its own negligence. *Jeffries v. Chicago, B. & Q. R. Co*.... 268

2. Excuse of carrier that it had annulled a regular freight train *held* not a sufficient excuse for delay in shipment of horses. *Jeffries v. Chicago, B. & Q. R. Co*..... 268

3. Where a carrier provides a shipper of live stock with free transportation for a caretaker, the carrier may rely on the caretaker to notify its agents whenever he thinks the stock requires unloading for feed and water. *Jeffries v. Chicago, B. & Q. R. Co.* ..... 268

4. Sec. 1*a*, art. V, ch. 72, Comp. St. 1909, relating to unlawful discrimination by carriers, *held* to provide a reasonable method of preserving written evidence that cars were ordered by a shipper, the date of his order, and the time when the cars were to be furnished. *Anderson v. Chicago & N. W. R. Co.* ..... 430

5. In an action against a carrier for unlawful discrimination in failing to furnish cars, where the shipper has made a written order therefor, his proof as to the date of the order and the time when the cars were to be furnished should be confined to the written order. *Anderson v. Chicago & N. W. R. Co.* ..... 430

6. Where it is claimed that a written order for cars was changed after it was signed by the shipper, the burden of proof is on the one who asserts it. *Anderson v. Chicago & N. W. R. Co*..... 430

**Colleges and Universities.**

An incorporated college *held* not a religious or eleemosynary corporation precluded from selling its property by its trustees, where the sale would not divert the property from the purpose for which it was obtained and used. *Tash v. Ludden* ..... 292

**Constitutional Law.** See COURTS, 1, 2. DRAINS, 5-7.

Continuance. See CRIMINAL LAW, 31, 41.

1. Refusal of a continuance applied for after the other side had rested *held* not an abuse of discretion. *Kramer v. Weigand* ..... 392
2. An order denying a continuance will not be reversed except for an abuse of discretion. *Kramer v. Weigand*..... 392

Contracts.

1. Punctuation marks in a contract will not be allowed in equity to give the contract an unconscionable and inequitable meaning. *Rice v. Lincoln & N. W. R. Co*..... 307
2. Equity will not construe doubtful language in a contract as in vlolation of the law against perpetuities, if it is reasonably susceptible of a construction that will validate the contract. *Rice v. Lincoln & N. W. R. Co*..... 307
3. A literal compliance with a contract for conveyance of a right of way *held* too inequitable to be enforced in equity. *Rice v. Lincoln & N. W. R. Co*..... 307
4. Contract of owner of livery business sold, not to engage in the business in the vicinity for ten years, *held* assignable to the purchaser of the business on a resale. *Hickey v. Brinkley* ..... 356
5. A contract based on considerations, partly legal and partly illegal, will, if separable, be enforced as to its legal provisions. *Shevalier v. Doyle* ..... 560
6. Contract for advertising *held* not void for lack of consideration or mutuality. *Doolittle v. Callender* ..... 747
7. Measure of damages for breach of contract for advertising *held* to be contract price less cost to complete contract. *Doolittle v. Callender* ..... 747
8. Statement of general rule as to measure of damages for breach of contract. *Diels v. Kennedy*..... 777

Corporations. See JUDGMENT, 3. STATUTE OF FRAUDS.

1. Certain acts of a purchaser of corporate stock *held* not to estop him from suing an officer of the corporation on his promise to repay the purchase price. *Trenholm v. Kloepper*, 236
2. A corporation not restrained by statute or prohibited by its articles of incorporation or outstanding contracts may dispose of all its property for any lawful purpose. *Tash v. Ludden* ..... 292
3. A single transaction by a foreign corporation may constitute a doing of business in the state within the statute making certain requirements of foreign corporations conditions precedent to their doing business in the state. *Tomson v. Iowa State Traveling Men's Ass'n* ..... 399

Corporations—*Concluded.*

4. A foreign accident corporation *held*, under the facts, to be doing business in the state. *Tomson v. Iowa State Traveling Men's Ass'n* ..... 399

**Counties and County Officers.** See APPEAL AND ERROR, 7. TAXATION, 7, 8. TRIAL, 12.

1. In a suit by a county to recover from an adjoining county for repair of a bridge, petition *held* sufficient to require contribution for repairs as distinguished from a new bridge. *Brown County v. Keya Paha County* ..... 117

2. The word "repair" as applied to bridges in the road laws means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. *Brown County v. Keya Paha County* ..... 117

3. In a suit by a county to recover from an adjoining county for repairs of a bridge, allegation as to notice of the necessity to rebuild a portion of the bridge *held* sufficient to include an approach or abutment and grading or riprapping. *Brown County v. Keya Paha County*..... 117

4. Within the meaning of that part of the road law defining the duties of county boards in relation to bridges, approaches are parts of bridges. *Brown County v. Keya Paha County* ..... 117

5. The purpose of art. III, ch. 18, Comp. St. 1903, the depository law, stated. *Hamilton County v. Aurora Nat. Bank*, 280

6. A bank refusing in good faith to qualify as a depository of public funds under art. III, ch. 18, Comp. St. 1903, *held* not liable to the county for interest on public money with which demand certificates were purchased. *Hamilton County v. Aurora Nat. Bank* ..... 280

7. Petition for services as special bailiff appointed by the court to take charge of a witness for the state in a criminal prosecution *held* not to state a cause of action. *Shaw v. Holt County* ..... 348

8. The district court cannot appoint a special bailiff to take charge for an indefinite time of a witness for the state, and thereby create an indebtedness against the county. *Shaw v. Holt County* ..... 348

9. County commissioners have not only the powers expressly conferred by statute, but such as are requisite to enable them to discharge their official duties. *Wherry v. Pawnee County* ..... 503

**Counties and County Officers—*Concluded.***

10. An action against a county for a tort may be commenced in a court, or by filing a claim with the county board, and, if the claim is filed with the board, the action will be deemed commenced on the date of filing the claim. *Wherry v. Pawnee County* ..... 503

**Courts.**

1. Under Const., art. VI, sec. 2, the supreme court has jurisdiction of all civil cases in which the state is a party. *State v. Chicago, B. & Q. R. Co* ..... 669
2. Any civil action in which the state has such interest that it may be prosecuted in the name of the state is within the original jurisdiction of the supreme court. *State v. Chicago, B. & Q. R. Co* ..... 669
3. The courts of Illinois have no authority by partition proceedings to transfer title to real estate in Nebraska. *Reams v. Sinclair* ..... 738

**Criminal Law.** See BURGLARY. COUNTIES AND COUNTY OFFICERS, 7, 8. GRAND JURY. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 14. LARCENY. RAPE. WITNESSES, 4.

1. The county attorney may, under direction of the district court, procure the assistance of counsel in the prosecution of a felony. *Johns v. State* ..... 145
2. The appearance of assistant counsel for the first time while the jury is being selected, but before accused has exercised any peremptory challenge, *held* not erroneous. *Johns v. State* ..... 145
3. The trial court may in its discretion permit the county attorney to indorse the names of additional witnesses on the information after the filing thereof and before trial. *Johns v. State* ..... 145
4. It is within the discretion of the trial court to permit witnesses to remain in the courtroom during the trial. *Johns v. State* ..... 145
5. If accused testifies in his own behalf, the county attorney may, on cross-examination, ask him whether he has been convicted of a felony. *Johns v. State* ..... 145
6. The district judge, in ruling on objections to evidence, should express no opinion as to its weight or the credibility of the witnesses. *Johns v. State* ..... 145
7. Certain remark of trial judge *held* not prejudicially erroneous. *Johns v. State* ..... 145
8. In the absence of special circumstances, it is no defense that three hours after the offense was probably committed, and 18 miles from the scene of the crime, accused was intoxicated. *Johns v. State* ..... 145

**Criminal Law**—*Continued.*

9. Exclusion of certain evidence *held* not prejudicial. *Johns v. State* ..... 145
10. If the prosecuting witness does not testify that accused committed the offense charged, it is not error to exclude statements made by him that he entertained a suspicion that some person other than accused committed the crime. *Johns v. State*..... 145
11. Evidence *held* to sustain averments of information charging illegal sale of liquors in violation of sec. 11, ch. 50, Comp. St. 1909. *White v. State* ..... 177
12. Under an information charging accused in separate counts with keeping for unlawful sale several different kinds of liquors, on a verdict of guilty on each count a separate sentence for each may be imposed. *White v. State* ..... 177
13. If instructions as a whole correctly state the law, that an isolated instruction may be indefinite *held* not prejudically erroneous. *White v. State* ..... 177
14. The court in giving instructions may describe the offense in the language of the statute. *Alt v. State* ..... 259
15. In charging the jury it is not necessarily improper to make quotation from the statutes. *Alt v. State*..... 259
16. Where the evidence will sustain a conviction of the offense charged in the information, it is error to direct an acquittal. *Alt v. State*..... 259
17. That accused was acting as agent of another in the commission of an offense will afford no excuse or justification for the act. *Alt v. State* ..... 259
18. In criminal law, malice may denote that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *Alt v. State*... 259
19. In a prosecution of a railroad employee for cutting telephone wires on a highway at a railroad crossing, evidence *held* to sustain a finding that accused acted with malice. *Alt v. State* ..... 259
20. The trial court is not required to instruct in the precise language requested by accused, though such request correctly states the law. *Johnson v. State*..... 328
21. Whether a sufficient foundation has been laid to admit a dying declaration is a question of law for the court and, if admitted, its reliability and weight is for the jury. *Johnson v. State*..... 328
22. An appellate court will not set aside the verdict as unsupported by the evidence unless the evidence is so deficient

