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MILTON L. THACKABERRY, APPELLANT, V. PORTS WILSON, APPELLEE.

FILED DECEMBER 14, 1911. No. 16,502.

**Pleading: SUFFICIENCY AFTER JUDGMENT.** A counterclaim filed in justice court to recover compensation for services alleged to have been rendered the plaintiff by the defendant in selling the plaintiff's real estate may sustain a recovery, where no objection was made before judgment to the sufficiency of the demand, and the record fails to affirmatively disclose that the agreement does not comply with the provisions of section 74, ch. 73, Comp. St. 1911, which requires such contracts to be in writing, signed by the owner and the agent, and to describe the land and the broker's compensation.

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

*George W. Berge,* for appellant.

*O. B. Polk, contra.*

ROOT, J.

The plaintiff contends that a cross-demand in justice court, where this action was commenced, does not state facts sufficient to sustain the judgment in the defendant's favor. The demand is as follows: "The defendant further alleges that there is due him from the plaintiff on account of services rendered by defendant to plaintiff in the sale of plaintiff's real estate. That plaintiff agreed to pay the defendant the reasonable value of said services which was $180, no part of which has been paid. Said services were rendered during the years 1903, 1904, and 1905. Defendant prays judgment for $180, interest and costs."

No request was made to require the defendant to make his demand more definite and certain, nor does the record disclose that the contract is oral. Sufficient appears from the pleading to warn the plaintiff that he was

being sued for compensation demanded by the defendant for bringing about a sale of the plaintiff's property. Section 74, ch. 73, Comp. St. 1911, requires that such contracts shall be in writing, subscribed by the landowner and the broker, and shall describe both the land and the compensation to be paid the agent. In *Schmid v. Schmid,* 37 Neb. 629, we held that "A petition alleging an agreement within the statute of frauds, but not alleging that such agreement was in writing, is sufficient after judgment." We think the rule should apply to the instant case. The contract may be in writing and comply with every requirement of the statute; the record does not otherwise disclose, and we should not presume that the justice of the peace would have rendered judgment upon an oral contract.

The argument that the services were rendered in Chicago and no liability attached thereby because of the defendant's failure to comply with alleged ordinances of that city is immaterial in the state of the record.

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

AFFIRMED.

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PAUL CLEMONT, APPELLANT, V. CUDAHY PACKING COMPANY ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,560.

1. **New Trial:** NEWLY DISCOVERED EVIDENCE. Newly discovered evidence not relevant to the issues joined will not sustain an application for a new trial based solely on that discovery.

2. ———: ———: DILIGENCE. A petition for a new trial based solely upon the discovery of new evidence is insufficient unless the facts and circumstances pleaded will sustain a finding that the petitioner exercised diligence in endeavoring to procure such evidence before the trial.

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

*Myron L. Learned* and *Alfred G. Ellick,* for appellant.

*Greene, Breckenridge, Gurley & Woodrough, contra.*

ROOT, J.

This is a proceeding by petition to secure a new trial in an action at law.

In December, 1905, the plaintiff, while in the defendant corporation's employ in its packing house, was stationed at or near the corner of a rectangular block, and directed to remove therefrom the sides of half-carcasses of slaughtered hogs remaining after the ham and shoulder had been severed therefrom by a cleaver wielded by another employee. About 500 pieces of meat an hour were to be thus removed. The plaintiff was furnished by the defendant corporation with an iron hook about three inches in length, and, because of his position with reference to the man using the cleaver and another servant whose duty it was to remove the severed ham, it was necessary for the plaintiff to reach across the line theretofore traversed by the cleaver. While the plaintiff was attempting to remove a side of meat, the man with the cleaver, without warning the plaintiff, and while striking a second blow to completely sever a ham, struck the plaintiff across the wrist with the cleaver and severely injured that member.

June, 1906, the plaintiff commenced an action in the district court for Douglas county against his employer and Mr. Novicki, the man who handled the cleaver, to recover for those injuries, which he alleged were caused by the defendants' negligence in the following particulars: That the plaintiff was directed by his foreman to change from a much less hazardous employment to the one in which he was injured, and, although the plaintiff was inexperienced and ignorant of the hazards of the last employment, his employer negligently, carelessly and wrongfully failed to warn or instruct the plaintiff, negli-

gently furnished an unsafe hook to work with, and negligently failed to furnish him a safe place to work in.

The defendants in the law action, in separate answers, denied the allegations of negligence, pleaded the plaintiff's alleged assumption of risk and contributory negligence, and the defendant corporation pleaded the alleged negligence of the plaintiff's fellow servant. To these answers replies in the nature of a general denial were filed. March 27, 1907, after the cause had been tried during three days, the trial judge, in response to separate requests, directed the jury to return a verdict for the defendants. Ordinary motions for a new trial filed March 30, 1907, were overruled July 30, 1907. The plaintiff alleges that for the first time he learned on June 30, 1908, that at the time he was injured the defendant corporation had no rule requiring the man with the cleaver, whenever it was necessary to strike a second blow to sever a half-carcass, to notify or otherwise warn the other men working around the chopping block, and on the same day for the first time learned that the man with the cleaver did not entirely sever the parts of the carcass with the first stroke because there was a defect in the chopping block, in this, that its surface was not smooth and the edge of the cleaver blade could not come in contact with the block along the length of the blade; that the plaintiff was unable during the former trial to produce testimony to prove these facts because the persons having knowledge of the facts refused to advise the plaintiff, although repeated efforts were made to obtain a statement from them, but he was unable to do so, and they refused to discuss the plaintiff's case with him or his attorney, and the witnesses produced could not testify to the facts; that no evidence was produced during that trial to prove the nonexistence of the rule or the cause for Novicki's failure to sever the one half-carcass with one stroke; that the newly discovered evidence is material, and, if it had been produced, would have changed the verdict; that the plaintiff could not with the exercise of reasonable dili-

gence discover and produce such evidence, but, if permitted, will prove the facts by the evidence of witnesses who did not testify on the former trial. A general demurrer to this petition was sustained, and, the plaintiff electing not to plead over, the proceeding was dismissed.

Counsel for the plaintiff say that this action is prosecuted under the provisions of section 318 of the code, which, among other things, provides for a petition for a new trial because of newly discovered evidence. The allegations in the petition will be considered denied without answer, and the case will be summarily determined during the next term. The litigant moving for the new trial should introduce the evidence adduced during the former trial as well as the newly discovered evidence. *Omaha, N. & B. H. R. Co. v. O'Donnell,* 24 Neb. 753. Ordinarily it will not be practical to state within the limits of a petition the testimony adduced during the former tral, so that a demurrer thereto will advise the district court or this court on appeal concerning the scope and quality of that evidence. A demurrer to such a petition is not ordinarily to be commended, but, where the showing made is clearly insufficient to justify granting a new trial, it may properly be filed. For the purposes of this case we must assume that the plaintiff during the trial of his case did not introduce sufficient evidence to sustain his allegation to the effect that the defendants were negligent, or, that, if he did, the proof of his contributory negligence was conclusive. In other words, the plaintiff's allegations in his present petition that the evidence adduced during his former trial disclosed facts from which a jury might lawfully find the defendants liable cannot prevail against the judgment in their favor. None of the alleged newly discovered evidence is relevant to any issue joined by the pleadings upon which the demand was tried, and hence it is immaterial. A new trial will not be granted for newly discovered evidence unless it is material. *Butterfield v. City of Beaver City,* 84 Neb. 417.

Furthermore, there is no such showing of diligence as will justify granting the plaintiff a new trial. Facts and circumstances, and not the litigant's conclusions, must be alleged, so that the court may determine whether reasonable diligence was exercised. The plaintiff alleges that none of his witnesses knew of the alleged defect in the chopping block or that the corporation defendant had not promulgated the rule he now asserts was necessary for his protection, but he does not state the names of the witnesses produced at the former trial or what relation they sustained to the defendant corporation, nor does he reveal the names of the alleged newly discovered witnesses, nor their relation, present or past, to the plaintiff's former employer. Clearly he did not call as witnesses those individuals who were working with him about the block, because if it be a fact that the table was defective, as he alleges, and it be conceded for the sake of argument that such defect was a proximate cause of his injuries, they would have known that fact. There is no allegation that either defendant suppressed evidence or interposed any obstacle to the plaintiff or his attorney in such investigations as may have been made to ascertain the facts. If a rule were necessary for the protection of the plaintiff and his fellow workmen, he knew that fact, or should have known it, before the case was tried.

No court can, from a consideration of all of the facts well pleaded in this petition, say that the plaintiff exercised reasonable diligence to ascertain and plead before his trial the facts which he contends creates a cause of action in his favor. Unless the petition discloses such facts that the court can say from their consideration that the plaintiff exercised reasonable diligence, it is fatally defective. *Todd v. City of Crete,* 79 Neb. 677.

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

AFFIRMED.

STEPHEN SCHULTZ, APPELLANT, V. HASTINGS LODGE NO. 50, INDEPENDENT ORDER OF ODD FELLOWS, ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,773.

1. **Contracts:** CONSTRUCTION: LEASES. Whether an instrument is an agreement to enter into a contract of lease or is a contract of lease is a question of construction to be ascertained from a consideration of its terms in the light of the surrounding circumstances.

2. ———: ———: CONTRACT FOR A LEASE. An agreement in writing, containing no apt words of present demise, wherein one party agrees to construct a building upon a definitely described parcel of land and to lease the basement and first story of the structure to the other party, and reciting that a lease shall subsequently be executed, and wherein the other party "agrees on his part to enter into a contract of lease for the above described and named building," when considered in connection with the facts stated in the opinion, is construed to be a contract for a lease.

3. ———: ———: INTEREST IN LAND. This contract did not create an interest in the real estate therein described.

4. ———: CONTRACT FOR A LEASE: BREACH: REMEDIES. For a breach of a contract to lease, the expectant tenant may maintain an action for damages, or, in a proper case, for the specific performance of the contract.

5. ———: ———: ABANDONMENT. The mutual rights of the parties to a contract for a lease may be waived and extinguished by oral declarations and other acts of the parties clearly evincing a purpose to abandon the contract.

6. **Specific Performance:** CONTRACT FOR A LEASE: ABANDONMENT. A court of equity will not decree a specific performance of a contract to lease, where the expectant tenant's declarations and conduct were such as to induce the landlord in reason to believe that the contract had been abandoned, and the proprietor, in reliance upon that conduct, leased the premises to another party.

APPEAL from the district court for Adams county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

*John C. Stevens*, for appellant.

*J. W. James, Karl D. Beghtol, H. F. Favinger, W. R. Burton* and *Tibbets, Morey & Fuller, contra.*

ROOT, J.

This is an action to compel a specific performance of a contract and for an injunction. The defendants prevailed, and the plaintiff appeals.

In 1909 the plaintiff was, and he still is, engaged in selling at retail automobiles and farm implements at Hastings, Nebraska. The defendant, Hastings Lodge Number 50, I. O. O. F., a corporation organized under the provisions of section 165 *et seq.*, ch. 16, Comp. St. 1909, in 1909 owned four lots in that city. In January, 1909, the defendants Messrs. U. S. Rohrer, J. F. Heiler, C. C. Keith, and J. H. Vastine, members of that corporation, were appointed as a committee to investigate and to report to the lodge whether sufficient funds could be pledged to construct a building upon those lots, and to secure a desirable tenant for that part of the proposed building which the lodge desired to lease. February 4, 1909, the committee, after negotiating with the plaintiff, signed a document upon which he declares in the instant case. It is as follows: "Hastings, Nebr., Feb. 4, 1909. This memorandum of agreement, entered into Feb. 4, 1909, between Hasting Lodge No. 50, I. O. O. F., of Hastings, Nebr., and Stephen Schultz of Hastings, Nebr., witnesseth: That said first party agrees to promptly begin the erection of a brick building 60x106 feet on the corner of Burlington ave. and Second street, Hastings, Nebr., to press same to early completion, and to lease the basement and first floor of said building to said second party, together with the adjacent grounds on the west, for a period of ten years for the agreed rental of $1000 per year, lease to that effect to be executed between the parties before the commencement of work on the building. And Stephen Schultz, the said second party, hereby agrees on his part to enter into a contract of lease for the above described and named building, at the rental of one thousand dollars per year payable monthly in advance, for the term of ten years, from the date of entry into said

building. Each party hereto, binds itself and himself to the strict performance of the conditions of this contract in the penal sum of five hundred dollars, the same to be collectible from the defaulting party hereto. To the performance of these agreements the parties hereto pledge themselves their successors and assigns. In witness whereof we have subscribed the same this 4th day of February, 1909. U. S. Rohrer, C. C. Keith, J. F. Heiler, J H. Vastine, Committee of Hastings Lodge No. 50, I. O. O. F., S. Schultz."

Among other statements, there was indorsed upon the document before it was signed these words: "That elevator shall be installed." It is conceded that this clause became part of the contract, if a contract was made. Subsequently the committee, having failed to secure sufficient encouragement in their attempt to raise funds, reported the fact to the lodge, and submitted the memorandum of contract. Thereupon the lodge abandoned its project, sold the lots to Mr. Rohrer, and subsequently, in accordance with his instructions, conveyed them to the defendant Fraternity Building Association, a corporation organized by Messrs. Rohrer and his associates for the purpose of acquiring the lots and constructing the building thereon. Rohrer agreed to hold the lodge harmless on account of the penalty in the contract, but the evidence does not reveal whether that agreement was in writing. There is no recital in either deed concerning the contract, or that Schultz had or claimed any interest in the property. Rohrer and Heiler are directors of the Fraternity Building Association and largely control its affairs.

The plaintiff, when informed by the contractor some time prior to October 30 (the exact date not being disclosed) that a hand elevator would be installed, stated that, if this were done, he would not occupy the building. During the evening of October 30 one of the plaintiff's sons, in a conversation with Messrs. Rohrer and Heiler, inquired whether a motor or a hand elevator was

to be installed, and upon being informed, sought his father, who went to Rohrer and Heiler, and, during a conversation which degenerated into an altercation, said in substance, according to the testimony of Messrs. Rohrer and Heiler, that he did not have to take the building, but would construct one for himself on a vacant lot across the street, that an attempt was being made to keep him out of the building, and that the contract had been violated. Schultz and his sons, Harry and Walter, testify that nothing was said by their father during the conversation with Heiler and Rohrer about not taking the building, and a Mr. Tooley, who heard part of the conversation, testifies that as Rohrer and Heiler were departing, and while they were about 15 feet from Schultz, the last named person said that they were trying to compel him to give up the building. Preceding this difficulty, Mr. Rohrer delivered the contract to his counsel, the late Judge Batty, with instructions to draft a contract of lease. Judge Batty prepared duplicate drafts of a contract and delivered them with the memorandum contract with the lodge to Mr. Schultz about October 15. Monday, November 2, Mr. Schultz, without comment, returned the contract and the copies to Judge Batty.

November 5, 1909, the building association and the defendant Stitt-Dillon Company, one of the plaintiff's competitors in business, executed a written contract of lease for the building at a rental greater by $200 a year than provided for in the contract with the lodge. The Stitt-Dillon contract was recorded the day it was executed. At this time the floor of the first story was not completed and some of the interior finishing was incomplete. The defendant Stitt-Dillon Company knew that negotiations had been pending between its lessor and Mr. Schultz for that part of the building described in the contract of lease, but were told by Mr. Rohrer that they had been discontinued. The Stitt-Dillon Company immediately posted a statement, to the effect that it would oc-

cupy the premises about December 1, in a conspicuous place on the exterior of one of the outer walls. Subsequently, having been informed that the plaintiff contemplated interfering with this defendant, it, with the contractor's consent, placed an automobile in the building after a temporary injunction had been granted, but before its service, and, as the district court found on a hearing for an alleged contempt, prior to the time that defendant knew that the order had been issued.

November 6, one of the plaintiff's sons having noticed the Stitt-Dillon sign on the building, and having informed the plaintiff of the fact, the plaintiff called on Judge Batty for an inspection of the drafts of the contract of lease, and for the first time stated that they were objected to because they contained provisions not in accord with the agreement to lease, and very soon thereafter a demand was made on the defendant Fraternity Building Association that it execute to the plaintiff a contract of lease according to the terms of the contract between the plaintiff and the lodge.

The defendants Rohrer, Keith, Heiler, and Vastine filed a general demurrer to the petition, which, so far as we are advised, has not been ruled on.

The defendant lodge answered separately, disclaiming any interest in the controversy, and alleging, among other things, that the contract was invalid because not executed according to law. Counsel for the plaintiff, during the argument at the bar, stated that his client did not contend for a judgment against the lodge, and we shall give it no further consideration.

The defendant Fraternity Building Association, among things, contends in its answer that, although it did not assume any of the obligations created by the transaction between the plaintiff and the lodge, it expected and was willing to lease the basement and first story of the building to the plaintiff, and deposited the contract with its counsel to draft a contract of lease for that purpose, but, having been informed by the plaintiff

that he would not enter into a contract unless a motor elevator was installed in the building, and the plaintiff having returned the drafts prepared by Judge Batty, it understood that all negotiations with the plaintiff were at an end, and, relying upon his declarations, entered into the contract with the Stitt-Dillon Company, and thereby became incapacitated to execute the contract demanded by the plaintiff.

The defendant Stitt-Dillon Company, among other defenses, contends that it is an innocent purchaser, that the contract between the plaintiff and the lodge did not run with the land, and that its lessor was not bound thereby. The plaintiff in his reply, while denying that he surrendered his rights under the contract, contends that whatever was said with respect thereto is void under the statute of frauds because not reduced to writing and signed by him. The district court found generally in the defendants' favor, and by reference incorporated a memorandum opinion into the decree. The gist of this opinion is that the contract between the lodge and the plaintiff is an agreement for a lease and did not run with the land; that, if it be conceded that the building association assumed the obligations of this contract, the plaintiff waived any right he may have had to a contract of lease. Specific performance therefore was not granted.

The plaintiff is not entirely consistent in asserting that the contract should be construed to be a lease, and in contending that he should have specific performance of the same contract as an agreement to execute a lease. Whether an instrument is a contract of lease or an agreement to execute a contract of lease depends upon the parties' intentions, which will be gathered from all the terms of the instrument considered in the light of the surrounding circumstances. 1 Underhill, Landlord and Tenant, sec. 179; Jones, Landlord and Tenant, sec. 141; *Griffin v. Knisely,* 75 Ill. 411; *Martin v. Davis,* 96 Ia. 718. There are no apt words in the agreement considered in this case to create a present or future demise; both parties clearly

contemplated the subsequent execution of a contract in writing, and the conduct of all of the parties in interest clearly indicates that they intended the contract as one for a subsequent lease. We shall therefore consider the case on that theory.

In this view of the case, the plaintiff acquired no interest in the real estate. 1 Taylor, Landlord and Tenant (9th ed.) sec. 37. The contract, however, if valid, may be enforced by an appropriate action against those liable for its breach. One of the actions recognized by the law is for a specific performance. Assuming, but not deciding, that the defendant Fraternity Building Association adopted the contract, we think the plaintiff's conduct was such that the district court was justified in denying specific performance. The part of the building in controversy had been planned and was built for the use of a retail dealer in implements, automobiles, or other like chattels, and could not without a considerable additional outlay be prepared for a tenant engaged in ordinary mercantile business. Ordinarily tenants for that class of property are not so easily secured as for a building property constructed and finished for the retail trade.

The plaintiff's condition of mind is shown by his statement to the contractor before the altercation of October 30 that, unless a power elevator was installed, he would not take the building, and corroborates the testimony of Rohrer and Heiler that Schultz said he did not have to take their building, and would not do so, but proposed to construct one for himself. The evidence discloses that the plaintiff is a wealthy, aggressive, successful business man, and Messrs. Rohrer and Heiler might in reason believe that Schultz intended to abandon whatever rights he had in the premises. The return of the contract and the drafts of the lease to the defendant's counsel would lead the average man with knowledge of the transaction to conclude that Schultz did not intend to take the building. Possibly this conduct was intended as weighty argument in favor of the building association yielding to

Schultz' demands, and possibly Schultz had no other purpose, but he took the chance that his declarations would be seriously considered by the officers of the building association and accepted as a correct statement of his intentions.

"A party, seeking a specific performance, must not only come to enforce a fair and reasonable contract, but must show that his own conduct in reference to the contract has been fair and candid." *Garrett v. Besborough,* 2 Dru. & Wal. (Irish Ch.) 452, 459. *Mahon v. Leech,* 11 N. Dak. 181.

If the contract was one for the purchase and sale of real estate, a court of equity might accept the plaintiff's conduct as an abandonment of his rights in the premises. *Sieker v. Sieker,* 89 Neb. 123.