Criminal Law—*Continued.*
that all reasonable minds, if uninfluenced by passion or prejudice, must agree that there is reasonable doubt of the guilt of accused. *Johnson v. State* ..... 328
23. Where the *res gestæ* is clearly proved, the court may refuse to require the prosecution to call witnesses interested in the defense. *Johnson v. State*..... 328
24. Where the state's witnesses having knowledge of the *res gestæ* prove hostile to the prosecution, the court may allow such examination as will bring out the truth. *Johnson v. State* ..... 328
25. In a prosecution for larceny, an instruction as to reasonable doubt *held* prejudically erroneous. *Brown v. State*... 411
26. A verdict will not be set aside for errors in cross-examination of accused unless the record shows an abuse of discretion and probable prejudice. *Brown v. State* ..... 411
27. A verdict will not be set aside because of remarks of the court unless the record shows the language used and that it was prejudicial. *Brown v. State* ..... 411
28. Objection to additional counsel *held* properly overruled. *Galloway v. State* ..... 447
29. Ordinarily a judgment will not be reversed for admission of immaterial evidence unless prejudice has resulted. *Galloway v. State*..... 447
30. Where accused was charged with rape on a child under 15 years of age, *held* not error to refuse an instruction applicable alone to rape upon a child over 15 and under 18 years of age. *Galloway v. State*..... 447
31. An application to continue a criminal case, set for trial at request of accused, is addressed to the discretion of the court. *Hanks v. State* ..... 464
32. Where it is not shown that reasons for continuance were not known to accused at time set for trial, conviction will not ordinarily be set aside because continuance was not granted. *Hanks v. State* ..... 464
33. An undergarment worn by the prosecutrix at the time of an alleged criminal assault may, if identified, be admitted in evidence. *Hanks v. State*..... 464
34. Failure to instruct that one charged with rape cannot be convicted without corroborating evidence is not error, unless such an instruction was requested. *Hanks v. State* .. 464
35. Error must affirmatively appear. *Hanks v. State*..... 464
36. A conviction will not be set aside because the court limited argument to an hour and 15 minutes on a side. *Hanks v. State* ..... 464

Criminal Law—*Continued.*

37. Abuse of privilege by counsel in addressing the jury, to be available on appeal, must be excepted to at the time. *Hanks v. State* ..... 464
38. Where the trial court upon conflicting affidavits finds that a venireman did not express an opinion that the accused was guilty, the supreme court will not ordinarily hold to the contrary. *Hanks v. State* ..... 464
39. A new trial will not be granted for newly discovered evidence cumulative in character, without a showing of diligence. *Hanks v. State*..... 464
40. It is not a good plea in abatement to an indictment that it was returned by a grand jury of which the complaining witness was a member. *Krause v. State* ..... 473
41. Conviction will not be set aside because accused was denied a continuance to procure an absent witness whose testimony was immaterial. *Krause v. State* ..... 473
42. In laying the foundation to impeach a witness by his testimony before the grand jury, it is sufficient to state the gist of that testimony. *Krause v. State* ..... 473
43. In a prosecution for a felony, the trial court need not define a lesser offense included in the crime charged, unless requested so to do. *Krause v. State* ..... 473
44. It is within the discretion of the court to overrule a request to compel a county attorney to elect beween a count in an indictment for shooting with intent to kill and one for shooting with intent to wound. *Krause v. State* ..... 473
45. In a prosecution for felonious shooting, certain evidence as to the direction of the bullet *held* proper. *Krause v. State* ..... 473
46. Sentence for felonious shooting reduced. *Krause v. State,* 473
47. Where there is no direct evidence of venue, the facts and circumstances relied on must establish it beyond a reasonable doubt. *Union P. R. Co. v. State* ..... 547
48. Opinion of juror that the white race is superior to the colored race, to which accused belonged, *held* not to render him incompetent. *Johnson v. State*..... 565
49. Statement of juror that he would not join in a verdict of guilty with the death penalty *held* to render him incompetent. *Johnson v. State* .....565
50. That the state is accorded the last challenge affords no ground for reversal. *Johnson v. State*..... 565
51. Instruction as to reasonable doubt *held* not erroneous. *Johnson v. State* ..... 565

**Criminal Law**—*Concluded.*

52. Instruction as to effect of accused's evidence *held* not erroneous. *Johnson v. State* ..... 565

53. Where the court has properly instructed on a matter of defense, he need not repeat the instruction in another form at accused's request. *Johnson v. State* ..... 565

54. Where the record discloses that there was competent evidence to sustain every material charge in the information, it cannot be said that the evidence is insufficient to sustain the verdict. *Johnson v. State*..... 565

55. Evidence of a nonexpert as to blood on accused's clothes *held* admissible. *Johnson v. State* ..... 565

56 Voluntary statement of accused *held* admissible to contradict his subsequent statements. *Johnson v. State* ..... 565

57. Acts of others associated with accused in the commission of a crime in furtherance of a common design may be admitted in evidence. *Joyce v. State* ..... 599

58. Proof of conspiracy need not be made before receiving evidence of acts of one associated with accused in the common design. *Joyce v. State* ..... 599

59. Verdict of guilty, based on sufficient competent evidence, will not be disturbed, though the supreme court may entertain doubt as to correctness of jury's finding. *Burnett v. State*, 638

60. Exclusion of photographs of accused as evidence *held* not prejudicial. *Morrison v. State* ..... 682

61. Objection to receipt of bank draft in evidence because not sufficiently identified, *held* properly overruled. *Morrison v. State* ..... 682

62. *Held*, too late to object in the supreme court for the first time that the police magistrate lost jurisdiction because judgment was not pronounced until five days after the case was submitted. *Grimes v. State*..... 848

63. A defendant, knowing all the facts, who states in open court that he has no objection to the qualification of the judge, cannot urge such objection in the supreme court. *Grimes v. State*..... 848

**Crops.** See LANDLORD AND TENANT, 2-4. VENDOR AND PURCHASHER, 5, 6.

**Damages.** See APPEAL AND ERROR, 41. ATTACHMENT. CONTRACTS, 7, 8. DEEDS. EMINENT DOMAIN. FRAUD. INTOXICATING LIQUORS, 2, 3. LIBEL AND SLANDER, 2. TRESPASS.

1. In estimating damages to realty from the laying of railroad tracks, the jury may consider every element of an-

**Damages—*Concluded.***

noyance and disadvantage resulting therefrom. *Kayser v. Chicago, B. & Q. R. Co.* ..... 343

2. Verdict of $1,100 for injury to realty from the construction of railroad track *held* not excessive. *Kayser v. Chicago, B. & Q. R. Co.* ..... 343

3. Where a builder's contract provides for liquidated damages for delay, no other damages should ordinarily be allowed therefor. *Jobst v. Hayden Bros.* ..... 469

**Deeds.** See MORTGAGES, 5. RELIGIOUS SOCIETIES.

Measure of damages for breach of covenant against incumbrances caused by a lease *held* to be the value of the use of the land for the term. *Malsbary v. Jacobus* ..... 751

**Descent and Distribution.**

1. The character of an estate at the death of an intestate, as impressed upon it by his act, determines the course of its descent. *Zimmerer v. Stuart* ..... 530

2. Acts of owner of telephone system *held* to have fastened the character of personalty upon it so that it descended as such upon the owner's death. *Zimmerer v. Stuart*..... 530

**Divorce.** See JUDGMENT, 5. PLEADING, 2.

1. An accusation by a wife charging her husband with incest with his daughter may constitute extreme cruelty, and a ground for divorce, when made maliciously and often repeated. *Pedersen v. Pedersen* ..... 55

2. Extreme cruelty under sec. 7, ch. 25, Comp. St. 1909, defined. *Preuit v. Preuit* ..... 124

3. Petition for divorce, containing a demand for settlement of property rights not growing out of the marriage relation, *held* demurrable for misjoinder of causes of action. *Hunter v. Hunter* ..... 153

4. In a suit for divorce on the ground of adultery, it is not necessary to show the overt act. *Stackhouse v. Stackhouse,* 184

5. Evidence *held* to sustain decree for plaintiff. *Stackhouse v. Stackhouse* ..... 184

6. Unjustifiable conduct which destroys the objects of matrimony may constitute extreme cruelty. *Myers v. Myers*.... 656

7. Unjustifiable conduct without physical injury may constitute extreme cruelty. *Mills v. Mills*..... 596

8. Where a decree grants both a divorce and alimony, the provision for alimony alone cannot be assailed. *Newell v. Newell* ..... 705

**Divorce**—*Concluded.*

9. Petition *held* sufficient to sustain a decree of divorce for cruelty and desertion. *McLane v. McLane* ..... 833
10. The supreme court on appeal *held* authorized to make allowance for plaintiff's support pending an action for divorce and for counsel fees. *Wyrick v. Wyrick* ..... 9
11. Where a divorce is granted a husband on any ground except adultery, the court may allow the wife permanent alimony. *Pedersen v. Pedersen* ..... 55
12. Contract between husband and wife, without permanent separation, as to income of certain specified property *held* not binding in an action for divorce several years thereafter. *Myers v. Myers*..... 656
13. Property accumulated by the joint efforts of husband and wife, title to which is in the name of the wife, may be adjudged property of the husband with permanent alimony to the wife. *Myers v. Myers*..... 656
14. Allowance of $4,000 alimony *held* sufficient. *Myers v. Myers*, 656
15. Award of $2,500 as permanent alimony sustained. *Mills v. Mills* ..... 596

**Drains.**

1. Petition on which county supervisors acted in fixing boundaries and calling an election for drainage district, *held* sufficient as against a collateral attack. *O'Brien v. Schneider*, 479
2. Finding by a board of supervisors on a petition for a drainage district under art. V, ch. 89, Comp. St. 1907, *held* sufficient. *O'Brien v. Schneider* ..... 479
3. Bond required by sec. 3, art. V, ch. 89, Comp. St. 1907, need not be signed by petitioners on petition for drainage district as principals, but county clerk may accept petitioner as surety. *O'Brien v. Schneider* ..... 479
4. Bond for drainage district approved by county clerk *held* not invalid by reason of its conditions. *O'Brien v. Schneider*, 479
5. Formation of drainage district and assessments levied therein *held* not void because no assessments were levied on a small fraction of the district not benefited. *O'Brien v. Schneider* ..... 479
6. Art. V, ch. 89, Comp. St. 1907, *held* not void because directors are not required to give notice before adopting a plan for draining lands, nor because apportionment of benefits precedes construction. *O'Brien v. Schneider* ..... 479
7. Art. V, ch. 89, Comp. St. 1907, *held* not void because of method of levying assessments. *O'Brien v. Schneider* .... 479

**Ejectment.**

1. Plaintiff in ejectment must rely on the strength of his own title. *Reams v. Sinclair* ..... 738
2. A plaintiff in ejectment who has not established a *prima facie* right to possession cannot urge that defendant is a trespasser. *Reams v. Sinclair* ..... 738

**Election of Remedies.**

1. Where defendants violated a contract not to engage in a certain business, *held* that plaintiffs could either sue for damages or apply for an injunction. *Hickey v. Brinkley*.. 356
2. Where a ward elects to sue defaulting guardian's bondsmen, a court in another state may dismiss a subsequent suit by the ward to foreclose the mortgage on which the defaulter realized the money converted. *Gentry v. Bearss*.. 742

**Eminent Domain.**

The measure of damages to realty from the construction of railroad tracks is the difference between its market value immediately before and after the laying of the tracks and their use. *Kayser v. Chicago, B. & Q. R. Co*..... 343

**Equity.** See CONTRACTS, 3. INTOXICATING LIQUORS, 12. JUDGMENT, 4. PARTNERSHIP, 3.

**Estoppel.** See CORPORATIONS, 1. GUARDIAN AND WARD, 2. TRIAL, 5. WATERS, 7.

Recitals in a master's deed in an Illinois court to land in Nebraska *held* not competent proof against a stranger to the record. *Reams v. Sinclair* .....738

**Evidence.** See BILLS AND NOTES, 4. CARRIERS, 5, 6. CRIMINAL LAW. MASTER AND SERVANT, 1, 2, 8, 13, 14. MORTGAGES, 7. NEGLIGENCE, 2, 3. PRINCIPAL AND AGENT, 2. RAILROADS, 4-7. SALES, 1, 2. TAXATION, 4. TRIAL, 2-5. WILLS, 5.

1. Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved. *Shold v. Van Treeck*.. 80
2. Parol evidence may be received to supply an omission in a contract for sale of land as to the time when delivery of a deed was to be made. *Fletcher v. Brewer*..... 196
3. Admission of payments of interest on mortgage debt *held* to refer to payments made by the owner of the equity of redemption. *Girard Trust Co. v. Paddock*..... 359
4. Recital in release of mortgage that it was executed in consideration of payment of the debt *held* not conclusive. *Pettit v. Louis* ..... 496
5. Abstract of title *held* competent proof of execution and recording of a deed as therein recited. *Bresee v. Seberger*.. 632

**Exceptions, Bill of.** See APPEAL AND ERROR, 28, 43, 44. MORTGAGES, 2.

It is not necessary to serve a proposed bill of exceptions on one who purchases the subject matter of litigation pending the action and continues it in the name of the assignor. *Wells v. Cochran* ..... 367

**Executors and Administrators.** See INSURANCE, 5.

1. Where a homestead is selected during the lifetime of husband and wife, and after the death of one the survivor resides thereon during life, the title descends to the heirs, whether direct or collateral, exempt from debts and costs of administration. *Judson v. Creighton* ..... 37
2. The property described in subd. 1, sec. 176, ch. 23, Comp. St. 1901, is not an asset in the hands of an administrator whose decedent died in 1902. *Judson v. Creighton*..... 37
3. Where an executor without an order of court prorated the assets among the legatees upon the assumption that the bequests were in the same class, and the legatees retained their dividends for ten years, *held* that they ratified the distribution, and that the executor was held to the theory upon which he distributed the estate. *Fauber v. Keim*.... 379

**Forcible Entry and Detainer.** See JUSTICE OF THE PEACE, 3. PARTNERSHIP, 2.

1. The notice to quit prescribed by the statute of forcible entry and detainer is not for the purpose of terminating the tenancy, but is preliminary to the action for possession, and is properly given after the right of action has accrued. *Krull v. Rose* ..... 655
2. Action of forcible entry and detainer is not limited to cases in which the relation of landlord and tenant exists. *Knapp v. Reed* ..... 754

**Fraud.** See PRINCIPAL AND AGENT, 3, 4.

1. Facts essential to recovery for deceit stated. *Omaha E. L. & P. Co. v. Union Fuel Co*..... 423
2. A vendor is liable in damages for misrepresenting value of his realty to a nonresident vendee who relies thereon. *Dresher v. Becker*..... 619
3. Measure of damages stated where one purchased realty relying on vendor's misrepresentations. *Dresher v. Becker*.. 619

**Fraudulent Conveyances.**

Where parties to a fraudulent deed are not *in pari delicto*, the less guilty will be relieved. *Brady v. Central W. R. Co.* .. 840

**Garnishment.** See BANKRUPTCY, 1, 3.

**Grand Jury.**

Where officers substantially follow the statute in selecting a grand jury, a plea in abatement to an indictment will not be sustained because the county clerk did not record the proceedings. *Krause v. State* ..... 473

**Guardian and Ward.** See ELECTION OF REMEDIES, 2.

1. Secs. 55, 59, ch. 23, Comp. St. 1909, requiring a guardian to subscribe an oath before fixing the time and place for sale of his ward's land, is mandatory, and a sale without compliance therewith is void. *Howe v. Blomenkamp*..... 389

2. Where defendant claimed title to a homestead under a void guardian's sale, the ward *held* not estopped by a settlement with another guardian from asserting title to the homestead, where the settlement related alone to funds arising from a pension. *Howe v. Blomenkamp*..... 389

**Habeas Corpus.**

After conviction for a misdemeanor, a prisoner will not be liberated on habeas corpus because of insufficiency of the complaint, if by any possible construction it charges an offense. *State v. Birdsall* ..... 587

**Highways.** See TELEGRAPHS AND TELEPHONES.

Proceedings to establish a public road *held* not to comply with sec. 19, ch. 47, Rev. St. 1866. *Rosenbery v. Tibke*..... 51

**Homestead.** See EXECUTORS AND ADMINISTRATORS, 1. GUARDIAN AND WARD, 2. HUSBAND AND WIFE, 1, 2.

**Husband and Wife.**

1. Where the homestead of husband and wife was held in the name of the wife, and the petition in an action for damages thereto alleged that it was the property of both, *held*, that they were properly joined as plaintiffs, and there was no error in overruling objection to question as to the husband's interest. *Kayser v. Chicago, B. & Q. R. Co*..... 343

2. Joinder of an unnecessary party plaintiff *held* not to prevent a recovery in view of sec. 429 of the code. *Kayser v. Chicago, B. & Q. R. Co*..... 343

3. A husband *held* not entitled to partition of his wife's land, he having accepted the benefits of an antenuptial contract. *Erb v. McMaster* ..... 817

**Indians.**

A tenant under a lease of Indian lands will be enjoined from removing improvements made by him. *Krull v. Rose*.... 651

**Indictment and Information.** See BURGLARY, 2. LARCENY, 2.

1. Information for burglary *held* sufficient. *Johns v. State* .. 145
2. An indictment under sec. 6 of the criminal code charging in the same count that accused used and advised to be used instruments to procure an abortion, *held* not demurrable for duplicity; the allegation that he advised their use being surplusage. *Johnson v. State*..... 328
3. Sec. 435 of the criminal code requiring a prosecutor to elect, where an information and an indictment are both pending, *held* not to apply where accused has waived examination before the magistrate and has been indicted by the grand jury for the offense charged before the magistrate, and no information has been filed. *Johnson v. State*..... 328
4. Two counts may be united in an indictment, one charging larceny and the other charging the receiving of stolen property knowing it to be stolen, under sec. 419 of the criminal code. *Brown v. State*..... 411
5. An indictment *held* not subject to attack for duplicity. *Union P. R. Co. v. State* ..... 547
6. Where the offense charged is a substantive act of which one or more may be guilty, it is not necessary that the fact of conspiracy be averred in the indictment. *Joyce v. State* ..... 599
7. That persons concerned in a common crime are not jointly indicted is immaterial. *Joyce v. State* ..... 599

**Injunction.**

Injunction to restrain an action on an account stated *held* properly denied. *Olsen v. Marquis*..... 610

**Insurance.** See CORPORATIONS, 4. LIMITATION OF ACTIONS, 6.

1. An insurance agent whose agency was terminated within a year in conformity with his contract, *held* not entitled to a contingent commission dependent upon the agency continuing for a year. *American Fire Ins. Co. v. Howell* ... 493
2. Where there is no uncertainty as to the meaning of an insurance contract, it will be enforced as made. *Rye v. New York Life Ins. Co*..... 707
3. A life policy *held* to lapse under the terms of the contract for nonpayment of premiums. *Rye v. New York Life Ins. Co.* ..... 707
4. Insurance business transacted in Nebraska by a New York company *held* not subject to a New York statute requiring notice as a condition to forfeiture for nonpayment of premiums. *Rye v. New York Life Ins. Co.* ..... 707

Insurance—*Concluded.*

5. A beneficiary in an application for accident insurance, who sues on the policy as administratix, *held* to be the real party in interest so that a judgment will be a bar to any subsequent individual claim as beneficiary. *Tomson v. Iowa State Traveling Men's Ass'n* ..... 399

6. The rule that a fraternal insurance company cannot have the benefit of its by-laws and amendments thereto, in defending against a death claim, unless certified copies thereof have been filed with the auditor of public accounts, *held* to apply to foreign companies, whether licensed to do business in the state or not. *Tomson v. Iowa State Traveling Men's Ass'n* ..... 399

7. Insurance society *held* a fraternal beneficiary association as defined in sec. 91, ch. 43, Comp. St. 1909. *Tomson v. Iowa State Traveling Men's Ass'n* ..... 399

8. Where a foreign fraternal accident company does not select its agents upon whom process may be served, as provided in sec. 5, ch. 16, Comp. St. 1909, the law declares as such agents all persons doing any of the things named in sec. 8, where the company accepts the benefits of such acts. *Tomson v. Iowa State Traveling Men's Ass'n*..... 399

9. One so injured that he cannot intelligently give notice of an accident will be excused while so disabled. *Tomson v. Iowa State Traveling Men's Ass'n*..... 399

10. Benefit society *held* estopped by course of dealing to declare forfeiture of certificate. *Worley v. Supreme Lodge Royal Achates* ..... 440

Interest. See TAXATION, 3.