We conclude, from a consideration of the entire record, that the judgment of the district court is right, and it is

AFFIRMED.

FAWCETT and SEDGWICK, JJ., dissent.

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DAVID VAN ETTEN ET AL., APPELLANTS, V. FLORENCE P. LEAVITT, TRUSTEE, ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,570.

**Pleading:** PETITION: RES JUDICATA. Where it appears upon the face of a petition that every material matter complained of has been adjudicated in former actions between the same parties or their privies, a general demurrer thereto is properly sustained.

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

*H. H. Bowes,* for appellants.

*Henry P. Leavitt* and *William J. Hotz, contra.*

FAWCETT, J.

This suit was instituted in the district court for Douglas county, to set aside a decree entered in that court, in the case of William Medland against plaintiffs, in a suit for the foreclosure of a tax lien on sublot 13 of lot 9, Capital addition to the city of Omaha. Florence P. Leavitt, trustee, John W. McDonald, as sheriff of Douglas county, and the Passumpsic Savings Bank, a corporation, were made defendants. Subsequently Charles B. McDonald, administrator of the estate of John W. McDonald, deceased, appears to have been substituted for the said John W. McDonald, whom he succeeded as sheriff. The defendants Leavitt and McDonald appeared and filed separate general demurrers to the petition. The savings bank was never served with summons; hence, neither it nor the second cause of action set out in the petition is now before us. In their brief plaintiffs say that the demurrers of defendants Leavitt and McDonald were sustained and plaintiffs' suit as to them dismissed. The record is silent as to any ruling upon the two demurrers referred to, but does contain a journal entry dismissing the action as to the defendant savings bank "and all other defendants in said action." As the parties have treated this order as having been made after a ruling upon the demurrers of defendants and an election by plaintiffs to stand upon their petition, we will treat it in like manner.

This is the fourth time that the controversy set out in the first cause of action has been before this court. The opinion, upon its first appearance, is reported in *Van Etten v. Medland,* 53 Neb. 569; upon its second appearance, in *Medland v. Van Etten,* 75 Neb. 794; and, upon its third appearance, in *Medland v. Van Etten,* 79 Neb. 49. The plaintiffs in this suit were parties and appellants in all of these appeals. The petition filed in this case shows upon its face that everything contended for was adjudicated by those decisions, and that this

suit was evidently instituted, not for the purpose of obtaining justice, but for the purpose of affording the pleader an opportunity to give vent to his animus toward the judges of the district court for Douglas county and the judges and commissioners of this court. The character of the petition is such that if the attorney who wrote it, and who was himself one of the plaintiffs, were now living, it would be stricken from the files. There is no merit in this appeal.

The judgment of the district court is clearly right, and it is

AFFIRMED.

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WILLIAM A. WAGNER, APPELLEE, V. FARMERS & MERCHANTS INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 14, 1911. No. 17,001.

1. **Carriers: INJURY: EVIDENCE: CREDIBILITY OF WITNESSES.** Evidence examined and referred to in the opinion *held* sufficient to sustain the verdict and judgment.

2. **Instruction** set out in the opinion sustained.

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

*A. L. Chase* and *Greene, Breckenridge, Gurley & Woodrough,* for appellant.

*Stewart, Williams & Brown, contra.*

FAWCETT, J.

Action for injuries sustained by plaintiff while entering and being carried in an elevator in defendant's building. Verdict and judgment for plaintiff. Defendant appeals.

Two errors only are relied upon for a reversal: "First. Whether the plaintiff is entitled to recover on the facts.

Second. The error of the learned trial judge in the eighth instruction."

In support of the first assignment it is said: "We are not asking the court to draw a different conclusion *from facts* than the jury drew; *we are insisting that the jury disregarded the truth and the facts;* that the account by the plaintiff of the manner in which he received the injury for which he recovered a verdict in this action is not only false, but impossible." The brief states that the jury saw the elevator, and suggests that "as it (the elevator) is only a little distance from the state capitol building, and could not well be attached to the record, we suggest the propriety of an inspection by your honors, for there has been no substantial change in the situation since the accident." We think we will have to decline the invitation to inspect the elevator, and rest the inspection upon that made by the jury. We will not extend this opinion by extensively setting out the evidence. It is sufficient to say that it is conflicting. Plaintiff testified that as he was in the act of entering the elevator with his left foot forward, and before he had taken his right foot from the hall floor, the elevator started down; that his right leg was caught by the top of the elevator door and was dragged downward between the elevator and the elevator shaft until the elevator reached an open space below, which released his leg from its imprisonment. The evidence of the physician, introduced by the defendant, is that it would have been impossible for plaintiff's leg to have been drawn through between the iron top of the door frame and the edge of the building without crushing the leg very badly and breaking the bones, and that he did not find upon plaintiff's leg enough of a scrape or scratch or bruise to leave a scar after it was cured. This testimony standing alone would, it is true, cast discredit upon plaintiff's testimony; but the jury heard plaintiff's description of the accident, and viewed the elevator and the elevator space referred to, and we cannot say that the inspection of these twelve

men was not a sufficient corroboration of the testimony of plaintiff to overcome the testimony of the physician and of other witnesses introduced by defendant. It is a well-known fact that in times of accident the victim often escapes serious injury in a manner almost miraculous. If there were a two-inch space on all sides of the elevator between the elevator and the elevator shaft, it is not impossible that, as the elevator was descending, with plaintiff's leg between the elevator and the elevator shaft, the former may have yielded sufficiently to have allowed more than the two-inch space on the side of the elevator where the leg was imprisoned. But whether that be true or not, we cannot agree with counsel that the testimony of plaintiff is so incredible and beyond human probabilities that we should substitute our judgment of its credibility for that of the jury.

The eighth instruction reads: "You are instructed that if you find that the elevator was stopped on the second floor at the place where the plaintiff was waiting, and in response to his signal, and the door thereof was opened by defendant's servant in charge of such elevator, and that, while plaintiff was in the act of entering, the elevator was started by defendant's servants, and by reason thereof plaintiff was injured, as alleged in his petition, this would be presumptive evidence of negligence upon the part of defendant, so far as such negligence is alleged in plaintiff's petition, to be overcome only by evidence which would show that the defendant was not in fault, or that the accident was due to plaintiff's own negligence or that his own negligence contributed thereto." It is said in the brief: "This instruction is vicious and prejudicial because it gave undue prominence to the plaintiff's theory of the case. It referred the jury to the contention of the plaintiff stated in his petition, and practically informs them that there was competent evidence tending to show negligence, and that such evidence creates a presumption of negligence which is to be 'overcome only,' said the court, 'by evidence

which will show that the defendant was not in fault.' In other words, having considered the facts and therefrom found that the defendant was at fault, the jury were gravely informed that the only chance for the defendant was for it to exculpate itself by showing it was not to blame." We do not think the instruction is open to the charge made against it. It does not "practically inform them that there was competent evidence tending to show negligence." What it does say, and what the court had a right to say, was that if the jury found the facts with relation to the attempted entry into the elevator by plaintiff, as set out in the first part of the instruction, those facts would constitute "presumptive evidence of negligence upon the part of defendant." In this we think the trial court was right, and, had the instruction stopped there, we do not think the defendant could have made any complaint. What followed was favorable to defendant, as it limited such presumptive evidence of negligence to the negligence charged in the petition, and states substantially that this presumptive evidence could be overcome; and the fact that the court says it could be overcome only "by evidence which would show that the defendant was not in fault, or that the accident was due to plaintiff's own negligence or that his own negligence contributed thereto," could not render the instruction prejudicial, as those qualifications were in the interest of defendant.

We think both of the errors assigned by counsel must be decided adversely to its contention. The judgment of the district court is therefore

AFFIRMED.

CHARLES R. POWERS ET AL., APPELLANTS, V. FRED M. FLANSBURG, APPELLEE.

FILED DECEMBER 14, 1911. No. 16,568.

1. **Injunction:** REMEDY AT LAW. The remedy of injunction cannot be used when there are adequate remedies in the usual course of the law.
2. **Nuisance:** PUBLIC NUISANCE: ABATEMENT: SPECIAL INJURY. A private individual cannot maintain an action to suppress a public nuisance, unless he sustains some special injury caused thereby other than that sustained by the public at large.

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

*Perry, Lambe & Butler*, for appellants.

*A. A. McCoy* and *C. E. Eldred, contra.*

SEDGWICK, J.

Three citizens and property owners in the village of Trenton began this action in the district court for Hitchcock county to enjoin the defendant from "conducting or in any manner operating and keeping open" a pool and billiard-hall in the village of Trenton. The finding and judgment were for the defendant, and the plaintiffs have appealed.

The petition alleges that the defendant's license has expired, and that he conducts the business complained of without a license; that he keeps and sells intoxicating liquors in his place of business without any license so to do, and allows drinking and swearing in his place of business, and in various ways keeps and maintains a disorderly and disreputable house, which has become and is a public nuisance. A large amount of evidence was taken, many citizens were called as witnesses, and the evidence in regard to the manner of keeping and conducting the business is somewhat conflicting, but there

is evidence tending to prove that the defendant is keeping and selling intoxicating liquors contrary to law, and maintaining a disorderly house, and doing other illegal and improper things complained of in the petition. It is stated in the brief that the village council was enjoined by the district court from repealing the ordinance which provided for licensing billiard-halls, and that prosecutions were begun against the defendant for keeping and selling intoxicating liquors without license, and that these actions have been allowed to remain in the courts without determination, and that the courts and the officers of the law are preventing the good people of the village of Trenton from enforcing the law and from putting a stop to the unlawful actions and conduct of the defendant.

The evidence shows that an action was begun by this defendant in the district court to enjoin the village council from enacting an ordinance repealing the ordinance under which he was licensed, and in that action a temporary injunction was allowed as prayed, but the evidence does not show what became of these proceedings, nor whether the action was promptly tried or was unduly delayed. The evidence also shows that a complaint was made against this defendant in the county court of Hitchcock county, charging him with unlawfully keeping intoxicating liquors wth intent to sell or dispose of the same contrary to law, and that a warrant was issued, under which a search was made of the premises and certain liquors found and the defendant arrested, and that a hearing was had before the county court, and that the defendant was held to the district court for trial, and a judgment entered by the county court ordering the liquors to be destroyed. The defendant in that action then gave bond for his appearance in the district court and for an appeal to the district court from the judgment ordering the destruction of the liquors. The evidence does not show what was done in this matter in the district court. There is no evidence tending to

support the statements of the brief criticising the courts and officers of Hitchcock county.

If we consider only the allegations of plaintiffs' petition and the evidence which they introduced, it appears that the defendant has been guilty of various crimes as charged in the petition, and that he is violating the criminal law in many particulars. There seems to be a great diversity of opinion in regard to these matters as disclosed by the evidence, and we do not find it necessary to determine the preponderance of the evidence under the issues presented. The trial court made no special findings of fact. There is nothing in the petition or evidence to indicate that the criminal laws of the state are in any respect insufficient to punish the defendant and put a stop to the crimes which it is alleged he has committed, if indeed the defendant is guilty as alleged. The petition does not allege any special interest of these plaintiffs in these proceedings, as distinguished from the interest of the general public. On the other hand, it is specifically alleged that this action was brought by these plaintiffs in their own behalf and in behalf of all of the citizens of Trenton who, it is alleged, were similarly situated. Under these circumstances, it is clear that this action cannot be maintained. If the defendant persists in keeping and selling liquors without license at his place of business in Trenton, the criminal law is amply sufficient to punish such offenses. If the proper officers refuse or neglect to enforce the law, a remedy is provided other than by injunction. If a public nuisance is maintained that affects alike all the members of the community, the public authorities may deal with it, but these plaintiffs have not shown such an interest as will enable them to maintain this action. If the village authorities were improperly enjoined by the district court, the remedy is by appeal, and a review of those proceedings cannot be had in another and independent action. The plaintiffs have failed to allege or prove sufficient grounds, or, in fact, any necessity, for the extra-

ordinary writ of injunction; nor have they shown any special interest, as distinguished from the interest of the general public.

The judgment of the district court is

AFFIRMED.

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FRED NEICE, APPELLEE, V. FARMERS CO-OPERATIVE CREAMERY & SUPPLY COMPANY, APPELLANT.

FILED DECEMBER 14, 1911. No. 17,003.

1. **Master and Servant: INJURY TO SERVANT: RIGHT TO USE PREMISES.** An employee in a business in which a steam boiler is used is not a mere licensee in going into the boiler room where conveniences for the use of the employees are established, and they are accustomed to use the same with the knowledge and consent of the employer.

2. ———: ———: ———: **QUESTION FOR JURY.** Under such circumstances, if an employee remains in said boiler room during the rest hour, with the implied permission of the employer, he is entitled to the ordinary protection of an employee, and it is a question for the jury, upon substantially conflicting evidence, whether the employer has so consented.

3. ———: ———: **NEGLIGENCE OF EMPLOYER.** If the employer is guilty of negligence by which an employee is injured while in such boiler room, it is immaterial that the employer did not know that the employee was in the boiler room at that particular time and liable to be injured by such negligence. It is sufficient if he knew that the employees were at times properly in said boiler room.

4. ———: ———: ———: **QUESTION FOR JURY.** If the employer allows an inexperienced man to operate the valves of a steam boiler and let the steam pressure with such force into a steam trap as to cause an explosion of the trap, and the trap is shown by the evidence to be of proper construction and suitable for the purpose for which it was intended, and the gauges upon the boiler for determining the steam pressure are so placed that the operator cannot observe them, it is proper to submit to the jury the question of the employer's negligence as to the cause of the explosion.

5. **Appeal: INSTRUCTIONS.** It is not reversible error to instruct the

jury that the employer should "use every reasonable precaution" to safeguard his employees, if the instructions as a whole fully and properly define negligence and ordinary care.

6. Witnesses: PRIVILEGED COMMUNICATIONS. Defendant offered to prove by the physician statements alleged to have been made by plaintiff to the physician some time after he treated him for the injuries complained of. *Held*, That it was not an abuse of discretion to exclude this evidence as privileged under the circumstances stated in the opinion.

7. Damages. Upon the evidence indicated in the opinion, it is *held* that the verdict for $3,000 damages is not so excessive that this court must say as matter of law that the judgment is clearly wrong.

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

*Montgomery, Hall & Young*, for appellant.

*Sullivan & Rait, contra.*

SEDGWICK, J.

The plaintiff was employed by the defendant in its butter factory in Omaha. He was injured by the explosion of a steam trap, and brought this action to recover damages. The jury rendered a verdict in his favor for $3,000, and from the judgment entered thereon the defendant has appealed.

The defendant, in the manufacture and sale of butter and ice cream, occupied a three-story building with basement, and employed an engineer, fireman, butter-makers and other workmen. The plaintiff was employed in what was called a "churn room." The accident complained of occurred in what was called the "boiler room." In this latter room there is a trap or basin which is connected with cast iron pipes with the boiler, and also by similar pipes with the public sewer. It is used for "draining or blowing off the boiler." In so using it, the engineer opens the valves in the boiler and permits the steam and water to pass into the pipe, and thence to the

sewer. The trap is covered by a circular steel or cast-iron plate two or three feet in diameter and an inch in thickness, secured to the trap by bolts which are set in the concrete floor. When the accident occurred, the plaintiff was in the boiler room, and had just finished eating his lunch and was standing near the trap. In the absence of the engineer, the fireman, as appears to have been his custom under such circumstances, opened the valves communicating with the trap, and the explosion occurred, causing the plaintiff's injury. The plaintiff alleges that the fireman "did negligently and recklessly open the blow-off valves and cocks of the boiler and permitted great quantities of steam and water under enormous pressure to pass from the boiler into said basin," which caused the explosion. The defendant insists that the verdict and judgment are not supported by the evidence.

1. It is said that the plaintiff "while in the trap room eating his lunch was a mere licensee, and, there being no proof of wanton or wilful injury to him by appellant or its fireman, appellee cannot recover." The churn room where the plaintiff worked was cold and not a suitable place for resting and lunching during the noon hour. A few months before the accident happened it had been the custom of the workmen, generally, to use the boiler room for this purpose, but the company had prepared another room on the floor above, which room was at the time of the accident more generally used by the employees. The closets for the use of the men, however, were in the boiler room, and these were being used generally at the time of the accident. The men were supposed to go into the boiler room to use these closets, and the plaintiff was not a mere licensee in so doing. The engineer testified that the men were not expected to remain in the boiler room during the noon hour, and that he had so instructed the plaintiff, and had frequently directed him not to remain in the boiler room for eating his lunch. The defendant's foreman testified

that he had never given the men such orders, and the plaintiff positively denied that he had ever received any such directions. Under this conflicting evidence, the jury might have found that the plaintiff was not violating any rules of the company in remaining in the boiler room during the lunch hour, and that he was not a mere licensee therein.

2. The allegation of the plaintiff that the fireman, Reisberg, knew that the plaintiff was in the trap room at the time that the accident occurred is not supported by the evidence. The fireman testified positively that he had no such knowledge or notice, and there appears to be no direct evidence that he did. The fireman, however, was bound to know, and the evidence indicates that he did know, that the closets in the boiler room were designed for the use of the men and that they were so used, and that it was reasonable to expect that the men might probably be in the boiler room at any time. It is not therefore necessary that he should know at that particular time that this plaintiff might be exposed to danger by his carelessness.

3. The principal question in this case is whether there is sufficient evidence from which the jury might find negligence on the part of the fireman, Reisberg, in opening the valves and allowing the steam to escape in the trap in the manner in which he did. The evidence shows that this trap was suitable and properly constructed in the ordinary manner, and had been continuously in use for some time, but its construction, as above stated, conclusively shows that it was not intended to sustain the force of the full boiler pressure, and was incapable of doing so; if submitted to such pressure, there must necessarily be an explosion. It appears that there were steam and water-pressure guages upon the boiler, but these were so located that they could not be seen by the person operating the steam valve. The custom was that another person should watch these guages while the steam was being admitted to the trap, but this custom

was not always observed. On this occasion, the engineer being absent, the fireman undertook to "blow off" the boiler. It appears that he had done this at other times in the engineer's absence. The evidence shows that he had some experience in taking care of and operating the boiler, but he had been but a short time in that employment, and was not an experienced engineer. The plaintiff contends that not to have another person watching the gauges and notifying the operator of dangers was in itself negligence. It may be that a skilled engineer in operating the valves could, from his experience, judge the pressure he was causing upon the steam trap with sufficient accuracy to avoid danger of an explosion. If the jury so found, they might still consider that to allow an inexperienced man to operate these valves without another to observe the guages, and without means of knowing the dangerous pressure upon the steam trap, was negligence. It cannot be said that there is such a failure of evidence as to require the court to determine this point as a question of law.

4. In the eighth instruction the court told the jury: "You are instructed that a workman, during the hours of his service, whether at the noon hour, or hour of work, while at such places as is usual for such employees as he was, had a right to rely upon the fact that the employer will take every reasonable precaution looking to the safeguarding of such places as safe places to be." It is said that this is wrong, because the law "only requires reasonable care and prudence in providing a safe place." It is perhaps not usual to use the word "every" in such instruction, and the language suggested in the brief is more accurate. Construing the instructions together, they so define negligence and reasonable and ordinary prudence that it seems impossible that the jury could have been misled by the instruction complained of. In the fifth instruction the jury were told: "By 'negligence' is meant the doing of some act, under the circumstances surrounding the accident involved

which a man of ordinary prudence would not have done; or it is the failure to do some act or take some precaution which a man of ordinary prudence would have done or taken under the circumstances." And it is also said in this instruction: "By 'ordinary care' is meant that amount or degree of care which common prudence and a proper regard for one's own safety or the safety of others would require under the circumstances." The issue as to the defendant's negligence was plainly and properly stated to the jury.

5. The physician who treated the plaintiff after the accident was, while upon the witness stand, questioned by the defendant as to statements that he had heard the plaintiff make, a short time before the trial, in regard to his injuries. This was objected to as calling for a privileged communication, and the objection was sustained. This ruling is complained of, and it is said that the relation of physician and patient had terminated a long time before the statements of plaintiff which it was sought to prove, and that therefore the question was not privileged. It appears that two other physicians employed by the defendant were examining the plaintiff, and the plaintiff's former physician was called in by these others. The plaintiff still regarded him as his physician, and objected to his assisting the physicians employed by the defendant in obtaining evidence. The two other physicians testified to what took place upon their examination, and the trial court seems to have considered that in making statements to his former physician the plaintiff still regarded those statements as confidential. We do not think that there was such an abuse of discretion on the part of the trial court in this ruling as to require a reversal of the judgment.

6. It is said that the verdict for $3,000 is more than the evidence will sustain. There was some conflict in the evidence as to the extent of the plaintiff's injuries and as to the probability that they are permanent. It is conceded that the plaintiff was badly scalded by the

steam; that he was rendered unconscious, and was for several days confined in a hospital. There was also substantial evidence that his hearing and his eyesight were both seriously injured, and that at the time of the trial, which was about a year after the accident, he was still suffering from the effects of the injury. There is no mathematical rule by which such damages can be computed. The matter is peculiarly within the province of the jury, and, when the evidence is conflicting, this court cannot interfere with the verdict of the jury, unless upon the whole evidence the verdict is clearly wrong.

We have not found any sufficient error in the record requiring reversal, and the judgment of the district court is

AFFIRMED.

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STATE, EX REL. LOUIS HUTTER, SR., APPELLEE, V. PAPILLION DRAINAGE DISTRICT ET AL., APPELLANTS.

FILED JANUARY 3, 1912. No. 17,177.

OPINION on motion for rehearing of case reported in 89 Neb. 808. *Rehearing denied.*

PER CURIAM.

The respondent's brief in support of its motion for a rehearing has been supplemented by several instructive briefs filed by friends of the court. These briefs contain many contentions not theretofore presented in this court or in the district court. Had they been seasonably made, a more extended opinion would have been written.

Our judgment is predicated upon the narrow question of law discussed at the bar and in the original briefs and considered in our opinion. We have not foreclosed the questions for the first time presented in these briefs, but will be free in a proper case to consider and determine them, uninfluenced by the opinion in the case at bar.

Upon more mature reflection, we are inclined to the view that the evidence of public necessity therefor is insufficient to justify the writ, so far as Adams, Jefferson and Monroe streets are concerned. Our opinion is therefore modified to that extent, and the judgment of the district court, in so far as it directs the bridging of the drainage ditch at the point where it intercepts those streets, is not approved. The judgment of the district

court is affirmed, in so far as it directs the respondent to construct a bridge with proper approaches at the point where its ditch intersects Addition street, but, in so far as it grants further relief, is reversed, and the petitions to that extent are dismissed without prejudice to another application should the facts justify.

The motion for a rehearing is

DENIED.

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JOHN G. JACOBS ET AL., APPELLEES, V. FRED L. GOODRICH, APPELLANT.

FILED JANUARY 3, 1912. No. 16,558.

1. **Appeal: CONFLICTING EVIDENCE.** There is no controlling question of law involved in this case. The evidence was conflicting. The cause was submitted to the trial jury on proper instructions. A verdict was returned in favor of plaintiffs. Where the evidence is conflicting, it is the province of the jury to decide questions of fact, and a reviewing court cannot interfere.

2. **Boundaries: ESTABLISHMENT.** Where the evidence shows without conflict that all government and plat monuments within the business district of the city of O. have been lost or destroyed and none of them can be found, that the curbstones along the streets, having been established by legal authority, are the only safe monuments by which engineers and surveyors can be guided, and that the custom of using them as such monuments, as the only available ones, has been adopted in such city, good faith measurements from them by disinterested engineers and surveyors will not be held invalid.

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

*E. C. Page,* for appellant.

*Hugh A. Myers, contra.*

REESE, C. J.

This is an action in ejectment for a strip of ground

a few inches in width and 32 feet in length in the rear of block 138, in the city of Omaha. Plaintiffs are the owners of the west third of lot 3, in said block, and defendant is the owner of the middle third thereof, each being 22 feet in width. On the 24th day of July, 1869, the then owners of the two parcels of land entered into an agreement that the wall of a building to be erected on the middle third of said lot should be upon the dividing line between the two holdings, one-half thereof on each side, the wall to be used as a party wall when a building should be erected by the other on the opposite side. The building then under contemplation was constructed, extending a depth of about 80 feet. A building was constructed upon the other lot, of about 100 feet depth. The lots are 132 feet in length. The partition wall was used, without dispute or misunderstanding, the whole 100 feet. In 1907 defendant made an addition to his 100-foot building, extending back to the alley, a distance of 32 feet. In extending the wall this distance, it is claimed by plaintiffs that the wall was so placed as to encroach upon their lot. A jury trial was had, when a verdict was rendered finding that "the defendant unlawfully occupies with a wall the following described property belonging to said plaintiffs, to wit: Beginning at a point at the southeast corner of the west one-third of lot three (3), block one hundred and thirty-eight (138), city of Omaha, thence north running 32 feet to the old Jacobs' wall, thence west 8½ inches, thence running south 32 feet, thence east 11 inches to place of beginning; and that plaintiffs are the owners of said property and entitled to the possession of the same." A motion for a new trial was filed, overruled, and judgment rendered upon the verdict. Defendant appeals.

There is no distinct question of law involved in the case. From the record, it seems to have been tried with due care by the presiding judge and counsel representing the parties. There being no abstract of the record required, the case is submitted upon the bill of exceptions

and transcript, all of which we have carefully read. While the witnesses all appear to have testified with the utmost candor, yet the evidence is conflicting on practically every material point. Some objection is made as to the method of locating the boundaries of the lots by the engineers and surveyors who sought to locate the line between the lots. This arises out of the fact that the curbstones on Fourteenth and Fifteenth streets were taken as the monuments from which distances should be computed. This applies principally to Fifteenth street. The evidence shows beyond any question that all the government monuments in the business part of the city have long since been lost and destroyed, and that it is, and has been for years, the practice and custom of engineers and surveyors to accept the curbstones as the only monuments which could be found or on which reliance could be placed. As said by some of the witnesses, they were all the monuments they had for their guidance. No stakes or plat monuments remain. The curbstones having been established by lawful authority, they probably constitute not only the best, but the only satisfactory monuments.

The giving of one instruction is assigned for error. We have examined all the instructions given, and are unable to discover any prejudicial error in them. They seem to have been carefully prepared, and correctly state the law.

While, had the cause been submitted to the writer hereof as the trier of fact, the decision might not have been as returned by the jury, yet, as they were the legitimate triers of the facts, on the conflicting evidence we must acknowledge our inability to change the result.

The judgment of the district court will therefore be

AFFIRMED.

J. ARTHUR TILLSON, AMINISTRATOR, APPELLEE, V. CHESTER HOLLOWAY, APPELLANT.

FILED JANUARY 3, 1912. No. 16,691.

1. **Executors and Administrators: RIGHT TO POSSESSION OF ASSETS: EJECTMENT.** Under the provisions of section 202, ch. 23, Comp. St. 1911 (Ann. St. 1911, sec. 5067), an executor or administrator has the right to the possession of all the real estate and personal property belonging to the estate of his decedent. In order to enforce that right he may maintain ejectment against one without title and wrongfully in possession.

2. **Ejectment: ADMISSIBILITY OF EVIDENCE: PROBATE RECORDS.** Where a foreign-probated will is admitted to probate in this state by a county court having jurisdiction of the subject matter, and from which no appeal has been taken, the proceedings and decree of the probating court are admissible in evidence in an action in ejectment by the administrator of the estate of the devisee under the will.

3. **Wills: DEVISES: VESTING OF TITLE.** Where lands, which a testator had the power to dispose of by will, are devised to one who is in life at the time of the decease of such testator, the devisee becomes vested with the title thereto, subject to the probating of the will, in the absence of debts, and the probating of the will after the death of the devisee renders effectual the title in his or her estate.

4. **Ejectment: ISSUES: DETERMINATION.** Where a defendant in an ejectment suit pleads in his answer, and upon the trial offers evidence tending to prove, his purchase of the land in dispute from Ira Holloway, under whose will plaintiff claims, the payment of the purchase price and possession under the contract of purchase, it is error to decide the case without determining that issue.

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

*H. M. Sinclair* and *W. D. Oldham,* for appellant.

*J. Arthur Tillson* and *Fred A. Nye, contra.*

REESE, C. J.

This is an action in ejectment for the possession of the

northwest quarter and the west half of the northeast quarter and the north half of the southwest quarter, all in section 3, township 10 north, of range 14, in Buffalo county. The action is prosecuted by plaintiff as administrator of the estate of Achsah Holloway, deceased. In addition to the demand for possession of the property, a claim was made for the rents and profits during the time the land was in the possession of defendant. The answer consists of a general denial of the allegations of the petition, with the averment that Achsah Holloway was never the owner of the real estate in dispute; that defendant is her son; that the land was originally purchased from the Union Pacific Railroad Company by his father, Ira Holloway, the husband of Achsah; that Ira Holloway was thereafter indebted to defendant in the sum of $5,500, and offered the land to defendant in part payment of said indebtedness, which offer was accepted by defendant, and in the year 1884 he went into possession of the land, and has retained the open, adverse and exclusive possession thereof ever since, fencing and otherwise improving it and claiming it as his own. It is averred that Ira Holloway was never a resident of this state; that he lived in the state of Michigan, where he died testate in 1887, leaving all his property to his wife Achsah, but that the will was never probated in this state during the lifetime of Achsah Holloway; that there are no debts against the estate of Achsah; that the estate was possessed of a large quantity of personal property of the amount and value of $40,000, in addition to which the estate owned real estate of the value of $25,000, over the title to which there was no controversy; that Achsah never at any time claimed any interest in, or to own, the real estate in dispute, but knew of, and acquiesced in, the transaction had between her husband (defendant's father) and defendant, whereby the land was turned over to defendant on the indebtedness of Ira Holloway. The heirs of Ira and Achsah Holloway were not made parties to the suit, nor is there any prayer for affirmative relief.

The reply is, in effect, a general denial of the allegations of the answer. There was a jury trial, which resulted in a verdict finding that plaintiff was entitled to the possession of the land and for the sum of $1 against defendant for the rents and profits thereof. After a motion for a new trial was filed and overruled, judgment was rendered in accordance with the verdict. Defendant appeals.

The points of law presented will be disposed of in the order presented in defendant's brief. It is insisted that the petition does not contain allegations sufficient to constitute a cause of action. This question was raised at the beginning of the trial by a demurrer *ore tenus* and an objection to the introduction of any evidence. This contention is based upon the fact that it is not alleged in the petition that plaintiff has a legal estate in the land, but is suing only as administrator, without an averment that the estate is insolvent. While as a general proposition it is true, as contended by defendant, that in an action in ejectment it is necessary to allege that plaintiff has a legal estate in the land, the possession of which is sought (code, sec. 626), it seems that section 202, ch. 23, Comp. St. 1911 (Ann. St. 1911, sec. 5067), has changed the rule so far as executors and administrators are concerned. This section gives the right to the possession of all real as well as personal estate of a decedent to executors and administrators, and we have held that ejectment could be maintained by them. *Dundas v. Carson,* 27 Neb. 634; *Carson v. Dundas,* 39 Neb. 503. It is true we held in *Cooley v. Jansen,* 54 Neb. 33, that the right of an administrator to the possession of the real estate of his decedent arises from its being subject to the payment of the debts of the estate, which was correct as to the cause from which the right arises, and that a homestead right was not affected by the statute, but that it did not do away with the express provision of the statute above cited. Under that statute he is entitled to the possession of nonexempt property.

If he is entitled to such possession, the law furnishes a remedy against a disseizor, which is by ejectment.

In 1 Woerner, American Law of Administration (2d ed.) sec. 293, it is said: "Where, under the statute or a testamentary provision, the executor or administrator is put in charge of the real as well as of the personal estate, any action necessary to protect the same against wrongdoers, or to recover damages for injuries thereto, including ejectment for possession, must lie in favor of such executor or administrator." See, also, 2 Woerner, American Law of Administration (2d ed.) sec. 337. It is true, as contended by defendant, that the legal title belonging to an intestate estate descends to the heir subject to the payment of debts; but, under the statute, it is equally clear that the right of possession is in the administrator until his administration is closed. This, however, is subject to the higher rights of an equitable owner, in the absence of proof that there are creditors of the estate whose equitable claims to the property take precedence over that of the equitable owner of the land. *Koslowski v. Newman,* 74 Neb. 704. The property involved in that case was personal property, but the same principle must be applied to real estate. *Emery v. Darling,* 50 Ohio St. 160.

The will of Ira Holloway, by which his estate, "both real and personal," was devised and bequeathed to Achsah Holloway, his wife, which was duly admitted to probate in the proper court of Michigan, and afterward probated in Buffalo county, was admitted in evidence over the objection of defendant. The contention against the admission of this evidence is founded upon two reasons: (1) That this plaintiff, who signed the petition for its probate, had no authority to do so, and therefore the proceedings for its admission to probate was of no effect. (2) That the devisee under that will (Achsah Holloway) having died before that time, neither she nor her estate could take under the will.

As to the first contention, the petitioner was the ad-

ministrator of the estate of Achsah Holloway in the state of Michigan, and signed the petition for the probate of the will of Ira Holloway, which devised and bequeathed his property to her. There was no appeal from the action of the county court in receiving and acting upon the petition and the admission of the will to probate in this state. The county court had jurisdiction of the subject matter, and its judgment cannot be collaterally attacked. *Larson v. Union P. R. Co.*, 70 Neb. 261.

As to the second contention, it is shown that the will of Ira Holloway was duly admitted to probate in the state of Michigan before the decease of Achsah. It is certainly true, as claimed by defendant, that, in order that title and the right of possession may be shown in a claimant as devisee under a will, the will under which the title is asserted must be admitted to probate in order to its admissibility as evidence. It is also true that the legal title cannot vest in one deceased. It is conceded that, if a devisee die prior to the death of the testator, the estate, as a general rule, lapses, and, unless otherwise provided in the will, is intestate property. This, however, is subject to the provisions of section 5016, Ann. St 1911, but which is not important here. We have found no case holding that, if the beneficiary under a will dies subsequent to the death of a testator and before the will is probated, the devised property thereby lapses. If a will is executed in compliance with all the forms of law by one competent to make such will and the beneficiary survives the testator, the title to the devised property vests in the surviving devisee upon the death of the testator, but subject to the probating of the will, and, when so probated, it speaks as of the time of the death of the testator.

In *Babcock v. Collins*, 60 Minn. 73, it is held that where a foreign will was duly probated in the place of domicile of the testator, and the executor, under a power conferred in the will, sold the land in Minnesota, but without the probate of the will in that state, the sale would be sustained, if the will was probated subsequent

to the sale, and that the probating would relate back to the testator's death and perfect the title. Page, Wills, sec. 356. It is said by the same author (sec. 358) that a foreign will may be recorded (probated) even after litigation upon the title to realty has been taken to the supreme court, and, when so recorded, will date back to testator's death—citing *Wells, Fargo & Co. v. Walsh*, 88 Wis. 534; *Carpenter v. Denoon*, 29 Ohio St. 379.

In 1 Underhill, Wills, p. 437, sec. 324, it is said: "If the gift (devise) vests on the death of the testator, it will *not* lapse because of the death of the beneficiary before the time arrives for his enjoyment in possession." And in sec. 334 it is said: "The rule of lapse is not applicable to a case of the death of a legatee *after the death of the testator*. If the legacy has vested in the legatee, and he is to receive more than an estate for his life, the interest will not lapse upon his death, though that event may take place before the interest has become vested in possession," as a remainder in fee, etc.

In *Jersey v. Jersey*, 146 Mich. 660, it was held that, in the absence of provisions to the contrary in a will, a legacy does not lapse by death of the legatee after that of the testator before the probate of the will. See, also, *Traver v. Schell*, 20 N. Y. 89; *Price v. Watkins*, 1 Dall. (Pa.) *8; Schouler, Executors (3d ed.) sec. 467.

We therefore conclude that the title to the real estate of Ira Holloway in this state was vested in Achsah Holloway during her lifetime, subject to the probating of his will in this state, and that her decease before the will was probated here did not divest her estate of that title. In arriving at this conclusion, we have not overlooked section 5008, Ann. St. 1911, which provides: "No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court as provided in this chapter, or on appeal in the district court; and the probate of the will of real or personal estate as above mentioned shall be conclusive as to its due execution." It is evident from the provisions of

this section that the purpose of the legislature was to require the probating of the will before it would be "effectual" to pass the estate of record, but that it does not go to the extent of preventing the vesting of title, subject to such probate, for we held in *Walton v. Ambler*, 29 Neb. 626, that a failure to probate in Nebraska an Iowa will devising lands in this state would not preclude a devisee under the will from disposing of his interest in Nebraska lands, and that he would be bound thereby. It must be apparent that the probating in this state of a foreign-probated will is largely for the purpose of perpetuating the evidence of an already vested estate. There was no error in the admission in evidence of the record of the probating of the will.

As we have seen, defendant presented an equitable defense to the action, and in support of which evidence was introduced. By the fourth instruction given by the court the jury were told that their verdict should be "for the plaintiff on the first cause of action, unless defendant satisfies you by a preponderance of the evidence that he has been for a period of ten years in the open, notorious, exclusive and adverse possession of the premises, under a claim of ownership against all persons." This instruction excluded defendant's contention that, during the lifetime of Ira Holloway, he had purchased the land from Ira, had paid the price therefor by the cancelation of certain indebtedness held against Ira, and had taken and held possession under said purchase. The defendant was entitled to have this issue submitted to the jury, or, if plaintiff's contention that, being an equitable defense, it was for the court to decide is correct, the record should show affirmatively that the issue was passed upon by the court and a finding made of the facts as in any other case in equity, or that the question was submitted to the jury for an advisory verdict upon special findings. No such action is shown by the record.

The court having failed to submit the question to the jury, or to render any decision thereon, the cause will

have to be remanded for further proceedings, which is done.

REVERSED.

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NEBRASKA TRANSFER COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JANUARY 3, 1912. No. 16,581.

1. **Railroads:** DEMURRAGE. A railroad company engaged in interstate commerce may charge and collect demurrage or car service charges in accordance with its tariff schedules, rules and regulations, filed with and approved by the interstate commerce commission, on cars used in interstate shipments, where the consignee fails to unload and release them within 48 hours, free time, after notice of arrival and tender of the shipments to such consignee, or the one charged with the duty of unloading such cars.

2. ———: ———. The fact that neither the consignee nor the one charged with the duty of unloading is able to receive and unload the cars within 48 hours, free time, after notice of their arrival will not relieve the consignee of the obligation to pay such service charges.

3. **Trial:** DIRECTING VERDICT. Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion.

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

*James E. Kelby* and *Arthur R. Wells*, for appellant.

*T. W. Blackburn, contra.*

BARNES, J.

Action to recover demurrage charges collected from the plaintiff on certain cars of sugar transported by the defendant railroad company from refineries located in states other than Nebraska, consigned to and received by

the Russell Brokerage Company at Omaha, in the months of October and November, 1907.

It appears that the plaintiff, the Nebraska Transfer Company, had the contract for unloading and storing the sugar, and paid the charges in question, which it claims were unlawfully exacted, and thereafter brought this action to recover the money so paid. The petition alleged the corporate capacity of the plaintiff and the defendant, and the facts upon which the recovery was sought were stated therein, as follows: "(5) That in the performance of its obligations to its customers, being the consignees of the said Chicago, Burlington & Quincy Railroad Company, it did at divers times receive from the Chicago, Burlington & Quincy Railroad cars loaded with freight to the number of 56, and did with all speed unload said 56 cars from the track and switches of said defendant corporation. But that the said defendant corporation, without any authority of law, as a condition of the delivery of the cars to this plaintiff, required this plaintiff to pay to the defendant the sum of $409 in excess of the freight charges claimed by the defendant to be the just and proper charges, based upon the legal and established rate and classification under schedules published by said defendant; said defendant representing to said plaintiff that said sum of money, to wit, $409, was due and owing from this plaintiff to the defendant as demurrage on said cars, the said defendant well knowing that no such sum, or any part thereof, was due from this plaintiff to the said defendant, and the said defendant, with the purpose of creating a claim or liability for said demurrage, failed and neglected to deliver to said plaintiff the cars as they were received from the consignor by the defendant, so that the plaintiff should have to unload not to exceed two cars per day, but, instead, forced upon this plaintiff from 7 to 12 cars per day and within such short intervals as to make it impossible for this plaintiff to unload all of said cars within 48 hours after their arrival in Omaha."