Intoxicating Liquors. See CRIMINAL LAW, 11, 12. TRIAL, 17.

1. In an action against a saloon-keeper for loss of support to plaintiff and her minor children, certain evidence *held* not a variance. *Selders v. Brothers* ..... 61

2. A verdict for $2,000 for loss of support *held* not excessive. *Selders v. Brothers*..... 61

3. Measure of damages in a civil damage action against a saloon-keeper stated. *Selders v. Brothers*..... 61

4. A manufacturer of beer who sells to unlicensed consumers for their use sells at retail, within the meaning of ch. 82, laws 1907, forbidding sales at retail. *In re Application of Metz Bros. Brewing Co.* ..... 164

5. A manufacturer of beer who sells at retail is guilty of selling without a license, and should not be granted a license in the year next succeeding the commission of that offense. *In re Application of Metz Bros. Brewing Co*..... 164

Intoxicating Liquors—*Concluded.*

6. A judgment of the district court dismissing an appeal from an order of a licensing board granting a druggist's permit to sell intoxicating liquors is a final judgment from which an appeal may be taken to the supreme court. *In re Application of Gering & Co.* ..... 192

7. Where the transcript of the evidence taken before a licensing board is certified to the supreme court on appeal from the district court, the appeal will not be dismissed for want of a bill of exceptions. *In re Application of Gering & Co.* ..... 192

8. An appeal from a judgment dismissing an appeal from an order of an excise board granting a permit to sell liquor *held* not a moot question if heard during the term of the permit, unless it has been canceled by the licensing board. *In re Application of Gering & Co.* ..... 192

9. Where it is shown that an applicant for a druggist's permit to sell intoxicants had violated the provisions of the Slocumb law (Comp. St., ch. 50) during the preceding year, the licensing board has no discretion, but is required to refuse him a permit. *In re Application of Gering & Co.* .... 192

10. Signers on petition for saloon license *held* freeholders and competent to sign as such. *In re Application of Anderson,* 338

11. Purchasers of real estate *held* not disqualified to sign petition for saloon license. *In re Application of Anderson* ... 338

12. Equity can enjoin violation by railroad corporation of ch. 83, laws 1909, which forbids intoxication and drinking liquors on railroad trains. *State v. Chicago, B. & Q. R. Co.,* 669

13. Action for violation of ch. 83, laws 1909, prohibiting drinking liquors on railroad trains, *held* properly brought in supreme court in name of state by attorney general on application of state railway commission. *State v. Chicago, B. & Q. R. Co.* ..... 669

14. Evidence *held* to sustain conviction for sale of liquor to a minor. *Grimes v. State* ..... 848

Judgment. See MORTGAGES, 12.

1. Proceedings to confirm issuance and sale of irrigation bonds under sec. 59 *et seq.,* ch. 70, laws 1895 (Comp. St. 1895, ch. 93*a*, art. III, sec. 59 *et seq.*) *held* an action *in rem,* and that, if the court acquired jurisdiction of the subject, its decree cannot be assailed in a collateral proceeding. *Wyman v. Searle* ..... 26

2. A *bona fide* purchaser for value of land for irrigation district taxes *held* not bound by a decree canceling those

**Judgment**—*Concluded.*

taxes in a suit commenced subsequent to his purchase, and to which he was not a party. *Wyman v. Searle*..... 26

3. A judgment in favor of directors of a corporation *held* a bar to an action against the corporation. *Young v. Rohrbough* ..... 101

4. If an executor sued for his testator's debt is prevented from proving a set-off by unconscionable conduct of an insolvent plaintiff, and by his own innocent mistake, equity may enjoin collection of the judgment until the set-off is liquidated, and then set off the judgments so far as they equal each other. *Wells v. Cochran* ..... 367

5. The striking of an answer in divorce for failure to pay temporary alimony and suit money, though ground for reversal on appeal, *held* not to make the decree void. *Newell v. Newell* ..... 705

6. A decree in a suit to quiet title is conclusive in a partition suit among the same parties. *Mason v. Rowley* ..... 801

**Jurisdiction.** See APPEARANCE, 2. COURTS, 3. JUSTICE OF THE PEACE, 3. TRIAL, 19.

**Jury.** See APPEAL AND ERROR, 49. CRIMINAL LAW, 38, 48-50. GRAND JURY.

1. In an action for violating a city ordinance where the penalty was a fine, defendant could, on appeal to the district court, waive a jury and consent that the case be tried on the evidence before the police magistrate. *Grimes v. State* ..... 848

2. On appeal from conviction for violating a city ordinance, defendant going to trial before the court without objection *held* to have waived a jury. *Grimes v. State*..... 848

3. In an action at law either party ordinarily is entitled to a jury trial as a matter of right. *Olsen v. Marquis* ..... 610

**Justice of the Peace.**

1. A justice's judgment establishing an attorney's lien *held* not void. *Hoyt v. Chicago, R. I. & P. R. Co*..... 161

2. Appeal from justice court *held* to confer jurisdiction on the district court. *Hoyt v. Chicago, R. I. & P. R. Co*..... 161

3. A justice of the peace has no jurisdiction in forcible entry and detainer to determine the rights of partners in the leases or good-will of the partnership. *Knapp v. Reed*.. 754

Landlord and Tenant. See FORCIBLE ENTRY AND DETAINER. INDIANS.

1. Unless the landlord has agreed to repair demised premises, he is not liable to the tenant for failure to make repairs. *Young v. Rohrbough* ..... 101

2. One cultivating land under an agreement to deliver to the owner one-third of the crops as rent is a tenant. *Hansen v. Hansen*..... 517

3. Where a tenant agrees to deliver one-third of a crop of corn to his landlord as rent, the right to the corn stalks is to be determined by the contract. *Hansen v. Hansen*..... 517

4. Where a landlord agrees to accept a share of corn as rent, the tenant, reserving the stalks, may sell them to another. *Hansen v. Hansen*..... 517

5. A tenant holding over after his term *held* not a tenant from year to year unless the landlord has recognized him as a tenant while holding over. *Krull v. Rose* ..... 655

6. A landlord, by granting the use of an appurtenant water privilege, covenants not to interfere with the tenant's enjoyment of it during the term. *North Platte Land & Water Co. v. Arnett* ..... 821

7. Landlord *held* liable for resulting damages for not permitting water to flow into the lateral extending to leased irrigated land. *North Platte Land & Water Co., v. Arnett*.... 821

8. Where, in an action between landlord and tenant, the evidence is undisputed as to the contract of lease, the judgment will not be set aside because the court submitted the lease to the jury for construction. *North Platte Land & Water Co. v. Arnett* ..... 821

Larceny. See BURGLARY, 1.

1. In a prosecution for larceny, the state must prove that the owner did not consent to the taking of his property. *Johns v. State* ..... 145

2. Indictment held to charge ownership of the property stolen. *Brown v. State* ..... 411

3. Refusal to give a certain instruction *held* not error. *Brown v. State*..... 411

Libel and Slander.

1. In an action for slander, an instruction to find that the defamatory words were spoken, *held* erroneous, where their utterance was contested. *Herold v. Coates* ..... 487

2. Verdict of $3,000 *held* excessive. *Bailey v. Kling* ..... 699

Limitation of Actions

1. An action by purchaser of land for damages for vendor's fraud is barred if not commenced within four years from discovery of the fraud. *Kaup v. Schinstock* ..... 95

2. An action by purchasers for cancelation of their overdue notes and a mortgage executed as part consideration for land, *held*, in effect, an action to recover damages for fraud, and barred four years after discovery of the fraud. *Kaup v. Schinstock*..... 95

3. Purchasers of land may set up by recoupment their damages for vendor's fraud in an action on a note for the purchase price, or to foreclose the mortgage. *Kaup v. Schinstock* ..... 95

4. Where, after maturity of a note secured by mortgage, interest payments are made, foreclosure may be maintained at any time within ten years from the last payment. *Girard Trust Co. v. Paddock*..... 359

5. A suit by an heir to quiet title to the homestead of his ancestor may be commenced any time within ten years after the cause of action accrues, or within ten years after he attains majority. *Howe v. Blomenkamp* ..... 389

6. An amended petition *held* not to state a new cause of action, and the original petition having been filed within five years after plaintiff's right of action upon a benefit certificate accrued, recovery was not barred by limitations. *Tomson v. Iowa State Traveling Men's Ass'n* ..... 399

7. A mortgage in the hands of a mortgagee in possession never becomes barred by lapse of time, so that the mortgagor can quiet his title without paying it. *Pettit v. Louis*..... 496

8. The statute of limitations does not run in favor of one claiming an interest in land until he has taken possession or exercised such dominion over it as amounts to notice of his adverse claim. *Stephenson v. Murdock* ..... 796

Marriage.

1. The consent of competent parties is essential to a valid contract of marriage. *Kutch v. Kutch* ..... 114

2. Where a contract of marriage has not been consummated, the court should require no greater quantity of proof to sustain a finding of fraud or of mental incapacity in a suit to annul that contract than in any other case. *Kutch v. Kutch* ..... 114

3. Evidence *held* insufficient to annul a marriage. *Kutch v. Kutch* ..... 114

Master and Servant. See APPEAL AND ERROR, 18.

1. In an action by a servant for personal injury it is necessary that he prove that the negligence of the master was the proximate cause of the injury. *Johnson v. Model Steam Laundry Co.* ..... 12
2. Evidence *held* not to show that negligence of the master was the proximate cause of plaintiff's injury. *Johnson v. Model Steam Laundry Co*..... 12
3. One *held*, under the facts, to be an independent contractor. *Westover v. Hoover*..... 201
4. One in the general employment of one person may be temporarily in the service of another so that the relation of master and servant arises, though the general employer may have an interest in the special work. *Westover v. Hoover* ..... 201
5. Where one is temporarily in the special employ of another, it is the duty of the special employer to provide a safe place to work and give proper warning. *Westover v. Hoover*.... 201
6. Where an independent contract is to be carried out on the general employer's premises, he owes the same duty to the independent contractor and his servants as to other persons invited to that portion of the premises where the work is to be carried on. *Westover v. Hoover* ..... 201
7. Evidence *held* not to sustain verdict for plaintiff. *Westover v. Hoover* ..... 201
8. Railroad company *held prima facie* liable for injury to servant caused by negligence of a fellow servant. *Metz v. Chicago, B. & Q. R. Co*..... 459
9. A railroad company's servant in its water supply department *held* within the protection of sec. 3, ch. 21, Comp. St. 1907, relating to injuries caused by the negligence of fellow servants. *Metz v. Chicago, B. & Q. R. Co*..... 459
10. If an injured servant is free from contributory negligence, the master is liable where the injury was caused by the concurrent negligence of the master, or his vice-principal, and of a fellow servant. *Van Horn v. Cooper & Cole Bros*..... 687
11. A servant *held* not to assume risks from master's negligence in failing to provide reasonably safe appliances and a reasonably safe place to work, unless the servant knows of the danger. *Van Horn v. Cooper & Cole Bros*..... 687
12. A servant *held* to assume ordinary risks of service he undertakes to perform, but not unknown risks of a more hazardous service. *Van Horn v. Cooper & Cole Bros*..... 687
13. In an action for death, evidence *held* sufficient to go to the jury. *Van Horn v. Cooper & Cole Bros*..... 687

**Master and Servant**—*Concluded.*

14. If there is any competent evidence from which want of proper care can be reasonably inferred, the question is for the jury. *Van Horn v. Cooper & Cole Bros*..... 687
15. Railroad employee recovering judgment against the company for injuries, and accepting the amount thereof, cannot recover benefits from its relief department. *Koeller v. Chicago, B. & Q. R. Co*..... 712
16. Servant *held* not to assume risk from master's failure to repair a defect within a reasonable time after promise to do so. *Lynn v. Omaha Packing Co.* ..... 720
17. A servant induced by master's promise to continue to work in an unsafe place *held* not guilty of contributory negligence, and not to have assumed risk of injury. *Lynn v. Omaha Packing Co.* ..... 720

**Mortgages.** See EVIDENCE, 3, 4. LIMITATION OF ACTIONS, 4, 7. QUIETING TITLE, 2-7.

1. In a suit to foreclose a mortgage owned after maturity by successive parties, plaintiff must make *prima facie* proof that no action at law had been commenced by any of those persons to recover the debt. *Lyons v. Allen*..... 41
2. An order denying a motion to vacate an appraisement as too low will, in the absence of a bill of exceptions embodying the evidence, be presumed to be correct. *Zwiebel v. Sehestedt* ..... 100
3. Failure of county clerk to include in his certificate a statement of junior liens and to attach his official seal to such certificate *held* not prejudical to owners of equity of redemption. *Zwiebel v. Sehestedt*..... 100
4. A note secured by mortgage on land in Nebraska, signed in Iowa, payable in Pennsylvania, and containing a clause that it shall be governed by the laws of Nebraska, should not be construed according to the laws of Iowa. *Girard Trust Co. v. Paddock* ..... 359
5. Under sec. 16, ch. 73, Comp. St. 1909, a sheriff's deed to purchaser at foreclosure sale without notice conveys title superior to that of an unrecorded deed executed by the mortgagor before foreclosure. *Richards v. Smith*..... 444
6. To give constructive notice to defendant in foreclosure of a mortgage, the notice must include his first Christian name and surname. *McCabe v. Equitable Land Co.* ..... 453
7. Possession of mortgage notes *held* to sustain a finding that the holder was the owner thereof, notwithstanding they were indorsed payable to the order of a third person. *McCabe v. Reed* ..... 457

**Mortgages**—*Concluded.*

8. A mortgagee rightfully in possession of mortgaged premises may hold possession as against the mortgagor or his grantees until the mortgage is paid. *Pettit v. Louis*..... 496
9. Where one who purchased land at a void tax foreclosure sale went into peaceable possession, and subsequently purchases an outstanding mortgage, he may defend his possession as a mortgagee in possession. *Pettit v. Louis*..... 496
10. An assignment of a real estate mortgage is an instrument affecting title to real estate within the recording act. *Jones v. Fisher*..... 627
11. Assignee of a mortgage whose assignment was not recorded *held* barred by a decree foreclosing a prior lien in a suit to which his assignor was a party. *Jones v. Fisher*..... 627
12. Where the court had jurisdiction of necessary parties to a foreclosure, *held* that its decree, though erroneous, was not subject to collateral attack. *Bresee v. Seberger* ..... 632

**Municipal Corporations.** See QUO WARRANTO. WITNESSES, 1, 2.

1. A municipality cannot delegate the care of its sidewalks to another, and escape liability for damage from his failure to use that care which devolves primarily upon the municipality. *Severa v. Village of Battle Creek* ..... 127
2. A judgment in proceedings under sec. 101, art. I, ch. 14, Comp. St. 1909, to exclude territory from a municipal corporation will not be set aside on appeal, unless the court committed an important mistake of fact, or made an erroneous inference of fact or of law. *Chapin v. Village of College View*..... 229
3. A city cannot escape liability for neglecting to repair a sidewalk, because it is on the outskirts of the city. *O'Loughlin v. City of Pawnee City*..... 244
4. Where a sidewalk was defective for a year, actual notice to the city of the defects *held* not essential to a recovery for injury therefrom. *O'Loughlin v. City of Pawnee City*..... 244
5. A city of the second class having less than 5,000 inhabitants cannot escape liability for neglecting to repair a sidewalk because notice of the defect and resulting injury was not given. *O'Loughlin v. City of Pawnee City*..... 244
6. A city must keep in repair a sidewalk constructed along a public street under direction of the city, and afterwards controlled by it and used by the public, though it is not within the limits of the street as originally platted. *O'Loughlin v. City of Pawnee City* ..... 244
7. An ordinance regulating the location of stock-yards *held* reasonable. *Union P. R. Co. v. State*..... 247

**Municipal Corporations**—*Continued.*

8. The mayor and council of Omaha *held* to have power under its charter (laws 1897, ch. 10, sec. 101*a*) to direct by ordinance the board of public works to advertise for bids for street improvements. *McCoy v. City of Omaha* ..... 316

9. A notice inviting bids for street improvements, signed by the chairman and secretary of the board of public works of Omaha, will be presumed to have been authorized by that board, in the absence of evidence to the contrary. *McCoy v. City of Omaha*..... 316

10. Under the Omaha charter (laws 1897, ch. 10) *held* that the council need not fix a time and place for property owners to protest a street improvement or designate material, provided 30 days were allowed after publication of the ordinance authorizing the improvement before proceeding with the work. *McCoy v. City of Omaha* ..... 316

11. A certain notice of the sitting of the city council as a board of equalization of special assessments *held* sufficient under sec. 152 of the Omaha charter (laws 1897, ch. 10). *McCoy v. City of Omaha* ..... 316

12. Under sec. 152 of the Omaha charter (laws 1897, ch. 10) *held* that notice of the sitting of the council as a board of equalization might be given by the board of public works when so directed by the mayor and council. *McCoy v. City of Omaha*..... 316

13. In an action for services superintending an improvement of village water-works *held* that it will not be presumed that the improvement was made without approval of the water commissioner. *Launt v. Village of Oakdale* ..... 320

14. An agreement to perform services for a village gratuitously may be withdrawn, and the village will be liable for services thereafter rendered. *Launt v. Village of Oakdale* ..... 320

15. A city or village acquires the fee to streets platted and dedicated under secs. 104, 105, art. I, ch. 14, Comp. St. 1909, and an abutting lot owner cannot recover value of natural products of the soil grown upon an adjacent street and appropriated by the municipality. *Carroll v. Village of Elmwood* ..... 352

16. Under sec. 109, ch. 12*a*, Comp. St. 1901, governing cities of the metropolitan class, owners of buildings fronting on streets *held* not liable for damages caused by defects in sidewalks until notified by the city to repair them. *City of Omaha v. Philadephia M. & T. Co*..... 519

**Municipal Corporations**—*Continued.*

17. Owner of building who excavates under adjacent street for a room in connection with the building *held* liable for damages caused by neglect to maintain the excavation in safe condition. *City of Omaha v. Philadelphia M. & T. Co*..... 519

18. Purchaser of property at foreclosure sale *held* to have notice of excavation under adjacent street rendering it unsafe, and to be liable for damages caused thereby. *City of Omaha v. Philadelphia M. & T. Co*..... 519

19. City *held* entitled to recover over money paid for injury caused by neglect of owner of adjacent building to maintain excavation under street in safe condition. *City of Omaha v. Philadelphia M. & T. Co*..... 519

20. Petition *held* to present issue as to duty of defendant to maintain safe covering for area under street. *City of Omaha v. Philadelphia M. & T. Co*..... 519

21. An ordinance granting rights for a telephone system *held* to repeal a prior ordinance so that the rights of the parties should be measured by the repealing ordinance. *Zimmerer v. Stuart* ..... 530

22. Where an ordinance contains valid and void provisions, the valid portion will be upheld if not dependent upon that which is invalid. *Zimmerer v. Stuart*..... 530

23. Where an ordinance granted an "exclusive" right to occupy the streets, the word "exclusive," if invalid, could be eliminated and the remainder of the ordinance stand. *Zimmerer v. Stuart* ..... 530

24. Under its charter (Comp. St. 1893, ch. 13*a*) the city of Lincoln *held* empowered to grant the right to a lot owner to excavate a room under an alley. *Tiernan v. Thorp*..... 662

25. It will be presumed that an excavation under an alley made under an ordinance complied therewith. *Tiernan v. Thorp*, 662

26. After an excavation under an alley has been used for 15 years, city authorities cannot summarily declare it a nuisance and destroy it. *Tiernan v. Thorpe*..... 662

27. The legislature may by general law authorize cities and villages to grant exclusive franchises to public service corporations. *May v. City of Gothenburg* ..... 772

28. Cities and villages cannot grant exclusive franchises to public service corporations unless authorized by the legislature so to do. *May v. City of Gothenburg*..... 772

29. Cities and villages of less than 5,000 inhabitants are not authorized to grant exclusive franchises to telephone companies. *May v. City of Gothenburg*..... 772

Municipal Corporations—*Concluded.*

30. Ch. 15, laws 1903, curing irregularities in special assessments levied subsequent to March 15, 1897, and authorizing relevy thereof, *held* not to prevent relevy of special assessments levied prior thereto. *Byron Reed Co. v. City of Omaha* ..... 828
31. The procedure in the district court on appeals from the board of equalization in metropolitan cities is the same as on appeals from a justice of the peace. *Byron Reed Co. v. City of Omaha* ..... 828
32. Delay of ten years to relevy a special assessment adjudged invalid *held* to estop a metropolitan city from relevying the assessment on lots transferred subsequent to date of original assessment. *Byron Reed Co. v. City of Omaha* ..... 828

Names. See MORTGAGES, 6.