The defendant, by its answer, admitted the introductory paragraphs of the petition, and further admitted that the plaintiff was entitled to receive and have a refund of the demurrage charges assessed upon certain cars, which were described by numbers in the answer, amounting to $12 in all, which sum the defendant offered and tendered to pay to the plaintiff before the action was begun, and offered to confess judgment in plaintiff's favor for that amount. The defendant's answer to paragraph 5 of the petition, which is quoted above, admitted that it did at divers times receive and transport over its lines and deliver to the plaintiff cars loaded with freight, and that it collected from the plaintiff demurrage or car service charges upon certain of said cars, which demurrage or car service charges were the legal and usual charges therefor, and were justly and lawfully due and owing to the defendant upon said cars from the consignees thereof, except the sum of $12, and denied each and every other allegation contained in that paragraph, except those expressly admitted. Defendant also denied each and every of the allegations contained in the petition, other than those expressly admitted, and specially denied that it owed the plaintiff the sum of $409, or any other sum, except the said sum of $12. For further answer, the defendant challenged the jurisdiction of the court by suitable and proper allegations, which were, in substance, that it was a common carrier engaged in interstate commerce, and owned and was operating a line of railroad between points in the state of Nebraska and points in the states of Colorado, Iowa, Illinois, and other states, and alleged that as such common carrier it was subject to the act of congress approved February 4, 1887, entitled "An act to regulate commerce," and the acts amendatory thereof and supplemental thereto; that all of the shipments mentioned in the plaintiff's petition were interstate shipments, and were transported from points outside of the state of Nebraska to the city of Omaha, in the state of Nebraska; that the rates of charges and the

terms and conditions upon which the shipments were received and transported by the defendant, and the amount of the demurrage or car service charges that should be assessed thereon, and the terms and conditions upon which they were assessed, became due, were fixed and determined by the tariffs, rules and classifications of the defendant which had been published and filed with the interstate commerce commission at and before the time said shipments were received and transported; that the rights of common carriers and shippers in such cases were regulated and determined by the acts of congress relating to interstate commerce; that by said acts of congress the interstate commerce commission is vested with sole and exclusive jurisdiction to hear and determine the complaint made by the plaintiff in this action, and to award reparation therefor, in case it should appear that said charges were not legally assessed and collected, and this court and the courts of the state of Nebraska have no jurisdiction to hear and determine this controversy. Defendant prayed for a judgment against the plaintiff for costs.

Upon the issues thus joined, the cause was tried to a jury in the district court for Douglas county. At the close of all of the evidence, defendant moved the court to direct a verdict for the plaintiff for $12, for which sum the defendant had theretofore offered to confess judgment. The motion was overruled, and the defendant excepted. The cause was then submitted to the jury, and a verdict for the plaintiff for $170.24 was returned. Judgment was rendered thereon, and the defendant has appealed.

It is contended that the evidence does not sustain the judgment, and therefore the district court erred in overruling the defendant's motion to direct the verdict. The record discloses that on the trial the plaintiff abandoned the right of recovery on all but six cars of sugar, which it was contended defendant negligently placed and allowed to remain upon a certain storage track in order to

create a demurrage or service charge against the plaintiff.

The evidence on which plaintiff relied for a recovery and to support the judgment was given by its president, and is quoted in its brief as follows: "Q. With these exhibits before you, and any other papers that you may have to refresh your recollection, can you state when these cars were delivered to you, or notice given you that they were ready? A. Yes, sir. Q. You may state when. A. They were delivered on the team tracks of the Burlington on the 26th day of November, 1907. Q. How soon were they unloaded? A. They were unloaded the following day. They were either unloaded or reconsigned. They may not have been all unloaded the following day. Q. They were disposed of as far as you were concerned? A. Yes, sir. Q. Have you ever been refunded any part of this $109? A. No, sir. Q. Calling your attention to the Rock Island car No. 30,695, have you any personal recollection with reference to that car, Mr. Magaret? A. Yes, sir. Q. What is it? A. That car was never unloaded here, but it was reconsigned. It was sent to Rochester, Minnesota. Q. Did you pay any demurrage on that car? A. The refineries paid $31 on it, and it was charged back to our account and deducted at the time of settlement. Q. Did you pay that $31? A. Yes, sir. Q. You may relate when you received notice that that car was available to you. A. We reconsigned that car immediately upon being advised that it had arrived. Q. State to the jury what you mean by reconsigned. A. Shipped it on. Billed it out and shipped it to Rochester, Minnesota. Q. Have you ever been refunded that $31? A. No, sir.

As opposed to this testimony, it was shown by the defendant, without dispute, that notice of the arrival of each one of the cars in question, including car No. 30,695, was given by telephone to the Russell Brokerage Company, the consignee, on the day they arrived in Omaha. As to car No. 30,695, John Holmes, who was the chief

clerk in the defendant's freight office at Omaha, testified that on October 28, 1907, notice was given by him by telephone to the Russell Brokerage Company, the consignee, that the car had arrived, and this was followed at once by a postal card notice of that fact. It appears that plaintiff had a private track and warehouse situated upon the Union Pacific road, where it was engaged in unloading and storing cars of sugar for the consignee. Witness Holmes further testified that that car was at once delivered to the Union Pacific Railroad Company to be placed on plaintiff's private track; that it was returned to the defendant because the plaintiff's track was full of cars which they were then engaged in unloading, and it could not be placed thereon. The defendant then attempted to place the car on what is called the "team track," where the plaintiff was also engaged in unloading cars of sugar, but that track was full, and it was impossible to place the car there; that defendant was then compelled to place the car on its storage track; that when plaintiff was in condition to receive it, which was on the 28th day of November, 1907, it was then placed on the team track; that it was not unloaded at Omaha, but was then reconsigned and forwarded to Sioux City. This testimony was not disputed by any one, and its truthfulness is not challenged.

As to the other five cars, defendant's witnesses testified that notice was given both by telephone and by postal card to the brokerage company at the time each car arrived in Omaha; that they were then delivered to the Union Pacific company to be placed on plaintiff's private track for unloading; that the track was full of other cars which plaintiff was engaged at that time in unloading, and there was no room upon their private track for them; that thereafter the cars were immediately returned by the Union Pacific Railroad Company to the defendant; that the defendant at once attempted to place them upon its team track, where the plaintiff was also engaged in unloading and storing car-loads of sugar for the brok-

erage company; that the team track was full, and the cars could not be placed upon it; that thereupon they placed them with car No. 30,695 upon the storage track, and they remained there until the plaintiff was ready to receive and unload them, when they were promptly placed upon the team track. This testimony is also undisputed, and its truthfulness is in no manner challenged.

The record further discloses that Mr. Magaret, the president of the plaintiff company, upon his cross-examination testified as follows: "Q. The way you handled this sugar business ordinarily would be to have the cars delivered on your private side-track at your warehouse, would it not? A. We had some delivered there and some delivered on the team tracks. Q. Until your private side-track was filled with cars and no more could be sent there, did you undertake to unload any cars on the team track? A. It was not a matter of our tracks being full at the warehouse, it was a matter of not having room at the warehouse, so we rented another warehouse that was not on the tracks, and because of the team tracks being near by that warehouse we had the cars set there. Q. During all this period of which you have been testifying, while this demurrage was accruing, did you have your full force working unloading cars? A. Yes, sir. Q. Were there enough cars of sugar on the team tracks all the time to keep your forces all busy? A. Well, I do not know what you mean by all the time. Q. I do not mean Sundays or nights, but I mean during the working hours of week days. A. During what period? Q. Well, this period you have been complaining about, when there were so many cars there, from the 25th to the 28th of October, and immediately before and after that. A. Yes; I think there were some cars on the team tracks there all the time. Q. For you to unload? A. Yes, sir. Q. Now, you were not using those team tracks alone? Other consignees were unloading there all the time, and had cars there for unloading? A. I presume so. Q. They were a part of the public team tracks of the Burlington company

at Omaha for the general public use, were they not? A. I think so, I am not sure that they were all, but— Q. You did not claim any right to use those tracks other than any other person having business with the company had of the same kind? A. No. Q. Now, referring to the five cars which are covered by the receipts, exhibits 1, 2, 3, 4 and 5, I think you paid $109 on them. I call your attention to the fact that all of these bills are made out to the Russell Brokerage Company, are they not? A. Yes, sir. Q. And the bills in each case were made out to that company because that was the consignee of the cars? A. I presume so. Q. And you are unable to say from your knowledge that notice was or was not given to the Russell Brokerage Company of the time of arrival of those cars, at a time which would start the car service charges to running, or at the times shown by these bills? A. I have no way of knowing what notice was given the Russell Brokerage Company. * * * Q. Do you know that at the time these cars arrived, or shortly before, the Union Pacific had served notice upon the Burlington that it would receive no more cars for your private track, for the reason that it was full? A. I do not know about that. Q. Don't you know that was a fact? A. The tracks were full at the warehouse some part of the time, but the Burlington had notice to deliver any cars that were refused by the Union Pacific to their team tracks, and that they would be unloaded at the team tracks. Q. Did you ever at any time make any request upon Mr. Holmes, or any one connected with the local freight office, to have any cars set upon the team tracks, when that request was not complied with within a reasonable time? A. I do not know about that. * * * Q. Were you, during this same time, receiving cars of sugar *via* other railroad lines to be unloaded? A. Yes, sir. Q. And that took part of your forces? A. We had an extra force of men at this warehouse up here, we hired considerable extra help, both teams and men." Herbert C. Kohn, who had charge of the Russell Brokerage Company's business at that time, testified that he had made no effort to find out

whether or not his company received notice of the arrival of car No. 30,695, which contained a shipment of sugar from Port Costa, and was reconsigned on the 28th day of November, and sent on to Sioux City.

It thus appears that the defendant's evidence in relation to the arrival, the notice of the arrival, and the unloading of the six cars in question was in no way disputed. Defendant also introduced in evidence its published schedules of tariff rates, rules and regulations adopted by the Western Car Service Association, of which it was a member, and approved by the interstate commerce commission, from which it appears that the defendant was required to charge and collect from shippers or consignees the demurrage or car service charges in question, and, had the defendant neglected to collect such charges, it would have been subject to prosecution for granting rebates to, or making discriminations in favor of, the consignee in this case.

Finally, it should be observed that the plaintiff alleged, in substance, and the evidence shows, that it could only unload from two to three cars a day; that all of the time for which the service charges were made there were from three to fifteen cars of sugar ready to be unloaded upon the team tacks. It therefore follows that to hold defendant's right to collect those charges dependent upon its having placed the cars in question upon the team track before November 28, 1907, would, in effect, require the doing of an impossible, useless, and vain thing.

From the foregoing it seems clear that the evidence was insufficient to sustain the judgment complained of, and the trial court erred in refusing to direct a verdict as requested by the defendant at the close of all of the testimony. Having arrived at this conclusion, it is unnecessary for us to consider or determine the jurisdictional question.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED.

## SIBLEY & DAVIS, APPELLEE, V. WILLIAM RODGERS, APPELLANT.

FILED JANUARY 3, 1912. No. 16,589.

1. Appeal: CONFLICTING EVIDENCE: LIMITATIONS. Where the statute of limitations is pleaded as a defense to an action on a promissory note, and that question is submitted to the jury upon conflicting evidence, under proper instructions, a court of review will not disturb the verdict.
2. ———: NOTES: CONSIDERATION: EVIDENCE. Where a defendant pleads a total failure of consideration as a defense to an action on a promissory note, and his evidence at most tends to prove only a partial failure of consideration, it is not error to refuse to submit that defense to the jury.

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

*J. B. Smith,* for appellant.

*F. L. Putney* and *O. A. Williams, contra.*

BARNES, J.

Action on a promissory note, which was dated December 31, 1902, and due one year from the date thereof. The petition was in the usual form, with an additional allegation that the defendant had paid $5 on the note, which was indorsed thereon, within five years next before the commencement of the action. The defendant, by his answer, admitted the execution of the note, denied that any payment had been made thereon, and alleged that the noted sued on was given for the purchase of a wagon, which was warranted in every respect by the plaintiff to the defendant "as being a good wagon, both as to material and workmanship; but said wagon proved to be worthless for the purpose for which it was intended, and a source of expense to the defendant, and the plaintiff neglected and refused to repair or fix the same, or to replace it by a new wagon, as he had agreed to do, in case

the defendant found that the said wagon was faulty in any respect, although often requested by the defendant so to do, and therefore this defendant has received no valuable consideration whatever, save and except the said worthless wagon, and that the plaintiff has wholly neglected and refused to comply with said conditions of his warranty of said wagon." Plaintiff, by the reply, admitted that the note was given for the purchase price of a wagon, alleged that the wagon was warranted as to material and workmanship for one year only, and denied all of the other allegations of the answer. The cause was tried in the district court for Antelope county upon the issues thus presented. The plaintiff had the verdict and judgment, and the defendant has appealed.

Contention is made that the verdict is not sustained by the evidence, and that the court erred in not submitting the question of the failure of consideration to the jury. From a careful examination of the record, it appears that counsel for the defendant, in framing his answer, adopted the theory of his client that there was a total failure of consideration for the note in suit, and relied upon that fact as one of his defenses. A reading of the bill of exceptions discloses that the defendant's evidence did not support that theory. The testimony, when construed most favorably to the defendant's contentions, tends to show that the boxing of one wheel of the wagon was found to be cracked some few months after defendant purchased it. But his own witnesses testified that he used the wagon in the ordinary way; that at one time he took a load of about 50 bushels of shelled corn to the market with it, and continued to use it for general purposes until about the 1st of April, 1907, when he had it repaired by a wheelwright, who testified that he put in a new axletree, part of the skein and boxing, and reset the spokes to the wheel, and set the tires; that, notwithstanding more than four years had elapsed after defendant purchased the wagon, the wheelwright found no other defects in it. Defendant made no claim for cost

of repairs, and it appears that the plaintiff offered to allow him a credit of $7 therefor if he would pay the balance of the note. This he refused to do.

With the evidence in the condition above indicated, the district court submitted the question of the statute of limitations to the jury under proper instructions. This was the only defense upon which there was any conflict in the evidence, and upon this question the jury found for the plaintiff.

It seems clear from the whole record that the defendant had a fair trial, and, being unable to show a failure of consideration, which was one of his principal defenses, judgment was properly rendered against him.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

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ARMSTRONG CLOTHING COMPANY, APPELLEE, V. JAMES A. BOGGS, APPELLANT.

FILED JANUARY 3, 1912. No. 16,591.

1. **Parent and Child:** LIABILITY OF PARENT. Ordinarily a father is not liable to pay for clothing purchased by his minor son. But where such purchases are made with the father's knowledge and consent, and his conduct is such that the seller may reasonably infer that the father authorized them, he may be held liable therefor.

2. **Evidence:** BOOKS OF ACCOUNT: ADMISSIBILITY. An account kept by a tradesman in a book called a loose-leaf ledger, shown to be his book of original entries, and which contains many successive charges against the defendant and other persons, made in the usual course of business and at the time the transactions occurred, upon being properly verified as provided by section 346 of the code, may be admitted in evidence as a book account.

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

*W. C. Frampton,* for appellant.

*George A. Adams, contra.*

BARNES, J.

Action to recover a balance on account for clothing sold and delivered to defendant and his minor son. The petition was the ordinary declaration to recover a balance due on an assigned account. The defendant for his answer denied that he had purchased any goods whatever from the plaintiff that were not paid for, or that he is indebted to the plaintiff for any goods sold and delivered to him whatever. Defendant admitted that his son, Glen Boggs, was a minor, and denied that his son purchased any goods from the plaintiff or its assignors with his knowledge or consent, and denied each and every allegation of the petition not admitted by the answer. Upon those issues the cause was tried to a jury. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the defendant had an open account with the B. L. Paine Clothing Company of Lincoln, Nebraska, for goods sold and delivered to him and other members of his family, on which from time to time he made partial payments. The B. L. Paine Clothing Company sold and assigned the account to its successor in business, the Adams, Farquhar, O'Neill Company, doing business under the name of the Sterling Clothing Company; and the last named company sold, assigned and delivered the account to the plaintiff. It further appears that the defendant and his minor sons purchased clothing on credit from time to time from the firm above named, which was charged to his account in what is called a loose leaf ledger, which was the book of original entries, and the only one in which the accounts with defendant and other purchasers were kept; that the defendant made partial payments on the account from time to time until the balance due thereon was reduced to $44.85; that there-

after he refused to make any further payments, and thereupon this suit was brought.

Appellant contends that the evidence was insufficient to support the verdict, and that the motion by which he requested the district court to instruct the jury to return a verdict in his favor should have been sustained, for the reason that a parent is not liable for goods sold to a minor, and that the defendant was under no legal obligation to pay for them. This contention, as an abstract proposition of law, is probably sound, but to this general rule there are certain exceptions, one of which is that if the father has knowledge that goods are being purchased, and he suffers them to be purchased, retained and used by his minor son under such circumstances and in such a manner as to give the seller the right to infer that he would be responsible and would pay for them, then in such a case he is liable therefor.

In the case at bar the evidence discloses without dispute that the plaintiff and the members of his family on the 12th day of November, 1906, began to purchase clothing of the B. L. Paine Clothing Company, and thereafter until the 27th day of December, 1907, purchased such articles on credit from time to time; that defendant had knowledge of said purchases, made no objection thereto until some time thereafter, and now makes no objection to any particular item of the account; that he made payments on the account at different times in different sums, amounting in all to $115.55, and there was a balance due upon the account of $44.85, with interest thereon, at the time this action was commenced. It is true that the defendant testified that at one time he told the manager of the company that he would not be responsible for the debts of his minor son; but he was unable to say when this conversation occurred. While, on the other hand, the plaintiff produced evidence tending to show that the defendant had at different times promised to pay the account. Upon this evidence the trial court submitted the question of the defendant's liability to the jury, under

proper instructions, and that question was resolved against him. Therefore, on this branch of the case, it is sufficient to say that, if the evidence is to be believed, the verdict of the jury should be sustained.

Defendant also strenuously contends that the district court erred in receiving the assigned book account in evidence over his objections; and it is argued that it was not admissible as a book account under the provisions of section 346 of the code. It appears, however, that before this evidence was received it was shown by competent testimony that the loose leaf ledger in which the items of account in question were entered was the original and only book of accounts kept by the plaintiff and his assignors; that it contained many successive charges by the B. L. Paine Clothing Company and its successors against the defendant, entered from time to time in the ordinary course of business. It was shown that the dealings were continuous, not only with the defendant, but with other persons, and such dealings were entered in the same book; that the entries were made at the time the transactions occurred. Finally, the account was verified by plaintiff's head salesman, who had held that position with the plaintiff and its predecessor and assignors for many years, including the time when the goods in question were purchased. This witness also testified that he saw many of the charges made, that they were all in the handwriting of the bookkeeper, and were correct. It was further shown that at the time of the trial the residence of the bookkeeper was not known, and the plaintiff was unable to procure her testimony. It therefore seems clear that the testimony relating to the book account, the manner in which it was kept, and the verification thereof, was sufficient to make it competent evidence in this case.

From a careful examination of the record and bill of exceptions, it appears that the cause was fairly tried; that it was submitted to the jury under proper instructions; and, finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

HARVEY M. DUVAL ET AL., APPELLANTS, V. JOSEPH JOHNSON ET AL., APPELLEES.

FILED JANUARY 3, 1912. No. 16,613.

1. Judgment: VALIDITY: CONSTRUCTIVE SERVICE. Where, in an action to foreclose a tax lien brought against a nonresident, neither the record nor the files in the case furnish proof that a notice for constructive service was ever published, a judgment in such proceedings is subject to collateral attack.

2. ———: ———: RECITALS IN JUDGMENT. A recital in the judgment that "the court finds that due and legal notice of the filing and pendency of this action was given the defendants" will not supply the lack of the facts necessary to confer jurisdiction.

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

*Harvey M. Duval, Ross Amspoker* and *J. A. Douglas,* for appellants.

*Lear & Lear, contra.*

LETTON, J.

This action was brought to quiet the title to certain real estate. Plaintiffs allege that they are the owners, and that the defendants are in possession of the premises claiming by virtue of a sheriff's deed issued in certain void proceedings to foreclose a tax lien on the property. The defendants answered by general denial and a plea of title under the decree of foreclosure, and prayed affirmative relief. The court found that Lyman G. Blair, plaintiffs' grantor, was divested of his title by the foreclosure, and that the quitclaim deed to the plaintiffs from him constituted a cloud upon the defendants' title. The judgment dismissed the plaintiffs' petition and quieted the title in the defendants.