Negligence. See APPEAL AND ERROR, 7. MASTER AND SERVANT. RAILROADS. STREET RAILWAYS. WATERS, 8.

1. Plaintiff's negligence will not defeat a recovery unless it was the sole cause of his injury, or concurred with defendant's negligence as a proximate cause. *McGahey v. Citizens R. Co.* ..... 218
2. Where defendant pleads contributory negligence, the burden is on him to prove it, and does not shift during the trial; he having the benefit of plaintiff's evidence tending to prove such issue. *McGahey v. Citizens R. Co.* ..... 218
3. An instruction that the burden is not on defendant to prove contributory negligence if the plaintiff's testimony proves that fact, *held* not to involve the doctrine of comparative negligence. *McGahey v. Citizens R. Co.* ..... 218
4. The doctrine of the last clear chance *held* properly submitted under the pleadings. *McGahey v. Citizens R. Co.*..... 218

Newspapers. See TAXATION, 7, 8.

New Trial. See APPEAL AND ERROR, 25, 29, 30. CRIMINAL LAW, 39.

1. Where there is a general assignment in a motion for a new trial that the court erred in giving a group of instructions, *held* not error to overrule the motion if any of the instructions was proper. *Fletcher v. Brewer*..... 196
2. An applicant for a new trial for newly discovered evidence must show that he exercised dilligence. *Dresher v. Becker*, 619
3. To obtain a new trial for newly discovered evidence, the evidence must be such that complainant could not with reasonable diligence have discovered and produced it at the trial. *Van Horn v. Cooper & Cole Bros*..... 687

Notice. See INSURANCE, 9. TAXATION, 11-15, 24.

Nuisance.

1. A private citizen cannot abate a public nuisance, unless he suffers special injury therefrom. *Gleason v. Loose-Wiles Cracker & Candy Co*..... 83

2. In a suit by a private citizen to abate a public nuisance, evidence *held* not to show that any special injury to plaintiff's property will result from the construction of a proposed sidewalk. *Gleason v. Loose-Wiles Cracker & Candy Co*.. 83

Parties. See HUSBAND AND WIFE, 2. INSURANCE, 5.

Partition. See HUSBAND AND WIFE, 3. JUDGMENT, 6.

Partnership. See JUSTICE OF THE PEACE, 3.

1. Where a partnership is carrying on business in leased premises, neither partner can, without the consent of the other, renew the lease in his own name and exclude the other. *Knapp v. Reed* ..... 754

2. One partner cannot maintain forcible entry and detainer to put the other partner out of premises leased by the partnership. *Knapp v. Reed* ..... 754

3. Where a partnership is dissolved without an adjustment by the partners of their rights, it is the province of equity to adjust such rights. *Knapp v. Reed* ..... 754

Pleading. See APPEAL AND ERROR, 35, 36, 47. ATTORNEY AND CLIENT, 2. BILLS AND NOTES, 3. BROKERS, 1. COUNTIES AND COUNTY OFFICERS, 1. DIVORCE, 3. DRAINS, 1. JUDGMENT, 5. LIMITATION OF ACTIONS, 6. MUNICIPAL CORPORATIONS, 20.

1. Where the sufficiency of the petition is first raised on appeal, it will be liberally construed. *Brown County v. Keya Paha County* ..... 117
*McLane v. McLane* ..... 833

2. If objection is seasonably made to a petition for divorce containing a demand for settlement of property rights not growing out of the marriage relation, the court should order the pleadings reformed so as to present only the suit for divorce. *Hunter v. Hunter* ..... 153

3. Where part of a paragraph of a petition is material, a motion to strike the whole paragraph should not be sustained. *Diels v. Kennedy* ..... 777

4. Petition in action for breach of contract *held* to state a cause of action. *Diels v. Kennedy* ..... 777

**Principal and Agent.**

1. Parties contracting in their own names do not exclude personal responsibility by describing themselves as agents of another, and the contract is their obligation, and not that of their principal. *Fowler v. McKay* ..... 387
2. A letter written by an agent with the principal's consent ordinarily is competent evidence against the principal. *Haner v. Palmer* ..... 438
3. Where principal and agent participate in and share the fruits of actionable fraud, they are jointly liable for resulting damages. *Dresher v. Becker* ..... 619
4. A principal who retains benefits from the fraudulent conduct of his agent is chargeable with the agent's acts. *Dresher v. Becker* ..... 619

**Process.**

1. A copy of the seal under which a summons is issued is not an essential part of the copy served under sec. 69 of the code. *Herold v. Coates* ..... 487
2. Where proof of service by publication in foreclosure has been made by a defective affidavit, the court may, after sale, permit an additional affidavit showing the facts. *Bresee v. Seberger* ..... 632

**Quieting Title.** See JUDGMENT, 6. LIMITATION OF ACTIONS, 5, 7.

1. Defendant in possession may defeat a suit to quiet title by showing that plaintiff has no interest in the land. *Van Patten v. O'Brien* ..... 382
2. In a suit to quiet title, where defendants rely on adverse possession and seek to cancel an outlawed mortgage, *held* that they are not entitled to affirmative relief on their failing to show adverse possession for ten years. *Van Patten v. O'Brien* ..... 382
3. Where both parties are defeated in a suit to quiet title, an intervener seeking to foreclose an outlawed mortgage *held* not entitled to a foreclosure; the owner of the equity of redemption not being a party. *Van Patten v. O'Brien* ..... 382
4. Where a third person intervenes in a suit wherein a mortgagor and mortgagee are litigating their interest in land, *held* that the decree quieting title in plaintiff will not be disturbed on the intervener's appeal. *McCabe v. Equitable Land Co.* ..... 453
5. A mortgagor cannot question the title acquired by void foreclosure of a valid mortgage, unless he pays or tenders the amount of the debt and interest. *McCabe v. Equitable Land Co.* ..... 453

**Quieting Title**—*Concluded.*

6. Where a purchaser at void foreclosure sale subsequently pays taxes on the land, the mortgagor, as a condition to equitable relief, must pay the amount thereof with interest. *McCabe v. Equitable Land Co.* ..... 453

7. Purchaser of equity of redemption subject to a mortgage cannot question the title acquired by foreclosure proceedings, though void, unless he pays or tenders the mortgage debt and interest. *Westerfield v. Howell* ..... 463

**Quo Warranto.**

1. A nonresident owner of agricultural land illegally included within a village may maintain quo warranto to prevent the exercise of jurisdiction over his land. *State v. Village of College View*..... 232

2. Relator seeking to prevent village trustees from exercising authority over his land *held* barred by laches. *State v. Village of College View* ..... 232

**Railroads.** See DAMAGES, 1, 2. MASTER AND SERVANT, 8, 9, 15. TELEGRAPHS AND TELEPHONES. TRIAL, 4. WATERS, 10, 11.

1. The state railway commission has no authority to order a railway company to construct a crossing within the limits of a village where no street has been opened. *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission*..... 239

2. Operating a passenger train at a speed of 45 or 50 miles an hour *held* not negligence. *Brown v. Chicago, B. & Q. R. Co.*, 604

3. In an action for death at a crossing, where the negligence alleged was failure to sound a whistle or ring a bell as required by sec. 104, ch. 16, Comp. St. 1909, *held* not error to charge the jury that, if a bell were rung or a whistle sounded, they should find for defendant. *Brown v. Chicago, B. & Q. R. Co*..... 604

4. In an action for destruction of buildings by fire from an engine, no particular engine being alleged, evidence that defendant's engines generally emitted sparks *held* admissible. *Abbott v. Chicago, B. & Q. R. Co*..... 727

5. In an action for fire caused by a locomotive, evidence that coal used therein retained fire for a long time *held* relevant. *Abbott v. Chicago, B. & Q. R. Co*..... 727

6. In an action for fire set by an engine, admissibility of evidence as to a particular engine and defendant's engines generally stated. *Abbott v. Chicago, B. & Q. R. Co*..... 727

7. In an action for damages for negligently setting out a fire, the origin of the fire may be proved by circumstantial evidence. *Abbott v. Chicago, B. & Q. R. Co*..... 727

**Railroads**—*Concluded.*

8. Railroad company held not liable to its grantor of a right of way for injuries necessarily incident to construction of a roadbed. *Conn v. Chicago, B. & Q. R. Co*..... 732

**Rape.** See CRIMINAL LAW, 30, 33.

1. Conviction of rape will not be reversed because no witness testified in direct language that prosecutrix was not the wife, sister or daughter of accused. *Hanks v. State* ..... 464
2. Evidence in prosecution for rape *held* sufficient to corroborate the prosecutrix. *Hanks v. State*..... 464

**Religious Societies.**

1. Act of February 15, 1869 (laws 1869, p. 276), providing for conveyances to trustees of religious societies, *held* not to require that such religious societies should be incorporated before the state could be divested of its title. *State v. First Catholic Church*..... 2
2. Deed by the governor, pursuant to act of February 15, 1869 (laws 1869, p. 276), to certain trustees *held* to vest title in them for the use of the religious society named in the trust and then existing; and that conveyances from trustees to the religious society after its incorporation vested fee title in the society. *State v. First Catholic Church*..... 2

**Sales.** See PLEADING, 4.

1. If defendant's liability for goods sold depends on a condition which he has not waived, the burden is on plaintiff to prove a performance thereof. *Fairbanks, Morse & Co v. Burgert* ..... 376
2. Where defendant, in an action to enforce a conditional liability for machinery sold, pleads that plaintiff represented that the condition should be construed in a certain way and that he replied thereon, the burden is on defendant to establish that fact. *Fairbanks, Morse & Co. v. Burgert*.... 376
3. In an action to recover money paid in reliance upon false representations, instruction as to fraud *held* to be defective. *Omaha E. L. & P. Co. v. Union Fuel Co*..... 423

**Schools and School Districts.** See COLLEGES AND UNIVERSITIES.

1. An owner of taxable property in a school district, who is not a legal voter therein, cannot contest the consolidation of that district with an adjoining one. *In re Petition of Rose* ..... 92
2. Ch. 125, laws 1909, creating the "Normal Board of Education," was declared invalid after ch. 126, laws 1909, was enacted, providing for the location of a normal school by that

Schools and School Districts—*Concluded.*
board; *held* that ch. 126 was not invalidated by the mistake as to name, and that the duty of carrying it into effect devolved upon the existing "Board of Education." *Tash v. Ludden* ..... 292

3. Provision in Act April 5, 1909, (laws 1909, ch. 126), that cities competing for location of a normal school should file their applications within 60 days *held* directory as to time. *Tash v. Ludden* ..... 292
4. Failure of state Board of Education to visit cities competing for location of a normal school and select a site within the time specified in ch. 126, laws 1909, *held* immaterial, where a later visitation and selection of site accomplished the substantial purposes of the statute. *Tash v. Ludden*... 292
5. That a city filed its application for location of a normal school with the "Normal Board of Education," instead of with the Board of Education *held* immaterial. *Tash v. Ludden* ..... 292
6. Long-continued construction of secs. 2, 3, 5, subd. XIII, ch. 78, laws 1881, allowing compensation to a member of the normal school board, *held* to authorize the auditor of state to approve such claim. *State v. Barton* ..... 576
7. Where a school district has exercised its franchises and privileges thereof for one year, its legal organization will be conclusively presumed. *Kockrow v. Whisenand*..... 640
8. Under subd. XIV, ch. 79, Comp. St. 1909, a petition of electors is not a prerequisite to the submission of a proposition for the issuance of school bonds, but an election may be called on a vote of two-thirds of the board of education. *Kockrow v. Whisenand* ..... 640
9. Variance in name of school district *held* not to invalidate acts of the district. *Kockrow v. Whisenand* ..... 640

Specific Performance.
1. Evidence *held* to support decree for specific performance of contract by father to convey land to his son. *O'Connor v. Waters* ..... 224
2. A contract for sale of land for a right of way will be enforced specifically unless manifestly inequitable. *Rice v. Lincoln & N. W. R. Co*..... 307

Statute of Frauds.
Promise of officer of corporation to prospective purchaser of stock to repay the purchase price at any time *held* an original contract not within the statute of frauds. *Trenholm v. Kloepper* ..... 236

**Street Railways.**

1. Respective rights of street railway company and an ordinary traveler on a city street stated. *Stewart v. Omaha & C. B. Street R. Co.* ..... 209
2. Duty of employees in charge of a street car at a street intersection where a car on the opposite track is discharging passengers stated. *Stewart v. Omaha & C. B. Street R. Co.*, 209
3. In an action for injury to a pedestrian, questions as to whether a bell was sounded and as to the speed of a street car, where the evidence is conflicting, are for the jury. *Stewart v. Omaha & C. B. Street R. Co.* ..... 209
4. If the driver of a vehicle is reasonably justified in believing that he can cross a street railway track before an approaching car, he is not negligent, as a matter of law, in attempting to cross. *McGahey v. Citizens R. Co.* ..... 218
5. Where an action against a street railway company for collision with a vehicle is based on defendant's negligence before, as well as after, it was aware of plaintiff's dangerous position, *held* proper to submit both theories to the jury. *McGahey v. Citizens R. Co.* ..... 218

**Taxation.** See JUDGMENT, 2. MORTGAGES, 9. MUNICIPAL CORPORATIONS, 30-32. WATERS, 2, 5.

1. In a suit to foreclose a tax certificate representing taxes levied for general purposes and assessments by officers of an irrigation district, an offer to confess judgment for the general taxes does not admit plaintiff's title to the lien created by the district assessments. *Wyman v. Searle*.... 26
2. Where a county treasurer includes in a sale of one tract of land taxes levied upon another, the tracts being separately assessed and taxed, the sale will subrogate the tax purchaser to the lien of the public. *Wyman v. Searle*..... 26
3. Liability of property owner for interest stated, where he tenders the general tax, but refuses to pay an invalid assessment. *Wyman v. Searle*..... 26
4. In a tax foreclosure, where defendant denies plaintiff's title as assignee of a tax certificate, the burden is on plaintiff to establish his title. *Wyman v. Searle* ..... 26
5. A taxpayer may appeal from an order of a county board of equalization sustaining another taxpayer's complaint that his property has been assessed too high, though appellant did not appear before the board. *In re Assessment of Bankers Life Ins. Co.* ..... 43
6. Where, on appeal from a county board of equalization, appellant in his notice and petition states that he is a tax-

**Taxation**—*Continued.*

payer in the county, his appeal should not be dismissed without a trial on the ground that he is not a taxpayer. *In re Assessment of Bankers Life Ins. Co.* ..... 43

7. Where the county board has designated the newspaper in which to publish the delinquent tax list and notice of tax sale under ch. 75, laws 1903, it is the duty of the treasurer to publish them in the paper designated. *Cronin v. Cronin*, 141

8. Where the county treasurer refuses to furnish notice and the delinquent tax list to the newspaper designated by the county board, he is liable on his official bond. *Cronin v. Cronin* ..... 141

9. Credits of a partnership maintaining but one office in Nebraska *held* subject to taxation where that office is located. *Clay, Robinson & Co. v. Douglas County*..... 363

10. The doctrine that movables follow the person will not be applied to defeat taxation of partnership credits evidenced by notes of residents of Nebraska payable in Chicago to a partnership transacting business in Nebraska. *Clay, Robinson & Co. v. Douglas County*..... 363

11. Notice to redeem from tax sale, as published, *held* insufficient. *Lanning v. Musser* ..... 418

12. Proof of publication of notice to redeem from tax sale *held* insufficient. *Lanning v. Musser* ..... 418

13. Notice of time to redeem from tax sale *held* properly made by the sheriff officially. *Lanning v. Musser* ..... 418

14. Notice of expiration of time in which to redeem from tax sale under sec. 214, art. I, ch. 77, Comp. St. 1903, *held* not required to state the time when the purchaser would apply for a deed. *Lanning v. Musser* ..... 418

15. Statute requiring notice before taking a tax deed *held* to have no application to tax foreclosure proceedings. *Hardwick v. Snedeker* ..... 515

16. Proceedings to foreclose a tax lien brought within the period of redemption, though irregular, are not void, and the owner has only two years after confirmation of sale in which to redeem. *Hardwick v. Snedeker* ..... 515

17. In an action by a county to foreclose a tax lien, objection that no administrative sale was made *held* to go to the existence of a cause of action, and not to the jurisdiction of the court. *Jones v. Fisher* ..... 627

18. Decree foreclosing tax lien, without a sale for taxes, though irregular, is not void and subject to collateral attack. *Jones v. Fisher*..... 627

**Taxation**—*Concluded.*

19. 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 the two years thereafter to redeem. *Bundy v. Wills*..... 554
20. Where a purchaser at tax sale refuses to allow redemption, a cause of action arises in favor of parties interested, which may be brought at any time before limitations run. *Bundy v. Wills* ..... 554
21. Objection that check is not a legal tender is waived unless made at the time. *Bundy v. Wills*..... 554
22. A formal tender of money is not required where, if made, it would have been fruitless. *Bundy v. Wills* ..... 554
23. Where a tender is refused without objection to the sufficiency of the amount, objection on that ground is waived. *Bundy v. Wills* ..... 554
24. A tax deed, without affidavit showing service of a notice to redeem required by sec. 124, art. I, ch. 77, Comp. St. 1901, is void. *Peck v. Garfield County*..... 635

**Telegraphs and Telephones.** See MUNICIPAL CORPORATIONS, 21-23.

1. A railroad company has no authority to cut telephone wires at a crossing, where they do not endanger railroad employees or interfere with the railroad right of way. *Alt v. State*... 259
2. In determining the respective rights of a telephone company and a railroad company at a place where the telephone wires on a highway cross the railroad right of way, the rights of the public should be considered. *Alt v. State* .... 259
3. The act granting to electric power companies the right to use public highways for poles and wires (Comp. St. 1909, ch. 26*a*, sec. 1) *held* not to apply to telephone companies. *Alt v. State* ..... 259

**Trespass.**

1. Matter in aggravation of trespass to the person is something done by the trespasser upon the commission of the principal trespass, which is of a different legal character from, but not inconsistent with, the trespass. *Kurpgeweit v. Kirby*.. 72
2. Where there is a direct invasion of personal rights in wanton disregard of another's right to personal security, the amount of compensatory damages will usually be left to the discretion of the jury. *Kurpgeweit v. Kirby*..... 72
3. Where, in an action for wilful trespass to the person, considering all the circumstances, the amount of the verdict shows it to be the result of passion or prejudice, a remittitur will be required, or the case reversed. *Kurpgeweit v. Kirby* ..... 72

**Trespass**—*Concluded.*

4. Evidence *held* to show such a wanton trespass upon the person as to justify inclusion of mental suffering, humiliation and disgrace as proper elements of compensatory damages. *Kurpgeweit v. Kirby* ..... 72

5. In an action for trespass to the person, verdict for $3,000 *held* excessive. *Kurpgeweit v. Kirby* ..... 72

6. Measure of damages in trespass to personalty stated. *Henderson v. Weidman* ..... 813

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 2. CRIMINAL LAW. LIBEL AND SLANDER, 1. MASTER AND SERVANT, 14. NEGLIGENCE, 2-4. RAILROADS, 3. SALES. STREET RAILWAYS, 5. WILLS, 10.