The only point relied upon by plaintiffs for reversal is that in the tax foreclosure suit the court was without

jurisdiction, for the reason that the record therein does not show that any service of summons was had or service by publication made upon Blair. At the trial plaintiffs offered in evidence a quitclaim deed from Blair and rested. The defendants called C. A. Ripley, who was clerk of the district court in October, 1901. He identified the appearance docket kept at that time, and testified that William Skinner, then the owner and publisher of the Springfield Herald, signed a receipt, which was written on the page of the docket under the title of the foreclosure case, for "printer's fee in this case, $10." The witness testified that this was in payment of the publication of notice by constructive service to nonresidents, and that the custom was that the affidavit of service "invariably would be filed before receiving his fees." The same docket also shows a similar receipt dated November 13, 1901, in the same case, "fee for sale notice, $9." No notice to defendants or proof of its publication appears in the files or in the record. It is shown that Skinner had the contract for printing all legal notices in connection with tax foreclosures by the county. The appearance docket shows the following papers were filed in the case: Petition, affidavit, *lis pendens*, decree, copy of appraisal, return to appraisal, order of sale, proof of publication of sale, confirmation. The clerk further testifies that it was his custom to note upon the appearance docket the filing of each instrument at the time it was filed; that there is no mention on the appearance docket of the filing of any proof of publication of notice to nonresident defendants; that in no other case are papers in the files which are not noted in the appearance docket; that he has no personal recollection as to whether any such proof was filed in that case; that there were a large number of tax foreclosure cases at this time; that Mr. Skinner would bring the notices, of which there were usually from 10 to 20, and he entered them in the appearance docket and put them in the files of the cases; and that it was his practice to examine the files and see if the affidavit of publication

was properly filed or delivered before he paid the printer's fees. No complete record seems to have been made. The evidence does not show that a search was made either for a newspaper containing the notice or for the proof of service, so that it may be questioned whether under the rule in *Murphy v. Lyons,* 19 Neb. 689, any of this testimony is competent; but it is deemed proper to set it forth. Where titles depend on court proceedings, it seems inexcusable that no complete record is made as the statute requires.

The decree recites: "The court finds that due and legal notice of the filing and pendency of this action was given the defendants as required by law." The vital question is whether this finding may be impeached by the fact that the record fails to show that any notice was ever published. This court has uniformly held that statutes relating to constructive service will be strictly construed, and that in order to sustain the jurisdiction of a court based on such service the record must affirmatively show that the statute has been complied with. *Murphy v. Lyons, supra; Albers v. Kozeluh,* 68 Neb. 522; *Boden v. Mier,* 71 Neb. 191; *Stull v. Masilonka,* 74 Neb. 322. The fact that a formal recital that service has been had upon the defendants is in the decree does not change this principle. This doctrine has been severely criticised by text-writers. Works, Courts and Their Jurisdiction, 284, 295; Van Fleet, Collateral Attack, 479, 480. The weight of authority in other states seems to support a contrary view, but the rule of strict construction which has been followed by this court forbids allowing such a formal recital to supply a total failure of the record to show the publication of any notice. These views are not without support by other courts. 1 Black, Judgments (2d ed.) sec. 281; *McMinn v. Whelan,* 27 Cal. 300, 314; *Shehan v. Stuart,* 117 Ia. 207; *Buck v. Hawley & Hoops,* 129 Ia. 406; *Cissell v. Pulaski County,* 10 Fed. 891; *Galpin v. Page,* 18 Wall. (U. S.) 350; *Settlemier v. Sullivan,* 97 U. S. 444; *Daniels v. Patterson,* 3 N. Y. 47; *D'Autremont*

*v. Anderson Iron Co.*, 104 Minn. 165. In a number of recent cases, where the service was fair on its face, but the fact was that the alleged nonresident lived in this state, this court, contrary to the general rule in other states, held that the judgment was void and subject to collateral attack. *Humphrey v. Hays*, 85 Neb. 239; *Herman v. Barth*, 85 Neb. 722; *Clarence v. Cunningham*, 86 Neb. 434. Having adhered to the rule of strict construction for so many years, we are content to follow the beaten track in this jurisdiction.

It seems obvious that the jurisdiction of the court cannot depend upon the mere manner of proof of publication. The essential inquiry is whether or not publication was ever made in accordance with the statute. If a copy of a notice appeared, there might be room for the presumption that the court had proof before it that the notice had been published for the necessary time when it made the finding. It is probable that the court might permit such proof to be supplied even after a decree and sale thereunder, as was done in the case of *Britton v. Larson*, 23 Neb. 806. See, also, Works, Courts and Their Jurisdiction, 284. But we are of opinion that it would be giving too much force to a presumption, and not enough weight to the constitutional provision that property shall not be taken without due process of law, if we held in a case where no notice appears to have been published, and where there is testimony of a negative character tending to show that if a notice had in fact been published and proof made the affidavit would have been filed with the clerk and entered upon the appearance docket, that the presumption as to the regularity of judgment should supply the place of the absent notice. It is possible that upon a retrial some additional proof may be furnished of the fact of publication. Since the record fails to show jurisdiction to render the decree under which the defendants base their title, the judgment of the district court must be reversed.

It is also urged that the plaintiffs failed to establish

the allegations of their petition by not proving a connected title from the United States to their grantor. There might have been something in this contention if made at the proper time; but, when plaintiffs rested, defendants proceeded with their proof, and it became clearly apparent that both parties claimed to derive their title from a common source. This being the theory on which the case was tried in the district court, it must be so tried here.

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

REVERSED.

ROOT and ROSE, JJ., dissent.

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NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, V. THOMAS B. STOCKER, APPELLANT.

FILED JANUARY 3, 1912. No. 16,625.

1. **Drains: ASSESSMENTS.** In levying an assessment by a drainage district, that portion of land taken for the right of way of the ditch should not be assessed to the landowner from whose premises it is taken.

2. ———: ———. In such assessments exact nicety of apportionment is impossible. If the result of the improvement will be to specially benefit each tract or subdivision as a whole, it is immaterial whether within its limits there are portions which are not susceptible of cultivation, and the value of which, if taken by themselves and disconnected from the remainder of the tract, would not be enhanced.

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

*E. B. Quackenbush, T. R. P. Stocker* and *Fred G. Hawxby,* for appellant.

*Kelligar & Ferneau, contra.*

LETTON, J.

From an assessment upon the appellant's land to pay the cost of the improvement in Nemaha Valley Drainage District No. 2, of Nemaha county, this appeal was taken. Many of the errors assigned are disposed of by the opinion in *Nemaha Valley Drainage District v. Marconnit*, p. 514, *post*, and will not be again considered.

The channel of the main drainage ditch, as planned, crosses the appellant's land diagonally. A proposed lateral drainage ditch also crosses his land in much the same direction. Appellant filed specific objections before the board of supervisors to the engineer's report and to the proposed assessment. The percentage of assessment upon one tract was reduced from 100 to 50 per cent., but in other respects the report of the engineer was confirmed. The district court affirmed the action of the board.

The appellant contends that he cannot be assessed for that portion of his land included in the right of way taken by the drainage district for the purposes of the improvement. The evidence shows that the land proposed to be taken by the district according to the plan of the engineer amounts to 27.85 acres. It is clear that, if the land is taken from appellant by the construction of the ditch, he ought not to be compelled to pay for benefits to property of which he is deprived by the very act of construction. We think this was erroneous, and the appellant is entitled to be relieved from the assessment to the extent that it is based upon land actually appropriated by the district.

Another objection made by appellant is that he is wrongfully assessed for that portion of his land which is occupied by the old channel of the Nemaha river, for the reason that this land cannot be benefited by the improvement. The plat shows that the Nemaha river is a winding stream in its course along the boundary of a part of appellant's land. The evidence does not show whether

the several tracts, according to the quantities of land marked on the plat and assessed to appellant, extend to the thread of the stream, but, even if they do, it is clear that it would be almost impracticable to separate the land covered by the tortuous course of the channel from the remainder of each of the respective tracts for the purpose of assessment. The benefits must be assessed as nearly as may be just under all the circumstances surrounding each tract. Exact nicety of apportionment as to each square yard or square rod is impossible. If the result of the improvement will be to specially benefit each tract or subdivision as a whole it is immaterial whether within its limits there are portions which are not susceptible of cultivation and the value of which if taken by themselves and disconnected from the remainder of the tract would not be enhanced.

With respect to the contention that the board assessed the appellant for benefits to a portion of his land included in the public highway, the record shows that two acres were deducted for the land occupied by the road to the south of his land. There has been no evidence called to our attention showing that the land occupied by the "Half-breed road" was included in the assessment. The plat shows the boundary line of his land to be the west line of the Half-breed Indian reservation, and in the absence of proof to the contrary we must presume that the land occupied by the road is not within the tracts assessed.

The appellant asked that the corporation furnish and maintain permanently a bridge over the new channel or ditch, or, in lieu thereof, pay him $5,000 damages for the cutting of his land by the new channel. He also complained of other damages caused by the main and lateral ditches cutting the land into small pieces so as to render portions inaccessible and creating waste, trouble and delay in farming. In the opinion in *Nemaha Valley Drainage District v. Marconnit*, p. 514, *post*, the rule with regard to the ascertainment of damages to land taken or damaged

by the construction of such an improvement as this is stated, and we think that opinion covers and disposes of these contentions. The appellant is not deprived of his right to such damages by the failure to be awarded them in these proceedings.

The other points covered by this appeal we believe to be settled by the opinions in *Nemaha Valley Drainage District v. Marconnit,* p. 514, *post, Nemaha Valley Drainage District v. Skeen,* p. 510, *post,* and *Nemaha Valley Drainage District v. Higgins,* p. 513, *post,* and they will not be further considered.

The judgment of the district court is

REVERSED.

FAWCETT, J., not sitting.

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NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, V. BENJAMIN T. SKEEN, APPELLANT.

FILED JANUARY 3, 1912. No. 16,626.

**Drains: ASSESSMENTS.** Upon an examination of the evidence, it is *held* to sustain the judgment of the district court.

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

*E. B. Quackenbush* and *Fred G. Hawxby,* for appellant.

*Kelligar & Ferneau, contra.*

LETTON, J.

The same general complaints are made as in the case of *Nemaha Valley Drainage District v. Marconnit,* p. 514, *post,* and these points will not be further considered. The appellant, however, urges several objections peculiar to his own case which it is necessary to examine.

At the time the district was originally organized 52½ acres of his land were included therein, and the remainder was afterwards brought in by the district court. At the hearing a number of specific objections were made by the appellants, which may be summarized, as follows: That very little of the original 52½ acres included in the district is subject to overflow; that part of it is timber land and would be benefited rather than injured by a flood; that the construction of the improvement would cast an additional volume of water upon the remainder of the tract; that the outlet for the waters of Swartz creek, a tributary stream, would be dammed by the improvement and cast upon his lands; that his lands are only flooded by the back water in the Nemaha, occasioned when the Missouri river is in flood. He denies that his lands will receive any benefit from the improvement, and asks that the assessment on the 52½ acres be reduced from 100 per cent., as fixed by the engineer, to 25 per cent., and for damages in the sum of $500 for injury to the remainder of the land. On appeal to the district court, his objections and protests were considered and the percentage of the assessment was substantially reduced on a part of his land.

The testimony of the engineer and several witnesses residing in the neighborhood and familiar with the land shows that much of appellant's land included within the drainage district is subject to overflow. In regard to the contention that this land was only flooded by back water caused by high water in the Missouri river, the engineer's testimony is that the difference between the elevation at the confluence of the Little Nemaha with the Missouri river and the elevation at a point on appellant's land which is about the average elevation thereon is 7.94 feet; that if the Missouri river were higher than the Nemaha there would be an upstream current flowing on the surface from the Missouri river, but that while this was flowing the current beneath would also be flowing into the Missouri much the same as at ordinary stages. From

these facts he draws the conclusion that with this difference in level the overflow on the appellant's land could not be caused solely by back water, as he claims. Appellant testifies that he has made a system of drains upon his land, and has straightened the channel of Swartz creek so that the water is more rapidly discharged, and has constructed dikes which protect his land from overflow; and that the construction of the proposed improvement would conduct the flood waters down the river valley so rapidly that the inevitable result would be that the grade of a railroad which extends across the valley below his land would hold back the water and cause it to overflow his property to a greater extent than before. He testifies further that his land would be worth no more after the improvement than before and that its result would be to cause him actual damage. A number of witnesses testified substantially in corroboration as to the results of high water in the Missouri river upon these lands, as well as to the condition of appellant's land with respect to the overflow. On the other hand, the testimony on behalf of the drainage district seems to establish that that portion of appellant's land which is assessed is subject at least in part to overflow, and that the assessment as finally modified by the district court is not unfair.

Considering all the evidence, we are not convinced that the tracts involved will not be specially benefited to the amount of the assessment. The question is a closer one in this case than in the *Marconnit* and *Higgins* cases, pp. 514, 513, *post,* but we are satisfied the evidence sustains the judgment of the district court, which is, therefore,

AFFIRMED.

FAWCETT, J., not sitting.

NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, V. H. F. HIGGINS, APPELLANT.

FILED JANUARY 3, 1912. No. 16,627.

Drains: ASSESSMENTS. In order to sustain an assessment made by a drainage board under chapter 161, laws 1905, it is not essential that the levy be confined to that portion of a tract of land liable to be actually covered with water in times of flood. If the improvement adds to the value of the whole of the owner's land or to an entire government subdivision the assessment may be made accordingly.

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

*E. B. Quackenbush* and *Fred G. Hawxby,* for appellant.

*Kelligar & Ferneau, contra.*

LETTON, J.

The appellant is the owner of two tracts of land, one consisting of 40 acres and the other of 10 acres in Drainage District No. 2, in Nemaha county. He appeals from a judgment confirming an assessment on the same. Appellant makes the same general objections to the validity of the statute and the jurisdiction of the court as are made in the case of *Nemaha Valley Drainage District v. Marconnit,* p. 514, *post,* and it is unnecessary to again treat of them. In addition, he complains that the evidence does not justify the assessment of his land as made.

The testimony shows that both of these tracts were in part subject to overflow, but that each tract was not liable to be entirely flooded. Among other things, it is insisted that, because each entire tract is not subject to be covered with water, the assessment is not confined to the land benefited, is unjust, and cannot be sustained. It is clearly impossible to make an assessment according to the varying contour lines of the high water mark. The only practicable method is to assess the land benefited as

nearly as may be according to the actual boundaries of the land of each proprietor or with reference to government subdivisions. *Moore, Ex'r, v. People,* 106 Ill. 376. Even though a portion of each small tract may not be overflowed, it is fair to conclude that the flooding of a part diminished the value of the whole, and that benefiting an irregular portion in a 40-acre tract added to the value of the whole subdivision.

We are of opinion that the evidence sustains the judgment of the district court, which is

AFFIRMED.

FAWCETT, J., not sitting.

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NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, V. GEORGE F. MARCONNIT, APPELLANT.

FILED JANUARY 3, 1912. No. 16,628.

1. **Drains:** ASSESSMENTS: APPEAL. It is sufficient to confer jurisdiction on the district court on appeal from a hearing upon objections to the assessment of lands to pay the cost of the improvement by the board of supervisors of a drainage district organized under the provisions of chapter 161, laws 1905, if the "secretary shall make and file a transcript of said hearing, together with all the papers relating thereto, with the clerk of the district court in which said matter has been appealed."

2. **Constitutional Law:** DRAINAGE ACT: CLAIMS FOR DAMAGES. The amendment made in 1909 of chapter 161, laws 1905, commonly known as the "Peabody Act," by which certain provisions providing for the filing of claims for damages and a hearing thereon before the board of supervisors in connection with the assessment were omitted from the amended act, *held* not to render the amended act unconstitutional, as being in violation of section 21, art. I of the constitution.

3. **Drains:** ESTABLISHMENT: ASCERTAINMENT OF DAMAGES. In the taking or damaging of private property by a drainage district corporation in carrying out the purposes of its organization, the same principles apply as to the ascertainment of damages as in the exercise of the right of eminent domain for the location of

a highway, the construction of a railroad, or like instances where private property is taken or damaged for public use.

4. ———: ———: ———: ACTION AT LAW. The fact that a special proceeding is not provided for in the act in question for the ascertainment of damages to land not actually taken does not interfere with the right of a landowner to maintain an action at law to recover his actual pecuniary loss, if any.

5. ———: DRAINAGE DISTRICT CORPORATIONS. A drainage district corporation founded under chapter 161, laws 1905, by the terms of section 37 is a body politic and corporate, and may sue and be sued.

6. ———: DRAINAGE DISTRICTS: BOARD OF SUPERVISORS: JURISDICTION. Where an engineer was appointed to make a survey, estimate and report for a drainage district, under the act of 1905, a topographical survey and maps and profiles made in substantial conformity with the provisions of the act as it then stood, which were filed in January, 1909, were sufficient to vest the board of supervisors with jurisdiction.

7. ———: ———: PETITIONERS: POWER TO LIMIT CORPORATION. A person signing articles of incorporation for the formation of a drainage district under chapter 161, laws 1905, cannot limit the powers of the corporation as to the manner in which the territory within the district shall be drained by expressions in the petition filed for the purpose of the formation of the district.

8. ———: ASSESSMENT OF BENEFITS. Where a general plan or scheme adopted for a drainage district consisting of over 20,000 acres of land in a river valley provides, as a part of the plan, for the straightening and cleaning out of the channel of the river and the excavation of certain lateral ditches, in order to more quickly dispose of water from overflow and that arising from surface waters flowing into the district from high lands adjoining, and the evidence shows that the lateral ditches are necessary to the complete carrying out of the plan or scheme, the mere fact that some of these laterals are not so situated as to confer a direct and immediate benefit on a landowner within the district cannot operate to relieve his land of its fair proportion of the common burden.

9. ———: ———. The fact that an exact measurement of the benefits which may accrue to lands within a drainage district cannot be made with mathematical accuracy until after the completion of the scheme does not render the damages so speculative and conjectural in their nature as to be impossible of ascertainment before the improvement is made.

10. Evidence examined, and *held* sufficient to sustain the findings and judgment of the district court.

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

*E. B. Quackenbush* and *Fred G. Hawxby,* for appellant.

*Kelligar & Ferneau, contra.*

LETTON, J.

In June, 1906, proceedings were begun in Nemaha county for the purpose of organizing a drainage district under the provisions of chapter 161, laws 1905, commonly known as the "Peabody Act," which resulted in the creation of a drainage district corporation. An engineer was employed by the board of supervisors, who made a survey and prepared and filed maps and plans with a report ascertaining and apportioning the benefits to each tract of land within the district. The board of supervisors then notified the owners of property affected of the time and place when and where objections to the report of the engineer and to the proposed assessment of benefits and to all other matters and things connected with the assessment could be heard. Much the greater number of property owners made no complaint, but a number of objections were filed, and separate hearings were granted to each objector. The board of supervisors in each case took testimony both on behalf of the objectors to the assessment and in support of the engineer's report, and personally inspected each tract or parcel of land as to which the proposed assessment was contested. A number of changes were made by the board at the respective hearings, and such changes, when made, reduced the amount of the assessment or operated to exclude from the district certain tracts included by the engineer, and the assessment of which was complained of. An appeal was taken from the board of supervisors to the district court, where hearings were had and decrees rendered, and from

such a decree Mr. Marconnit, a landowner and objector, has appealed to this court.

1. The transcript filed in the district court recited the objections filed by each appellant to the report of the engineer, the proceedings at the hearing before the board, and the final decision of the board on the matter. The jurisdiction of the district court was challenged on the ground that no sufficient transcript had been filed; the argument being that a complete record of all proceedings in the organization of the district, including the report of the engineer, should have been filed on appeal. We think this was unnecessary to confer jurisdiction. The statute (laws 1909, ch. 147, sec. 17) requires that, after an appeal bond is filed, the "secretary shall make and file a transcript of said hearing, together with all the papers relating thereto, with the clerk of the district court, in which said matter has been appealed. Upon the filing of said transcript and bond the said district court shall have jurisdiction of said cause, and the same shall be docketed and filed as in appeals in other civil actions to said court, and said court shall hear and determine all such objections in a summary manner as a case in equity, and shall increase or reduce the amount of benefit on any tract where the same may be required in order to make the apportionment equitable. All objections that may be filed shall be heard and determined by said court as one proceeding and only one transcript of the final order of the board of supervisors fixing the apportionments or benefits shall be required." A complete transcript showing the organization of the corporation and the final order of the board fixing the apportionment appears in the record, being offered in evidence in the district court. We are of opinion that the court acquired jurisdiction by the filing of a transcript of the proceedings upon the objections of appellant. The meaning of the provision that "only one transcript of the final order of the board of supervisors fixing the apportionments or benefits shall be required" is not quite clear; but, the entire proceedings leading up to the assessment

being in the record, there was sufficient before the court to allow the appellant to call to its attention any matter which he believed affected his interests injuriously, and this would seem to comply with the intent of the statute.