1. Where a contract for sale of land is not ambiguous, it is the duty of the court to determine its meaning. *Fletcher v. Brewer* ..... 196

2. The effect of evidence in support of and in opposition to an objection to jurisdiction, where there is no conflict in the evidence, is for the court. *Tomson v. Iowa State Traveling Men's Ass'n*..... 399

3. Hearsay evidence admitted without objection may sustain a finding of existence of a fact. *Metz v. Chicago, B. & Q. R. Co.* ..... 459

4. In an action for fire set by an engine, objection of no foundation for introduction of evidence *held* insufficient to challenge attention to contention that plaintiff has not introduced evidence to show that an unknown engine caused the fire. *Abbott v. Chicago, B. & Q. R. Co*..... 727

5. It is not error to refuse to submit to the jury a defense of equitable estoppel where the evidence does not sustain a material element of that defense. *Judson v. Creighton*.... 37

6. A judgment will not be reversed for the refusal of an instruction, where the substance thereof has been given. *Severa v. Village of Battle Creek* ..... 127

7. The court should not submit an instruction permitting a recovery upon a state of facts not admitted by the litigants or supported by any evidence. *Campbell v. Luebben* ..... 214

8. It is not error to withdraw from the jury's consideration facts which by no reasonable construction tend to establish a defense or to mitigate the plaintiff's damages. *McGahey v. Citizens R. Co.* ..... 218

9. Where requested instructions are substanially given in the court's charge, it is not error to refuse to repeat them. *McGahey v. Citizens R. Co*..... 218

Trial—*Concluded.*

10. Where the law is not misstated by the court, appellant cannot complain because a legal proposition is not included, where he did not submit an instruction containing it. *Trenholm v. Kloepper* ..... 236

11. Where the evidence is conflicting as to a material issue, that issue should be submitted to the jury. *Fairbanks, Morse & Co. v. Burgert*..... 376

12. In an action against a county for damages for negligence in failing to keep a bridge in reasonably safe condition, *held*, under the uncontradicted evidence, not error to fail to submit the question of notice to the county of the unsafe condition of the bridge. *Wherry v. Pawnee County*..... 503

13. If instructions as a whole state the law correctly, they will be sufficient. *Brown v. Chicago, B. & Q. R. Co*..... 604

14. If the court on its own motion charges the jury substantially as requested, it is not error to refuse to restate those principles of law. *Brown v. Chicago, B. & Q. R. Co*..... 604

15. Instructions must be considered as a whole, and a defective one will not require a reversal where the defect is cured by another instruction. *Bailey v. Kling* ..... 699

16. An instruction on the measure of damages for an assault *held* not misleading. *Moore v. Sturm* ..... 793

17. Where the issuance of a license was admitted, *held* unnecessary to submit the question of its issuance to the jury. *Henkel v. Boudreau* ..... 784

18. The trial court is not required to instruct the jury which of two witnesses is the more credible. *Sutorious v. Stalder*.. 843

19. The striking of defendant's answer to the merits does not oust the court of jurisdiction over him. *Newell v. Newell*.. 705

20. Remarks of judge while impaneling jury *held* not reversible error. *Moore v. Sturm* ..... 793

Trusts.

Under sec. 32 of the code, the trustee of an express trust may sue in its own name, though its name has been changed by the legislature. *Girard Trust Co. v. Paddock*..... 359

Vendor and Purchaser. See DEEDS. LIMITATION OF ACTIONS, 1-3. TRIAL, 1.

1. Remedies of persons induced by fraud to purchase land stated. *Kaup v. Schinstock* ..... 95

2. In an action for damages for breach of contract for sale of land, evidence that the purchaser knew at the time his ven-

**Vendor and Purchaser**—*Concluded.*
dor made the contract that the title was in a third person *held* immaterial. *Fletcher v. Brewer* ..... 196

3. Where in a contract for sale of land no time is fixed for delivery of the deed, the court should construe the contract to mean that delivery should be made within a reasonable time, and so as to carry out the contract. *Fletcher v. Brewer* ..... 196

4. A contract to convey a specified tract of land for a right of way, for a specified price, with an option for additional land, *held* not completed by accepting a deed of the specified land and paying the price, so as to rescind the option before the time expired within which to exercise it. *Rice v. Lincoln & N. W. R. Co.* ..... 307

5. Purchaser *held* entitled to growing crop. *Malsbary v. Jacobus* ..... 751

6. Grantee in a deed may waive damages for failure to deliver crops owned by tenant, and sue his grantor on the covenant against incumbrances. *Malsbary v. Jacobus* ..... 751

**Venue.** See CRIMINAL LAW, 47.

**Waters.** See LANDLORD AND TENANT, 6-8.

1. An innocent holder for value of irrigation district bonds delivered as a consideration for the sale of an incompleted ditch to the district, *held* entitled to enforce payment thereof. *Wyman v. Searle* ..... 26

2. Sec. 19, ch. 70, laws 1895, as amended by ch. 78, laws 1899, authorizes directors of an irrigation district to levy taxes upon all lands within the district for the upkeep of the ditch and for incidental expense. *Wyman v. Searle* ..... 26

3. Sec. 59 *et seq.*, art. III, ch. 93*a*, Comp. St. 1895, providing for confirmation of issuance and sale of irrigation bonds, does not authorize the court to confirm the exchange of such bonds for property. *Wyman v. Searle* ..... 26

4. Authority given directors of an irrigation district by sec. 10, art. III, ch. 93*a*, Comp. St. 1895, to exchange its bonds at par to pay for irrigation works, *held* not limited by sec. 14. *Wyman v. Searle* ..... 26

5. Mistake of a treasurer in accepting irrigation bond coupons in payment for district general taxes *held* not to deprive the public of its right to collect such taxes, and such payment not to subrogate the tax purchaser to the rights of the district. *Wyman v. Searle* ..... 26

6. Prior to act of March 31, 1899 (laws 1899, ch. 78) directors of an irrigation district had no authority to obligate the dis-

**Waters**—*Concluded.*

trict to pay for construction work until they had first created a construction fund. *Wyman v. Searle* ..... 26

7. Owner of land in an irrigation district *held* not estopped to deny the legality of taxes levied thereon for an irrigation ditch. *Wyman v. Searle* ..... 26

8. Where surface water negligently collected in a telephone conduit soaked through a sewer connection into a basement, that the owner of the building failed to tamp the earth around his sewer *held* not contributory negligence. *Helphand v. Independent Telephone Co.* ..... 542

9. A landowner may restrain the maintenance of a dam and ditch casting water in a body on his lands. *Nelson v. Wirthele* ..... 595

10. That a railway roadbed interfered with surface water *held* not to sustain a finding of negligent construction in an action for damages for obstructing the flow of such water. *Conn v. Chicago, B. & Q. R. Co.*..... 732

11. In an action for damages, instruction as to duty of railroad company in constructing its roadbed with reference to surface water criticised. *Conn v. Chicago, B. & Q. R. Co.*.. 732

**Wills.** See APPEAL AND ERROR, 26, 27.

1. That an order or material stipulation does not appear in the transcript on appeal from the county court will not prevent the district court from acquiring jurisdiction by the filing of the transcript. *In re Estate of Creighton*.... 107

2. Where the county court declared a bequest to executors in trust invalid and directed that the money bequeathed be paid to testator's heirs, *held* that the executors have such an interest in the order as entitles them to appeal therefrom. *In re Estate of Creighton*..... 107

3. Appellees requesting interlocutory orders in the district court will not thereafter be heard to question the certificate to the transcript. *In re Estate of Creighton*..... 107

4. On appeal to the district court from order of probate, where the parties agreed that the cause should be tried on pleadings in the county court, contestants *held* not entitled to judgment on the pleadings for want of a reply. *In re Estate of Normand*..... 767

5. Capacity of testatrix may be established by any competent witnesses. *In re Estate of Normand* ..... 767

6. The rule that words of limitation shall be applied to the death of the first taker without issue during the life of the testator *held* not to apply where there are any indica-

**Wills**—*Concluded.*

tions, however slight, that the testator referred to death subsequent to his own demise. *In re Estate of Willits*.... 805

7. The general rule is that the period of time to which survivorship relates depends upon the intent of the testator. *In re Estate of Willits*..... 805

8. Where power is given an executor to convert land into money, and he is directed to pay the proceeds to guardians of minors, equity will decree that the estate be distributed as personalty. *In re Estate of Willits*..... 805

9. Will construed, and *held* that bequests to two grandchildren took effect at the testator's death, with a gift over to the survivor upon a contingency terminable at the attainment of majority, and that, one grandchild having attained majority before his death, his share went to his executor, and not the surviving grandchild. *In re Estate of Willits*, 805

10. Instruction to jury to disallow probate of a will, if they find decedent did not sign it, *held* erroneous where the evidence will not sustain such a finding. *In re Estate of Gray* ..... 835

11. On contest of a will between executor and heirs, sec. 333 of the code *held* not to forbid a physician from testifying to the mental condition of testatrix. *In re Estate of Gray*... 835

**Witnesses.** See APPEAL AND ERROR, 4, 8. CRIMINAL LAW, 4, 5, 26, 42. TRIAL, 18. WILLS, 5, 11.

1. In an action against a village for injuries from a defective sidewalk, where a witness denied having made a statement, evidence in impeachment *held* proper. *Severa v. Village of Battle Creek* ..... 127

2. In an action against a village for injuries from a defective sidewalk, cross-examination of one of the village trustees as to notice of the dangerous condition of the sidewalk *held* proper. *Severa v. Village of Battle Creek*..... 127

3. Certain cross-examination of witnesses as to elements of damage to realty *held* proper as tending to weaken their testimony, but not to so destroy it as to require the whole thereof to be stricken. *Kayser v. Chicago, B. & Q. R. Co*... 343

4. When a witness upon cross-examination admits having made statements inconsistent with her evidence, it is error to permit other witnesses to testify to the statements admitted. *Brown v. State*..... 411

5. A witness should ordinarily be permitted to state the circumstances which called his attention to the fact about which he testifies. *Brown v. Chicago, B. & Q. R. Co*..... 604

6. Where there may be a failure of justice for want of evidence, the attorney in a case is justifiable in becoming a witness. *In re Estate of Normand* ..... 767