2. It is insisted that the statute as amended in 1909 is unconstitutional for the reason that the amendment took away from the landowner the right to recover any damages he might suffer by reason of the proposed improvement, by omitting certain provisions as to such damages; that it was the evident intention of the legislature of 1909, by omitting these provisions, to compel him to suffer damage to his property without compensation; and that hence the amended act violates section 21, art. I of the constitution. Section 12 of the original act (laws 1905, ch. 161), which section was not affected by the amendment of 1909, provides generally for the condemnation of right of way, and further provides that, after the appointment of appraisers, "the same proceedings for condemnation of such right of way shall be had, in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damage and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act." The provision of the act as amended seems to leave the law as to damages in much the same condition as that with reference to the ascertainment of damages to property occasioned by the construction of a railway or the opening of a highway. In such proceedings the appraisers, and on appeal the jury, must allow the landowner the value of the land actually taken, and incidental damages to that portion of his land not appropriated, less any special benefit which may accrue by reason of the improvement. *Wagner v. Gage County*, 3 Neb. 237. In the taking of property for a drainage district these principles apply, as modified in *Gutschow v. Washington County*, 74 Neb. 794. *Martin v. Fillmore County*, 44 Neb. 719; *Dodge County v. Acom*, 61 Neb. 376. It is held by some courts that such provisions in a constitution apply only

to the exercise of eminent domain, and are no defense in proceedings to specially assess property for special improvements according to benefits (*Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683; *Householder v. City of Kansas*, 83 Mo. 488); the thought being that, the assessment being made under the taxing power and the damages being caused by the exercise of the right of eminent domain, one cannot be offset against the other, although the party injured may have his action under the constitution for the damages sustained. But this question is not involved here and is not decided. It is also said by appellant in this connection that an action cannot be maintained against the district for damages in the absence of express statutory provision therefor, and that hence if lands are not actually taken, but only incidentally damaged, the injured party has no means of recovery. But a drainage district formed under this statute is a public corporation (*Drainage District No. 1 v. Richardson County*, 86 Neb. 355) and, as such, liable to pay for lands taken or damaged whether the obligation is enforced by condemnation proceedings or by civil action. Under section 37 of the act it may sue and be sued. The constitution is the supreme law; and, even if the statute failed to provide a special proceeding against the corporation for damages, the mere failure to do so will not operate to take away from a person damaged his right to the ordinary process of the law to ascertain and recover the same. *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, and cases cited. We think no such change was made by the amendment of 1909 as to render the amended act unconstitutional.

3. It is argued that the court had no jurisdiction because no complete topographical survey of the district had been made and filed as required by law. The engineer's report is accompanied by detailed maps and profiles of the proposed work in accordance with provisions of section 9, ch. 161, laws 1905, which was in effect when the survey was made and maps filed. At that time the statute required the engineer to make "a topographical survey,"

and to submit to the board "maps and profiles of the same" and a full and complete plan for drainage, etc. The amendment of 1909 makes no substantial change, except to say that there shall be a "complete" topographical survey. The witness Munn, who was the engineer in charge, stated upon the witness-stand that the maps filed did not show a "complete" topographical survey, but that he had made a topographical survey proper for such an enterprise, and that the maps and profiles showed all the elevations necessary for the work, that he took 10 to 14 elevations upon each 40 acres, and that, although there are no contour lines marked, the maps and profiles are sufficient to indicate the lands which would be benefited by the improvement, and gave the information necessary to enable contractors to estimate and bid upon the work. While a more minute survey and more detailed maps showing contour lines at short intervals could have been made, the maps and profiles in evidence seem to be in substantial compliance with the statute, and were sufficient to inform the landowners, the board of supervisors and the district court of the scope and extent of the proposed improvements and the lands which would be affected thereby.

4. In the execution of the general scheme of improvement, a number of lateral ditches are provided for which are designed to relieve part of the land, which is liable to overflow in times of flood in the Little Nemaha river, from excessive accumulations of surface water coming from other sources, and which accumulations find their discharge by way of the river. One of these laterals is a distance of several miles from the lands of the appellant. He claims that the drainage district had no power to include the construction of such laterals within its scheme or plan of drainage, for the reason that, when he signed the petition for the creation of a drainage district, the object and purpose expressed was to straighten the channel of the Little Nemaha river by changing the channel where necessary, and cleaning the old channel, and do

"any and all things which the board of supervisors of said district may deem necessary to straighten and clean out the channel of said river, and to prepare, protect and maintain said improvements." It is said that the inclusion of lateral ditches in the plan was beyond the power of the corporation, and that an assessment based upon such a scheme could not bind the appellant, who had never consented to the same. The power to create a drainage district corporation is conferred by section 1, ch. 161, laws 1905. Under its provisions "a majority in interest of the resident owners in any contiguous body of swamp or overflowed lands in this state * * * may form a drainage district for the purpose of having such lands reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign articles of association, in which shall be stated the name of the district, the number of years the same is to continue, the limits of the proposed drainage district, which shall in no event embrace an area of less than 160 acres, the names and places of residence of the owners of the land in said district, * * * and said articles shall further state that the owners of real estate so forming said district for said purpose are willing and obligate themselves to pay the tax or taxes which may be assessed against them to pay the expenses to make the improvements that may be necessary to effect the drainage of the said lands so formed into a district," etc. It is further provided that, after the articles have been signed, they shall be filed in the office of the clerk of the district court in the county in which said drainage district is located. Section 2 provides for the service of notice of the filing of articles. Section 3 provides that all owners of real estate in the district who have not signed the articles shall file their objections in the district court, "if any they may have, why such drainage district should not be organized and declared a public corporation of this state." The provisions of the statute and the decree of the district court declaring the drainage district a public corporation con-

stitute the charter of the corporation. It will be seen that the corporation is formed "for the purpose of having such lands *reclaimed and protected from the effects of water, by drainage or otherwise,*" and the petitioners obligate themselves "to pay the tax or taxes which may be assessed against them to pay the expenses *to make the improvements that may be necessary to effect the drainage* of the said lands so formed into a district." Expressions in a petition indicating the manner in which the petitioners desire or would prefer to have the scheme of drainage carried out cannot control or fetter the corporation in the exercise of its discretion in the adoption of plans to carry out the purpose of its creation, and are mere surplusage. So long as the officers of the corporation keep within the powers conferred upon them by its charter, the petitioners cannot complain. To hold that an enterprise requiring technical skill and knowledge of a high degree in order to successfully prosecute the same, and necessitating the expenditure in some instances of hundreds of thousands of dollars, can be limited in such a manner would substitute the judgment of the unskilled for that of experts, and would subject the property of other owners of land in the district to the risk of being sacrificed in order to pay the expenses and costs of ill-advised and immature schemes. We are of opinion that the powers granted by the statute cannot be limited in such a manner. Moreover, we think the power of the corporation to carry out as a part of its general purpose the drainage of the lands included within the district from surface water, as well as that arising from overflows, cannot be questioned in this collateral manner.

5. It is next objected that the court erred with regard to the assessment of the cost of the laterals upon the appellant's land, when in fact he derived no benefit therefrom. The report of the engineer states: "The primary object of this undertaking is to reduce the numbers and extent of the overflows from the river. The work of reclaiming the valley lands is not complete, however, until

adequate surface drainage is provided. Lateral ditches, 35 in number and aggregating 35 miles in length, have been laid out to complete the work of draining the valley." We think that the testimony bears out the conclusion that lateral ditches were proper and necessary in order to accomplish the result contemplated by the improvement. The method of assessment is explained in the engineer's report, as follows: "There are in round numbers 21,800 acres of land benefited by this improvement. The maximum benefit to the land is estimated at $40 per acre. In arriving at the degree of benefit to the various tracts, those lands receiving the maximum benefit were classified at 100, and other tracts receiving less than the maximum benefit were classed in percentages of the maximum. Land now worth $60 per acre that will ultimately sell for $100 per acre, when relieved of the uncertainty of overflow and is afforded ample drainage, is of course classified at 100. Very wet swamp land now worth say $20 an acre that will be made safe from the overflows of ordinary years and the value of which would be to $60 an acre is also classed at 100. * * * The benefits to certain tracts are increased by the proposed lateral ditches. The laying out of the lateral ditches in fact necessitated the including for benefits of land that otherwise would not have been listed. After the land was scheduled by percentages the amount of benefit to each tract was arrived at by extending the number of acres in the tract by $40 if the tract was classified at 100, or at the per cent of $40 the land was classified at. The cost of the improvement then apportioned to each tract bears the same ratio to the total cost that the amount of benefits bears to the total benefits."

It will be seen that, additional assessable land being brought within the district by reason of the laterals, the total cost was distributed over a greater number of tracts than before. We have nothing before us to indicate that the assessment on the additional land brought in would not operate to equalize the added cost. Moreover, it seems

clear from the testimony of the engineer and the elevations marked in the plats that the laterals were necessary to fully accomplish the drainage of the district, and that while the land of the appellant was not directly benefited by each lateral it was in fact benefited by the carrying out of the entire scheme. Without the laterals, it seems that water from excessive rains flowing into the valley from the higher land adjacent and water from unusual overflows would be retained in stagnant pools and ponds in various places, the remedying of which condition it was one of the principal objects of the improvement to effect. In the engineer's report the land throughout the district is not assessed at the same rate. He testifies that some of the lands assessed derive their principal benefit from the improvement in the channel of the river, while others are so situated that from the river improvement alone they would not receive the maximum benefit, without the aid to their reclamation afforded by the construction of the laterals, and that in making the assessment these elements were considered. The evidence shows the laterals were necessary to the drainage of the district, and the mere fact that some of them were not so situated with respect to appellant's land as to confer a direct and immediate benefit on it cannot operate to relieve his land of its fair proportion of the common burden.

6. It is objected that the benefits which may accrue are so speculative and conjectural in their nature that it is impossible to ascertain the same until after the construction of the improvements. This objection, however, would be equally applicable to proceedings for the ascertainment of damages occasioned by the laying out of highways or the building of railroads. Furthermore, if no assessment and levy could be made until after an improvement of this nature was completed, common prudence on the part of engineers and contractors would no doubt operate so that it would be a long time before the land would be relieved from overflow.

7. Appellant insists that the court erred in refusing a

trial of the issues in the case by a jury. This question, however, together with a number of other complaints with regard to the constitutionality of the act, was disposed of in *Dodge County v. Acom,* and in *Drainage District No. 1 v. Richardson County, supra,* and will not be noticed further.

8. We find no justification for the complaint that the board of supervisors was disqualified by reason of the fact that certain of the members were landowners in the district. The statute expressly requires that the board shall "be composed of owners of real estate in said district and resident of the county or counties in which such district is situated." Laws 1905, ch. 161, sec. 5. There is no evidence of and no complaint is made as to any misconduct on the part of any member of the board.

9. It is insisted that the court erred in many respects with regard to the admission and exclusion of evidence with relation to the lateral ditches, as to their effect upon the land in the district generally, the effect of the growth of vegetation in them, the necessity for their existence, and the effect that overflow would have upon them. The hearing was before the court, hence, under the settled rule, the admission of incompetent and immaterial testimony could not be prejudicial, and we are unable to find any prejudice to appellant by the exclusion of that which was offered by him and refused.

10. Having disposed of these general objections to the validity of the assessment, we come now to the complaint that the assessment against Marconnit's land as fixed by the board and confirmed by the court is too high and out of proportion to the assessment against other lands similarly situated. At the outset it is well to say that a uniform and exact apportionment of the benefits to each tract of land is an impossibility in most cases. The most that any officer or tribunal can do is to estimate the benefits to each tract upon as uniform a plan as may be in the light afforded by the evidence and by a personal examination and inspection. We have read the evidence with

much care in respect to the varying conditions in the three government subdivisions of Mr. Marconnit's land, the assessment as to which is in issue in this appeal. In considering his original complaint after a personal view of the land and the examination of witnesses, the board of supervisors found that certain portions were not benefited and should not be assessed, that part of it should be assessed on a basis of 60 per cent. and part of it at 100 per cent. Marconnit's own evidence shows that the land assessed is properly within the drainage district and subject to assessment. The estimate made by the witnesses in his behalf of the amount that the value would be enhanced by the construction of the improvement is much lower than that arrived at by the board and by the district court, but we are unable to say from a consideration of all the testimony produced that the finding and determination of the district court is erroneous. It is impossible within the limits which we are justified in devoting to this opinion to set forth in detail the evidence as to the value of each tract and the special benefit which it will sustain by the improvement. It is confused and indefinite at the best, and it is a difficult task for a reviewing court to form any just conception of actual conditions merely from the reading of the testimony. It seems clear that other land in the vicinity, lying at a lower elevation, and which would be covered with water when a portion of appellant's land was still above the flood, was also assessed at the rate of 100 per cent., but this alone is not sufficient to justify a finding that the assessment of these tracts is lacking in uniformity and is unjust and inequitable.

The appellant has not convinced us that the findings of the district court should be disturbed, and its judgment is, therefore,

AFFIRMED.

FAWCETT, J., not sitting.

CITY OF SOUTH OMAHA, APPELLEE, V. OMAHA BRIDGE & TERMINAL RAILWAY COMPANY, APPELLANT.

FILED JANUARY 3, 1912. No. 16,576.

1. Eminent Domain: CONDEMNATION OF STREETS: DAMAGES. A common carrier in 1901 by condemnation proceedings acquired the right to construct and maintain turnouts and tracks for the storage of cars upon parts of an alley and two streets within the city of South Omaha. *Held*, That the city, under the peculiar provisions of its charter and the facts in this case, should recover substantial damages.

2. ———: ———: ———: EVIDENCE. In such a case, the issue having been tried to the court without the assistance of a jury, the judgment will be affirmed if there is sufficient competent evidence to sustain the recovery.

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

*W. S. Kenyon, Kelleher & O'Connor* and *William Baird & Sons*, for appellant.

*H. C. Murphy* and *S. L. Winters, contra.*

ROOT, J.

This is the second appeal in this case. Our former opinion, published in 76 Neb. 718, is referred to for an understanding of the facts. The second trial was to the court without the assistance of a jury.

The railway company contended that the city should recover no more than nominal damages, and was permitted to prove by the testimony of experts that the value of the use by the city of those parts of the alley and the streets in controversy was not impaired by the use for railway purposes. The city, on the other hand, was permitted to prove that the land embraced within the parts of the alley and the strects condemned was worth from $2,100 to $2,500, but that subject to the use by the railway company was worth but $500. The court found that the effect of

the condemnation is to vacate the territory for street and alley purposes, and that the market value of the land is $900, for which sum judgment was rendered. There are no other findings.

The appellant contends that, since section 83, ch. 16, Comp. St. 1901, authorizes municipal corporations to agree with a railroad company upon the terms and conditions upon which public streets, alleys and grounds may be occupied and used by the company, and that if they cannot agree those rights may be acquired by condemnation, the appellant could not and did not acquire title to the land, and the damages, in the nature of things, could be no more than nominal. In support of this argument our attention is directed to the evidence, which informs us that the railway company owns three blocks of land situated parallel to the right of way of the Belt Line railway, over which the appellant propels its engines and cars; that the parts of the alley and streets in controversy run at right angles to, and terminate at the east side of, this right of way, and that they have not been opened for public use, but at the time of the condemnation were included within an inclosure which also included the blocks purchased by the railway company.

Reference is made in our former opinion to the peculiar provisions of section 20, art. II, ch. 13, Comp. St. 1901, which apply to the city of South Omaha, whereby the owners of real estate abutting on the part of any street sought to be vacated must pay into the city treasury the appraised value of that part of the highway before an order of vacation can lawfully be rendered. This statute vests the city with a valuable interest in the streets and highways within its limits, although it may not bargain and sell that interest to any person the authorities may choose.

The railroad company did not in its petition apply solely for a right of way across the streets and the alley for a main line, or a main line and side-tracks, but stated that it needed the territory for, among other things, the storage of cars. This right, when acquired, would be so

inconsistent with the use for ordinary highway traffic, that the parts of the streets and the alley for all practical purposes were vacated. Should the city formally vacate the alley and the streets, it could only do so subject to the easement of the railway company, and the land thus burdened in perpetuity would be practically worthless to the owner of the fee. While the legal consequences attendant upon a vacation may not flow from the condemnation, the practical present results are the same, so far as the city is concerned, and it should recover substantial damages. There is no prejudicial error.

There is sufficient competent evidence to sustain the award of damages, and the judgment of the district court is therefore

AFFIRMED.

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JOHN GASTER ET AL., APPELLEES, V. ESTATE OF FREDERICK GASTER, APPELLANT.

FILED JANUARY 3, 1912. No. 17,057.

1. **Husband and Wife**: SEPARATION: RECONCILIATION. Reconciliation between and a renewal of cohabitation by husband and wife will abrogate articles of separation theretofore executed by them.

2. **Wills**: ELECTION, TIME OF: INSANE SPOUSE. Section 7, ch. 23, Comp. St. 1911, which provides, in substance, that unless a surviving spouse, within one year after letters testamentary are issued on the estate of a spouse dying testate, files with the county judge a written election to inherit the deceased's estate as though he had died intestate, the survivor shall be deemed to have consented to take under the will and not under the law, will not prejudice an insane spouse for whom the county judge has made no election.

3. ———: ELECTION: INSANE SPOUSE. An oral demand by the guardian *ad litem* of an insane widow, made to the county judge at the time the decree of distribution is entered in the matter of her deceased husband's estate, that she should receive a share of the estate as though the husband had died intestate, if approved by the county judge, constitutes an election for her by him and is sufficient to sustain her rights under the law.

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

*P. M. Moodie* and *John J. Sullivan,* for appellant.

*A. R. Oleson, contra.*

ROOT, J.

This is an appeal from a judgment of the district court for Cuming county denying Theresa Gaster any interest in the estate of her deceased husband.

This controversy grows out of a contract between Frederick Gaster, the deceased, and his widow, who is now insane. The evidence is not so satisfactory as we might desire, but the record discloses that some time preceding April 30, 1881, Frederick Gaster, a widower, and Theresa Gaster, a widow, each having children by a former marriage, became husband and wife. On the day last mentioned these parties signed a contract as follows:

"Memoranda of articles of separation, and agreement of property settlement made and concluded this 30th day of April, A. D. 1881, by and between Frederick Gaster and Theresa Gaster (husband and wife) of the county of Cuming and state of Nebraska, witnesseth as follows, to wit:

"It is hereby specially agreed by and between said parties that from the signing of this agreement said parties will live separate and apart from each other, and each for themself promises and agrees not to interfere or meddle with the personal actions of the other, and each is hereby empowered to follow their course of life the same as if no marriage relation existed between them, and no control shall be used by either over the actions of the other.

"It is hereby agreed by said parties that the said Frederick Gaster hereby releases all rights, interest, claim, demand and privileges in or to any or all the real estate

or personal property now owned by said Theresa Gaster (as her own personal estate) as well as any and all personal property which the said Theresa Gaster may in the future acquire.

"The said Theresa Gaster hereby covenants and agrees that she the said Theresa Gaster by these presents hereby releases all rights, interest, claims, demands, privileges and dower in and to any and all the real estate and personal property now owned by said Frederick Gaster as well as to any and all property which the said Frederick Gaster may in the future acquire.

"It is further agreed that said Theresa Gaster shall alone be entitled to the possession of the farm owned by her in said county and the said Frederick Gaster to be alone entitled to the possession of the farm owned by him, and it is agreed that this shall be a full, complete and entire settlement of the property real and personal owned by said parties, and to be acquired by either of them in the future.

"The said Frederick Gaster hereby covenants and agrees that the said Theresa Gaster shall have the right and privilege to remove from the farm of the said Frederick Gaster all the personal property, furniture, paraphernalia and goods owned by the said Theresa Gaster, brought by the said Theresa Gaster to said Fred Gaster at the time of their marriage, and also the right to remove all personal property acquired by said Theresa Gaster since said marriage.

"It is hereby agreed by and between said parties that said Theresa Gaster shall be entitled to the possession of Theresa Maria Gaster, aged two years, born to said parties during said marriage, and it is hereby agreed that said Frederick Gaster at all reasonable times shall have the right to visit and see his said child, and make such provision for said child as to him the said Frederick Gaster may deem just. That when said child shall arrive at the age of ten years she shall have the right to choose between said parents. After said choice either

of said parties shall have the right to see said child as above.

"Signed this 30th day of April, 1881.

"In presence of

"T. M. FRANCE. F. GASTER.

"JEROME VOSTROSKY. THERESA GASTER."

The execution of this contract was acknowledged before a notary public. The parties did not separate, but continued to cohabit as husband and wife, and in 1884 another child was born to them. In 1886 Theresa Gaster was adjudged insane and committed to one of the state hospitals for the insane, where she is still restrained of her liberty. On July 23, 1892, the contract was recorded in the office of the register of deeds of Cuming county. In 1901 Frederick Gaster executed his last will and testament, wherein and whereby all of his property is devised to his children, and no provision is made for his widow. In 1908 Gaster departed this life, and this will was subsequently admitted to probate in the county court of Cuming county. The contract was filed in the county judge's office at the time the will was probated. The estate has been administered. In March, 1910, in the decree of the county court of Cuming county distributing the residue of the personal property, one-fourth of the estate is adjudged to belong to the widow. At no time did the guardian of the insane woman, or any one in her behalf, file in the county judge's office an election that she would take an interest under the law in the estate of her deceased husband, or renouncing the will, but the guardian *ad litem*, before the decree of distribution was entered, orally stated to the county judge that he demanded for the insane woman one-fourth of her deceased husband's estate. The district court on appeal held that by the terms of the contract the widow "released all right, interest, claim, demand, privileges and dower in and to any and all of the real estate and personal property then owned by the said Frederick

Gaster, as well as to any and all property which the said Frederick Gaster may in the future acquire," and vacated the order of the county court.

We find little, if anything, in this contract to merit the approval of the law. It will be observed that the husband makes no provision for the support of his wife, nor yet for that of his infant child. At the time the writing was signed Gaster had no expectant interest in his wife's estate that could not have been cut off by her will. He had absolutely no right to control her property or to receive any part of the rents or profits therefrom, while she, by reason of the marital relation, had an inchoate dower estate in his lands which he could not bar without her deed, and a life estate in the homestead, if one existed. She also had the right to maintenance and support during her husband's life, and after his death, should she survive him, was entitled to liberal allowances by way of maintenance, and, if he died intestate, would be entitled to share in the distribution of his personal property. This right before his death was enlarged by legislation. We would be surprised to learn that such a contract had received judicial sanction in a court of last resort. But, however that may be, if it be conceded for the sake of argument that the contract was valid in its inception, it was abrogated by the subsequent conduct of the parties, and all of their marital rights were thereby restored. The controlling principle is ancient, and, so far as we are advised, has been enforced in an unbroken line of decisions wherever its integrity has been questioned. *St. John v. St. John,* 11 Ves. Jr. (Eng.) *526, *536; *Angier v. Angier,* Gilb. Rep. (Eng.) 152, 25 Eng. (reprint) 107; *O'Malley v. Blease,* 20 Law T. Rep. n. s. (Eng.) 899, 17 Weekly Rep. (Eng.) 952; *Nicol v. Nicol,* 55 Law J. Ch. n. s. (Eng.) 437. The last case is peculiarly in point, because the wife, after deeds of separation had been executed, cohabited for a short time with her husband, and subsequently became insane, and it was held that the deeds were annulled by the resumption of

marital relations. See, also, *Kehr v. Smith,* 20 Wall. (U. S.) 31; *Shelthar v. Gregory,* 2 Wend. (N. Y.) 422; *Smith v. King,* 107 N. Car. 273; *Stebbins v. Morris,* 19 Mont. 115; *Knapp v. Knapp,* 95 Mich. 474. In the instant case, not only were the marital relations uninterrupted, but a child was born subsequent to the execution of the contract. The fact that the instrument was filed for record six years after the wife became insane suggests the thought that the husband adopted a doubtful expedient in an attempt to relieve his property from this helpless woman's lawful demands. But, irrespective of motives, the instrument, in the circumstances of this case, is null and void.

It is argued, however, that since no election to take under the law was filed in the office of the county judge, and more than one year elapsed between the date of the letters testamentary and the entry of the decree of distribution, the widow is not entitled to the benefit of sections 1, 6, 7 and 176, ch. 23, Comp. St. 1911, which provide for the descent and distribution of the estates of deceased persons, and permit the widow, within one year after letters testamentary issue, to renounce the provisions of the will and take under the law. If it be conceded that the duty to elect exists and should be exercised by a widow for whom no provision is made in the will, we think that section 7, *supra,* which relates to time, does not bind an insane surviving spouse while in that mental condition. In the case at bar, the fact that the widow was insane having been made known to the judge, it was his duty to order such an election as would best protect her interests. While a formal election was not made, the oral demand of the guardian *ad litem* for one-fourth of the testator's estate was treated by the judge as his own act, became so by adoption, and was sufficient to protect her rights in the premises. The admission of the will to probate established only its due execution. So far as her interest in the real estate may be concerned, the order of the probate court would not prejudice her rights as against the devisees.

The judgment of the district court, therefore, is reversed and the cause remanded, with directions to affirm the judgment of the county court.

REVERSED.

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STATE, EX REL. FRANK M. TYRRELL, COUNTY ATTORNEY, APPELLANT, V. LINCOLN TRACTION COMPANY, APPELLEE.

FILED JANUARY 3, 1912. No. 17,232.

1. Quo Warranto: CORPORATIONS: USURPATION OF POWERS: ADMISSIONS: PARTIES. "An information in the nature of a *quo warranto* filed against a corporation by its corporate name admits the existence of the corporation. If the charge be that the corporation is exercising powers not given by its charter, the action proceeds against the corporation to oust it from the use of the usurped power; but, where it is claimed that corporate powers are being usurped by a body which has no corporate existence, then the action must be against the individuals who are usurping corporate rights." *State v. Lincoln Street R. Co.*, 80 Neb. 333.

2. Street Railways: CONSOLIDATION: CONSTITUTIONAL PROVISION. Section 3, art. XI of the constitution, which prohibits the consolidation of the stock, property, franchises or earnings in whole or in part of railroad corporations and telegraph companies owning parallel or competing lines, does not apply to street railway corporations not engaged in general railroad or telegraph business.

3. ———: ISSUANCE OF STOCK: CONSTITUTIONAL PROVISION. Section 5, art. XI of the constitution, which forbids a railroad corporation issuing any stocks or bonds except for money, labor or property actually received and applied to the purposes for which such corporation was created, does not apply to street railway corporations not engaged in general railroad business.

4. ———: CONSOLIDATION: DISSOLUTION: EVIDENCE. The mere fact that the directors of two street railway corporations, which are consolidated by virtue of the provisions of sections 6-12, art. VII, ch. 72, Comp. St. 1907, agreed to an exchange of the stocks and bonds and the assets of the constituent corporations for the consolidated corporation's stocks and bonds, the aggregate par value whereof greatly exceeds the value of the tangible assets of the constituent corporations, is not in itself such proof of fraud as will justify a dissolution of the consolidated corporation.

5. ———: VALUATION; EARNINGS: FARES. The valuation thus placed on the assets of the constituent corporations will not bind the railway commission in estimating the valuation upon which the corporation should earn an income, or in fixing the price the carrier may charge for transporting passengers.

6. ———: POWER OF COURTS: CANCELATION OF STOCK. A franchise to be and to do as a public service corporation is held in trust for the public, as well as for the profit of the stockholders, and it is competent for a court of general jurisdiction, having jurisdiction of the subject matter and of the parties in interest, to cancel bonds and stocks issued without consideration by such a corporation, where, to permit them to gain currency, will seriously impair its ability to discharge its duty to the public.

7. ———: CONSOLIDATION: INCREASE OF STOCK: CANCELATION. But if, in a consolidation of constituent street railway companies which theretofore satisfactorily served the public, all of their tangible property is conveyed to the consolidated corporation and subsequently improved, the mere fact that the stock and bond issues of the constituent corporations were doubled by the consolidated corporation, without greatly adding to the tangible assets, will not justify a cancelation of that stock.

8. ———: ———: CANCELATION OF STOCK. And if to cancel one class of that stock will take from part of the stockholders the consideration for their agreement to consolidate the constituent corporations and will not interfere with the consideration received by other stockholders, none of the stock should be canceled if the consolidation be permitted to continue.

9. **Quo Warranto:** DEFENSES. In proceedings in *quo warranto* prosecuted by the county attorney or the attorney general, the respondent should either disclaim or justify exercising the challenged franchise, and, in the latter event, should plead the precise authority for his or its conduct.

10. ———: PLEA OF JUSTIFICATION: BURDEN OF PROOF. And if the plea of justification is traversed by the reply, the burden is upon the respondent to establish his right.

11. ———: JUDGMENT AS BAR: CAUSES OF ACTION. A judgment responding to the sole issues, confirming the respondent's right to be and to exercise the franchises of operating a street railway, is no bar to subsequent *quo warranto* proceedings challenging the respondent's right to exercise the franchise of manufacturing, selling and distributing electric current for illumination and power purposes, or operating a heating plant in the same city, nor did the state split its cause of action by failing to include

in its first information a complaint with relation to the exercise of the last described franchise.

12. Judgment on Appeal. The respondent having failed to sustain the burden of proof cast upon it by the issues joined and the law, and the charges in the information being severable, the judgment will be affirmed as to those issues which the evidence discloses were properly determined, and reversed as to those upon which there is a failure of proof.

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

*J. B. Strode* and *F. M. Tyrrell,* for appellant.

*Charles S. Allen* and *Hainer & Smith, contra.*

ROOT, J.

This is an appeal by the state from a judgment in the respondent's favor on the issues joined in *quo warranto* proceedings.

In January, 1909, the Lincoln Traction Company and the Citizens' Railway Company, corporations, were separately operating lines of street railway in the city of Lincoln. The traction company also controlled a heat, light and power plant within that city. At this time the Citizens' Railway Company had outstanding $415,000 capital stock, which the railway commission subsequently found represented the investment of money and services of the reasonable value of $399,000. This corporation was organized about 1905, and there is uncontradicted evidence tending to prove that the increase in the market value of materials used in the construction of that railway at least equalled the depreciation thereof by use intermediate the organization of this corporation and February, 1909.

The traction company in January, 1909, had outstanding $700,000 of common stock, $189,000 of bonds, and a floating debt of $61,000, or gross liabilities of $1,280,000.

The amount of money invested by this corporation and its predecessors in interest in the properties of this corporation cannot be so definitely ascertained, because the traction company in 1909 was the successor in interest of several street railway companies that some 20 years previously constructed and subsequently operated distinct railway systems in that city. By an inevitable process of evolution, the original equipment of those railways was discarded, the ways improved, and the motor power changed from horse to electricity. In September, 1907, the railway commission found that the original cost of the properties of the traction company was $1,660,000, and that $606,000 had been expended in additions and improvements. We are not advised by the record whether any part of this $2,266,000 represents money expended for such ordinary maintenance as should be charged to operating expenses. If so, to that extent the expenditure would be no more of an investment than the money paid for wages or taxes. It seems, however, that the railway commission found that at the time of the hearing the total replacement value of the street railway was $1,100,000, and that the company's expert fixed that valuation at $1,151,672. As we understand the record, the traction company also had invested about $350,000 in subsidiary heat, light and power organizations. While the evidence is not definite, we are of the opinion that the heating plant was constructed and is ostensibly operated by a separate corporation. Whether the light and power industry is owned by a distinct corporation, separate from the street railway company, we are not definitely advised by the proof, but our impression is that the respondent assumes ownership of and the right to enjoy those franchises without the intervention of any other corporation or other person. The traction company was then earning net upon all of its properties $116,000 per annum.

February 1, 1909, the directors of these corporations, assuming to act under the provisions of section 6 *et seq.*,

art. VII, ch. 72, Comp. St. 1907, entered into a contract of consolidation, by the terms of which all of the property, tangible and intangible, of the constituent corporations was to become the property of the new corporation, which was also to be known as the Lincoln Traction Company. The authorized bond and stock issue of the new corporation is as follows: $1,500,000 of bonds, $250,000 of which were appropriated to retire the bonds issued by the elder traction company and the floating indebtedness; $1,500,000 of preferred stock entitled to a cumulative dividend of 6 per cent. per annum; and $2,000,000 of common stock entitled to the residue of the net earnings of the company. $770,000 of the new bonds were to be exchanged for the $700,000 preferred stock of the elder traction company. Holders of the $330,000 common stock of the elder company were to receive two shares of preferred stock and four shares of common stock in the consolidated corporation for every share of their common stock. The holders of the $415,000 stock issued by the Citizens Railway Company received a like amount of the preferred stock of the consolidated company and $332,000 of the common stock of that corporation. Provision was also made, in accordance with the requirements of the statute, to ascertain the value of and to pay in cash for any stock of either constituent corporation which the holder refused to exchange for stock in the consolidated corporation. The agreement was executed in triplicate, one copy whereof was filed in the office of the secretary of state, and one copy in the office of the county clerk of Lancaster county, and one copy was retained by the consolidated corporation. The agreement was accepted by more than two-thirds of the stockholders of the constituent corporations, and, so far as we are advised, no stockholder or creditor of either corporation has taken any exception to the proceedings. The result of this transaction was to increase by $770,000 the bonded debt of the combined corporations, to increase by $375,000 the preferred stock, and the common

stock was increased $1,322,000. In other words, before consolidation the gross stock and bonds liability of the constituent companies was $1,695,000, and, immediately after, that liability aggregated $3,747,000, an increase of $2,052,000.

There is considerable evidence concerning the value of the combined properties, and, as might be expected, the opinions are not harmonious, nor, in the view that we take of the case, is that fact material. The sole respondent is the consolidated corporation, sued in its corporate name. By this proceeding the state is estopped in this action to question the corporate existence of the respondent, nor has it made those persons parties upon whom a judgment of ouster could operate. *State v. Uridil,* 37 Neb. 371; *State v. Lincoln Street R. Co.,* 80 Neb. 333.

The state invokes article XI of the constitution to sustain its contention that the stock and bond issues should be canceled and the consolidation adjudged null and void. Among other things, section 3, art. XI, *supra,* forbids the consolidation of the stocks, property, franchises or earnings of two or more railroad corporations or telegraph companies owning competing or parallel lines, and section 5 of that article provides that no railroad corporation "shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created; and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void."

In *City of Lincoln v. Lincoln Street R. Co.,* 67 Neb. 469, 483, it was suggested, but not determined, that these provisions of the constitution do not apply to street railway companies. In the instant case we are of opinion that the point is fairly presented and should be determined. No such limitations appear in the constitution of 1866. It is a matter of common knowledge that many of the provisions of our constitution were taken from the

1870 constitution of Illinois. Sections 3 and 5, art. XI of the constitution of Nebraska, are quite similar to sections 11 and 13, art. XI of the 1870 constitution of Illinois. In 1870 the agitation which gave birth to the granger laws of the western states was active, and the people of Illinois were determined that competition should continue between the common carriers for hire of freight and passengers. These conditions existed in a more acute form in Nebraska in 1875, when our present constitution was adopted. The evils growing out of the circulation of railroad stocks and bonds that had been issued without consideration or for a grossly inadequate consideration were also known in 1870 and in 1875. But, so far as we are advised, street railways were not during those years considered an inviting field for exploitation, and the people of Nebraska gave that subject no more thought than to adopt section 4, art. XI, *supra,* which forbids the general assembly to grant the right to construct or operate a street railway within the limits of any city, town or incorporated village, without the consent of the local authorities having control of the streets and highways of the municipality. As we are advised, but one street railway had been constructed in this state in 1875.

In section 72 *et seq.,* ch. 25, Rev. St. 1866, may be found comprehensive provisions for the incorporation by general law of railroad companies. But it was not until 1877 that the legislature enacted statutes referring specifically to the incorporation of street railway companies. Laws, 1877, p. 135. It is not improbable that theretofore such corporations might have been formed under the provisions of section 123 *et seq.,* ch. 25, Rev. St. 1866, relating generally to corporations, yet in 1867 the territorial legislature granted a special charter to the Omaha Horse Railway Company to construct and operate a street railway in the city of Omaha and within a radius of five miles of its limits. The legislature, by the act of February 25, 1875, purported to grant to the

first corporation that should build and operate a street railway in any of the cities in Nebraska exclusive franchises for 25 years. 2 Complete Session Laws, p. 884. In 1875 Omaha was the only city in Nebraska containing sufficient population to justify the maintenance of a street railway. At that time there were no evil practices with respect to street railways to be remedied in Nebraska and no reason to expand by construction the popular definition of the word "railroad." In its broadest significance that word includes a street railway, but its meaning depends upon the context and general intent of the written law in which it is used. *City of Chicago v. Evans,* 24 Ill. 52. Because the administrative branch of the government, by a practical construction of a revenue law, had construed the word "railroad" to mean street railways, the supreme court of Florida so held. *Bloxham v. Consumers E. L. & Street R. Co.,* 36 Fla. 519, 51 Am. St. Rep. 44. But it is said in substance in that case, by Liddon, J., that the word generally applies to commercial railways engaged in the transportation for long distances of freight and passengers, whereas the words "street railway" apply solely to railways laid upon the surface and grade of the street, and so constructed as not to exclude the public from the use of that part of the street. In *State v. Duluth Gas & Water Co.,* 76 Minn. 96, 107, Mitchell, J., in classifying street railways and railroads, said: "Speaking generally, a street railway is local, derives its business from the streets along which it is operated, and is in aid of the local travel upon those streets, while a commercial railway usually derives its business, either directly, or indirectly through connecting roads, from a large area of territory, and not from the travel on the streets of those cities, either terminal or way stations, along which they happen to be constructed and operated. In fact, so far from being an aid or advantage, they are a positive impediment to the travel on such streets." See, also, *Carli v. Stillwater Street R. & T. Co.,* 28 Minn. 373; *Minneapolis & St. P.*

*S. R. Co. v. Manitou Forest Syndicate,* 101 Minn. 132; *Louisville & P. R. Co. v. Louisville City R. Co.,* 2 Duv. (Ky.) 175; *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672.

The terms of a constitution should be construed according to their plain and ordinary acceptation unless it is evident they were used in a legal or technical sense. *State v. Bacon,* 6 Neb. 286; *State v. Lancaster County,* 6 Neb. 474; *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67; *Wilcox v. People,* 90 Ill. 186, 196.

Considering the mischief which article XI of the constitution was adopted to remedy, the general history of the state in 1875, and giving the words in sections 3 and 5 of that article their ordinary meaning, we are of opinion that those sections were not intended to, do not purport to, and do not as a matter of law relate to, street railways. These constitutional provisions, therefore, do not authorize the court to dissolve the respondent or to cancel any part of its capital stock.

The relator, however, contends that, if it be conceded that the fundamental law does not authorize a judgment of dissolution, yet for other reasons all of the common stock should in this proceeding be canceled. To sustain this assertion the relator argues that, since the aggregate value of the tangible property of the constituent companies does not amount to the sum of the par value of the preferred stock and the bonds of the consolidated corporation, the directors and stockholders of the constituent and the consolidated corporations committed a fraud upon the public by issuing and delivering the common stock in controversy, that it impairs the credit of the consolidated corporation, permits its affairs to be controlled and managed by men whose interest in its welfare is speculative, and will materially interfere with the proper maintenance and extension of street car service and legitimate rate reductions.

We do not question the right of a court in a proper action to cancel corporate stock issued and delivered

without consideration, or in some instances under such circumstances as to perpetrate a fraud, and this is particularly true of quasi-public corporations, vested by law with power to be exercised for the public welfare, as well as for the stockholders' profit. The law condemns such *ultra vires* acts of those corporations as will seriously impair their ability to properly discharge their public duties. *McCarter v. Pitman, Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255. But in a proceeding to cancel such watered stock, if the court's judgment is not controlled by statute, the proofs relied on to establish the illegality of the stock should be clear to justify a cancelation, and the fact that property exchanged for stock is not worth in the market the par value of that stock will not ordinarily sustain a finding of fraud. In the instant case the relator's evidence tends to prove that the value of these properties did not in February, 1909, exceed $2,000,000 in value, while the respondent's evidence tended to prove that the properties, tangible and intangible, were then worth $3,300,000. *Memphis & L. R. Co., v. Dow*, 120 U. S. 287; *Sioux City, O. & W. R. Co. v. Manhattan Trust Co.*, 92 Fed. 428; *Wells v. Northern Trust Co.*, 195 Ill. 288, 296. If we accept the state's proof, there is no such discrepancy in values as to justify a judgment canceling the stock. But however this may be, the statute under which the consolidation is said to have been consummated does not in direct language or by fair intendment provide that the stock and bond issue of the consolidated corporation shall not exceed the combined issues of the constituent corporations, nor that the property of the consolidated corporation shall equal in value the par value of its stock and bond issue. This statute invites rather than restricts the inflation of stocks and bonds. If the consolidation was consummated, a new corporation was created. *Ohio & M. R. Co. v. People*, 123 Ill. 467. Should the common stock of the new corporation be canceled, it would be impossible to place the stockholders of the constituent companies in

their former position, because the older corporations for most purposes ceased to exist with the creation of the new corporation, and the agreement between the stockholders would be partially annulled. The owners of the common stock in the constituent companies were willing to exchange it for the stock of the consolidated corporation upon the terms agreed to. Is it within the province of the court to say that they shall trade on other terms? Connected with the contract to exchange was an agreement to permit the holders of preferred stock to barter their holdings for the consolidated corporation's bonds. Would the owners of the common stock of the constituent corporations have been willing to permit that substitution had they known that the terms of the agreement with respect to their stock could not be enforced and would not be respected? It is evident that the court cannot by any process of scaling down the common stock place the holders in the position they occupied before the consolidation. So far as the respondent's ability to serve the public, it owns all of the property devoted by its predecessors to that purpose, and has expended over $200,000 in improving its power plant and in extending its railway, and it is within the power of the railway commission to compel such additional expenditures as may be necessary to afford the public the service it is entitled to from the respondent, and its earnings are ample to pay for such improvements.

Nor will the valuation by implication fixed by the promotors of the consolidation concerning the value of the property of the constituent corporations and of their stocks and bonds bind the railway commission in determining in a proper case the investment upon which the respondent's stockholders should receive a return in the way of dividends, or the exact amount of the charges that may be exacted for transporting passengers. *Smyth v. Ames,* 169 U. S. 466; *San Diego Land & Town Co. v. National City,* 174 U. S. 739, 757; *Covington & Lexington Turnpike Road Co. v. Sandford,* 164 U. S. 578. We

therefore conclude that the relator has not made out a case justifying the court in these proceedings to direct the cancelation of the common stock.

This brings us to the relator's final contention that the respondent should be ousted from the privileges of distributing and selling electric current for illumination and power purposes, and distributing and selling heat to private consumers. The respondent suggests that, inasmuch as the articles of incorporation of the Citizens' Railway Company are not in evidence, we should presume that they authorize the exercise of those privileges. But the burden was not on the state to produce this proof.

Where an information in *quo warranto* presented by the law officer of the county or of the state charges the respondent with the unlawful exercise of corporate franchises, the answer should be either a disclaimer or a justification. In the latter event, the facts to exonerate the respondent should be pleaded. 32 Cyc. 1455; *State v. Tillma*, 32 Neb. 789. And if the information does not disclose that the state is demanding a forfeiture of franchises at one time legal, the burden is on the respondent. *State v. Davis*, 64 Neb. 499; 17 Ency. Pl. & Pr. 481.

The respondent answered that its remote assignor, the Lincoln Electric Railway Company, acquired light and power franchises, that in 1900 the city of Lincoln granted the earlier traction company franchises for those purposes, and in 1906, when the judgment in *State v. Lincoln Street R. Co.*, 80 Neb., 333, was rendered, the respondent therein had been for several years exercising those franchises. It is contended that the respondent is not acting *ultra vires* in the matters complained of, that the judgment in *State v. Lincoln Street R. Co.* is a bar to this action, not only because of the things adjudged, but that to hold otherwise will permit the state to split its cause of action, and that by inaction the state is estopped to maintain this branch of its case. None of the ordinances or charters pleaded are in evidence. If they were, an interesting question as

to the power of a street railway to accept and enjoy a heating, power or lighting franchise would be presented. The prayer of the information is for a dissolution of the respondent, or, if that relief be not granted, that its common stock and bond issue be canceled, "and for such other relief as the court may find necessary to render effectual its said judgment." Whether the relief contended for in the argument should be granted under this prayer is not discussed in the briefs, and will not be determined. The district judge filed a written opinion giving his reasons for the judgment, and no mention is made of the heat, lighting or power franchise, but his discussion relates solely to dissolving the respondent. In the journal entry, however, the finding is general in the respondent's favor, and the information is dismissed without reservation, so that it is probable, as a matter of law, that the judgment confirms the respondent in the right to exercise those franchises. The discussion of this subject is not satisfactory, and we prefer not to dispose of the law question in this state of the record. There is some evidence tending to prove that the heating plant was constructed by a distinct corporation, and that all of its stock is owned by the Lincoln Traction Company. But a few words of general argument are found in the briefs with respect to this branch of the case.

In *Nebraska Shirt Co. v. Horton*, 3 Neb. (Unof.) 888, we held that, unless authorized by statute, a corporation has no power to subscribe to the capital stock of another corporation. And the rule is applied to a banking corporation in *Bank of Commerce v. Hart*, 37 Neb. 197. Section 9, art. VII, ch. 72, Comp. St. 1907, authorizes street railway companies to subscribe to the stock of another street railway company whose lines of railway connect with those of the subscribing company, but we have not been cited to any statute authorizing street railway corporations to subscribe to the stock of corporations organized for the purpose of transacting any business other than a street railway. We find no reference in either brief to the law on this branch of the case.

As we understand the record, the respondent failed to sustain the burden of establishing its right to exercise heat, light or power franchises, and to this extent the judgment is not sustained by sufficient evidence. The respondent pleads the judgment in *State v. Lincoln Street R. Co.*, 80 Neb. 333, in bar, but an inspection of the record in that case (which we find in the bill of exceptions) discloses that the sole franchise there challenged was the right of the respondent to exist, or to operate a street railway in the city of Lincoln. No mention is made in the pleadings or judgment to light, power or heat franchises. The testimony to support the respondent's right to exercise the franchise of a street railway is not necessary to sustain the other, so not only was there no adjudication of the subject matter of the instant case, but there was no splitting of causes of action. 23 Cyc. 439; *State of Maine v. United States*, 36 Ct. Cl. 531.

Nor are we willing, in the state of this record, to say that the state is estopped by its laches from prosecuting these parts of its complaint. We think these issues should not be determined by us in the state of the record. Some other matters, we deem immaterial to the merits of the case, are referred to in the answer and in the briefs, but we do not believe we are justified in extending this opinion by further reference thereto.

The judgment of the district court is affirmed, in so far as it refuses to dissolve the respondent, or to cancel its bonds or common stock, but, as to all other issues joined by the pleadings, the judgment is reversed and the cause remanded; each party to pay its own costs in this court.

JUDGMENT ACCORDINGLY.

REESE, C. J., not sitting.

PRUDENTIAL REAL ESTATE COMPANY, APPELLANT, V. CHARLES BATTELLE, TRUSTEE, ET AL., APPELLEES.

FILED JANUARY 3, 1912. No. 17,303.

1. Taxation: FORECLOSURE OF LIEN: SALE: REFUSAL OF CONFIRMATION. It is competent for the district court to refuse to confirm a sale made in a state tax suit, in case the purchaser, during the period premium bids may be made, and in order to coerce the owner of the equity of redemption to purchase the certificate at a premium, threatens that, should a premium bid be made, he, the tax purchaser, will overbid that offer irrespective of the value of the property, and by repeated declarations pursues a course tending to intimidate other investors from raising his bid.
2. ———: ———: ———: ———: REPAYMENT OF BID. In such a case where there is no proof of wrong-doing prior to the payment of the bid made at the sale, the court should not forfeit the purchaser's money or money paid by him for subsequent taxes, but should make such equitable orders as may be necessary to insure a return to the purchaser of his money.

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

*D. C. Patterson,* for appellant.

*Alfred G. Ellick, James P. English, John A. Rine, W. C. Lambert* and *Clinton Brome, contra.*

ROOT, J.

This is an appeal from an order made in the state tax suit for 1904, in Douglas county, refusing to confirm, but vacating, a sale, ordering a resale, and forfeiting the purchaser's bid and money paid for subsequent taxes.

In 1905 the real estate described in the transcript was purchased for $50 by D. C. Patterson at a sale conducted in the state tax suit. Subsequently the certificate was assigned to the Prudential Real Estate Company. The taxes with interest at that time amounted to $404.06 and the lot was probably worth a little less. There is a direct

conflict in the testimony concerning the subsequent conduct of Mr. Patterson, but since the witnesses appeared before the district court, we are inclined to accept its version of the transaction. Taking that view of the case, we find that within 12 months after the sale Mr. Patterson in conversations with Mr. Battelle, the owner of the real estate, said that, if the Patterson bid was raised, he (Patterson), without regard to the value of the property, would bid a greater sum, and that Battelle therefore had but one of two courses to pursue, i. e., redeem by paying the face of the decree with interest and costs, or purchase the Patterson certificate, which was offered for about $225. Mr. Patterson purchased many tracts of land at this sale, and subsequently transmitted to the owners of the equity of redemption statements advising them of the amount of the decree, the amount of his bid, and offering to sell the certificate for one-half the difference between the sum of the taxes and his bid. These letters inform the reader that the law gives the tax purchaser the last opportunity to bid, that Mr. Patterson acted in the interest of a third person in making the purchase, and closed with the statement, "My orders are to raise all premium bids, but offer to sell on the same basis after as before, but add the premium and costs of serving notices and later taxes paid."

The statute under which these proceedings were prosecuted (laws 1903, ch. 75, Ann. St. 1911, sec. 11144 *et seq.*), among other things, provides in substance that the state tax suit may be instituted against all lots and parcels of land against which there are unpaid and delinquent taxes. The proceedings up to the time of the sale are summary in their nature. The sale is at public vendue and the purchaser is required to forthwith deposit the amount of his bid with the county treasurer. Within 18 months the treasurer is authorized to accept a premium bid for not less than the original bid plus 10 per cent., and 18 per cent. interest on the first bid. The original bidder is given five days subsequent to the 18 months

within which he may increase the highest premium bid by 5 per cent. should he desire to consummate his tax purchase. It will be understood that, with this statute controlling the rights of the parties, an extensive investor in tax certificates could with profit finally bid more than some of the lots he was interested in were worth, in order to compel the owners of other lots to come to his terms and purchase his certificates at a considerable increase over his bid, and yet for less than the aggregate of taxes against their property, in the hope and belief that thereby they would relieve their land from the burden of the unpaid taxes. Under this statute the tax sale in the state tax suit would not actually be closed until 18 months for premium bids expired, if no premium bids were made, or until five days thereafter, if such bids had been made. At the end of two years subsequent to the sale, the holder of the tax certificate, upon notice, may apply to the district court to confirm the sale and order a deed executed. At this time interested persons may interpose their objections.

In the instant case Mr. Battelle objected to the confirmation because of Mr. Patterson's conduct. The county attorney also intervened on behalf of the public and made like objections. No offer had been made to increase the bid, as was done in *Prudential Real Estate Co. v. Hall,* 79 Neb. 805, but the district court was justified in believing that a substantially increased bid would be made at a subsequent sale. While the proceedings in the state tax suit are in some particulars summary, yet section 11151, Ann. St. 1911, provides that, in so far as the procedure is not controlled by the terms of the statute, it "shall be the usual practice of courts of chancery in this state." The sale is conducted by the treasurer and not by the sheriff, but he acts under the authority of the decree of the district court. If, upon confirmation, it is made evident to the court that sharp practice has been indulged to the disadvantage of the public, it has the undoubted right to refuse to confirm the sale, and the authority to make such

orders in the premises as will protect all parties in interest. *Prudential Real Estate Co. v. Hall, supra.*

The appellant contends that, since section 4, art. IX of the constitution, prohibits the commutation or release of taxes lawfully levied, the county treasurer had no authority to accept a premium bid from the owner of the real estate, but that his sole remedies are to redeem from the decree or to purchase the certificate. We do not think it necessary to decide this point. Had the owner bid and paid to the county treasurer the minimum amount of the premium bid, the public would have been that much better off, so that whether the legal effect would have been a payment to that extent of the tax lien or a liquidation of the incumbrance, the public were prejudiced by Mr. Patterson's conduct. We are not inclined to accept his argument that he was only asserting his intention to exercise a right given by the law. Nor does the plea that Mr. Patterson was not authorized by the holder of the certificate to make these representations appear to us as sound. Patterson was acting for his principal and it will not be permitted to accept the benefits and reject the burdens created by his unlawful acts.

While we approve the order of the district court refusing confirmation, setting aside the sale, and ordering the treasurer to again offer the lot for sale, we do not commend the judgment of forfeiture. No irregularities attended the bid, nor the payment of the subsequent taxes assessed. It has ever been the policy of this state to protect a tax purchaser who in good faith has paid to the treasurer money in satisfaction of a tax purchase, although it may subsequently appear that the sale was void. *Pettit v. Black,* 8 Neb. 52; *John v. Connell,* 61 Neb. 267. Ordinarily this is done by subrogating the purchaser to the right of the state. In the instant case, should the tax purchaser be merely subrogated to the rights of the public, he may be compelled to prorate his payments with the amount of the unpaid taxes, and, should the land sell for less than the aggregate of these sums, he will not be pro-

tected. The amount of the bid is in the possession of the treasurer, but the money paid to satisfy subsequent taxes has been distributed and paid out for the benefit of the public.

The judgment of the district court therefore is affirmed, in so far as it refuses confirmation, sets aside the sale, and orders a resale; but, as to the forfeiture, the judgment is reversed and the cause remanded, with instructions to enter an order directing the county treasurer to pay to the appellant the amount of Mr. Patterson's bid on the land lot in controversy, add to the decree the subsequent taxes paid, and adjudge that the money paid for those subsequent taxes, together with 10 per cent. annual interest thereon, shall be a first lien upon the proceeds of the sale of the premises; the appellant to recover its costs in this court.

JUDGMENT ACCORDINGLY.

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## J. K. ARMSBY COMPANY, APPELLANT, V. RAYMOND BROTHERS-CLARKE COMPANY, APPELLEE.*

FILED JANUARY 3, 1912. No. 16,563.

1. **Sales:** REFUSAL TO ACCEPT GOODS: ACTION FOR DAMAGES: CAPACITY TO SUE. A purchaser who by a valid written contract induced a nonresident corporation, in compliance therewith, to deliver to a carrier for shipment the goods purchased, and attempted without cause to rescind the purchase while the goods were in transit, will not, in an action for damages for refusing to accept the consignment, be heard to assert that plaintiff has not legal capacity to sue.
2. **Corporations:** ACTION: PLEADING: NONCOMPLIANCE WITH STATUTE AS DEFENSE. A defendant who relies for a defense upon the plaintiff's failure to comply with the act (Comp. St. 1907, ch. 16) requiring a nonresident corporation to become a domestic corporation, before transacting business in Nebraska, should plead and prove facts showing noncompliance with such statute.

* Rehearing denied. See opinion, p. 773, *post*.

3. Sales: RESCISSION: LIABILITY FOR DAMAGES. After goods have been sold and delivered to a carrier for shipment pursuant to a valid contract in writing, the purchaser, in absence of the seller's consent, cannot rescind the purchase on account of a financial depression alone without incurring liability for resulting damages.

4. ———: ———: RESALE: DAMAGES RECOVERABLE. Where an Illinois corporation, having an agency in Omaha, sells dried fruit and delivers it to a carrier in California for shipment to the purchaser at Lincoln, Nebraska, pursuant to a valid written contract and a custom of the parties, the seller may divert the shipment to Omaha, resell the fruit there or in neighboring markets within a reasonable time for the best prices obtainable, and recover from the purchaser proper charges for storage, insurance, and freight, which the latter agreed to pay, and also the difference between the contract prices and the prices for which the goods were resold, if the purchaser without cause attempted to rescind the purchase, while the fruit was in transit in a car-load lot containing goods ordered by other purchasers, and absolutely refused to accept the consignment any place under any circumstances.

5. ———: ———: ———: UNREASONABLE DELAY. Whether a resale of goods, purchased by a dealer who refused without cause to accept them, was unreasonably delayed depends upon the facts and circumstances of each particular case.

6. ———: ———: ACTION FOR DAMAGES: PLEADING: NOTICE OF RESALE. In a suit by a seller to recover from the purchaser the difference between the contract prices and the prices for which the goods purchased were resold, after the purchaser without cause absolutely refused to accept them, it is unnecessary for plaintiff to allege that defendant had notice of the resales, where the petition contains allegations showing the latter had notice of the facts under which plaintiff's right to make the resales existed.

7. ———: ———: ———: ———: TENDER. Where the purchaser of goods delivered to a carrier in California for shipment to Lincoln, Nebraska, absolutely refuses without cause, while the goods are in transit, to accept them anywhere under any circumstances, it is unnecessary for the seller, after diverting them to Omaha for storage and resale, in a suit to recover damages for breach of the contract, to allege and prove that the consignments were tendered to the purchaser at Lincoln, the latter having been repeatedly requested to accept them there.

8. ———: NONACCEPTANCE: GROUNDS FOR REFUSAL. Where a purchaser of goods absolutely refused to accept them on the sole ground

of an unexpected financial depression, other grounds, in absence of fraud, need not be considered in a suit by the purchaser to recover the difference between the contract prices and the prices for which the goods were resold, if they complied with the contract of purchase in kind, quality and quantity.

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

*Parish & Martin, T. J. Doyle* and *G. L. DeLacy,* for appellant.

*Charles O. Whedon, contra.*

ROSE, J.

This is an action to recover damages for defendant's breach of contract to accept and pay for the following items of dried fruit purchased from plaintiff, an Illinois corporation transacting business in California:

100 25-pound boxes extra choice ½ pears at 12½c. a pound.

100 25-pound boxes extra choice apricots at 22c. a pound.

200 50-pound boxes Muir peaches at 10½c. a pound.

30 25-pound boxes extra choice ½ pears, at agreed price of $93.75.

In the petition the substance of facts pleaded in detail is: Pursuant to contracts executed in writing in October, 1907, plaintiff delivered on board a car at Marysville, California, November 20, 1907, the first three of the items named, defendant to pay freight at car-load rates to Lincoln, Nebraska, the purchaser's place of business. Under a contract dated July 26, 1907, the fourth item was delivered on board a car at Fresno, California, November 18, 1907, defendant to pay freight at car-load rates to Lincoln, Nebraska. Through defendant's failure to accept the fruit according to agreement, plaintiff stored and insured it in Omaha, afterward resold it, and was damaged in the sum of $648.42, the difference between the

contract price and the amount for which it was resold, charges for freight, storage and insurance being added as elements of damage.

The execution of the contracts of purchase was admitted by an answer, in which defendant alleged that they were negotiated by Gable, Johnson & Jones, agents of plaintiff at Omaha; that through a letter written by defendant November 18, 1907, to plaintiff at San Francisco and through a letter to the agents named, the orders for the Marysville consignments were duly countermanded; that none of such fruit was ever delivered to or received by defendant or was ever in its possession; that the Fresno consignment was never sent to or received by defendant and was never in its possession; that if any fruit was delivered on board of a car at Marysville and consigned to defendant at Lincoln, as alleged in the petition, plaintiff stopped the car in transit and diverted it to Omaha, and the consignment was never received by defendant at Lincoln. Defendant in its answer denied all allegations of the petition not specifically admitted, and the reply was a general denial.

The case was tried to a jury, and at the close of plaintiff's testimony each party requested a peremptory instruction; the motion of defendant being based on the ground that "under the pleadings and proof the plaintiff is not entitled to recover." The motion of defendant was formally sustained and the action dismissed. Plaintiff has appealed.

Plaintiff argues that its petition states a cause of action for damages resulting from defendant's breach of contract to accept the fruit; that each consignment had been taken by the carrier from the shipping place and was in transit before plaintiff received any notice of a purpose on part of defendant to countermand the orders; that there was no cause to rescind the contract of purchase; that the full amount of plaintiff's claim was established by uncontradicted testimony; that there is no evidence to sustain the verdict in favor of defendant; and

that the overruling of plaintiff's motion for a peremptory instruction was erroneous.

Defendant offered no proofs. Plaintiff's evidence tended to show: The goods shipped complied with the contract of purchase in kind, quantity and quality. Before plaintiff received any notice from defendant of its attempt to cancel the contracts of purchase, the fruit ordered had been purchased by plaintiff for shipment, had been packed in a car at the proper shipping place in California, had been billed, and had been turned over to the carrier and had been started on its way to Nebraska. The carrier took the car from the plaintiff's packing-house switch November 20, 1907. In the afternoon, November 21, 1907, plaintiff received from defendant a letter dated at Lincoln, November 18, 1907. It contained a request for the cancelation of the orders for the fruit shipped from Marysville; the reason given by defendant being: "Financial conditions are such here that we cannot handle these goods, and therefore we ask you to cancel our orders as we cannot take the goods." Defendant was advised that the fruit had been shipped and that the sale could not be rescinded. Afterward, while the fruit was in transit, defendant wrote to plaintiff as follows: "Lincoln, Neb., Nov. 23, 1907. The J. K. Armsby Co., San Francisco, Calif. Gentlemen: Gabel, Johnson & Jones of Omaha sent us your letter and telegram stating you could not cancel our order for dried fruits. We notify you that we will not accept the goods. We countermanded the order and will not take the goods under any circumstances. This is positive. We gave you the proper reasons for countermanding the order and we can not take the goods, and ask you to make disposition of same. The cancelation was sent to you in ample time and we ask you to act accordingly. Yours truly, Raymond Bros.-Clarke Co. By I. M. Raymond."

The only reasons offered by defendant for attempting to cancel the order were financial conditions and inability to pay for the fruit. There was no intimation of fraud on

the part of plaintiff. After repeated attempts to persuade defendant to accept the consignments, and after the latter had positively refused to do so under any circumstances, they were diverted to Omaha, where plaintiff had an agency. Later the fruit was resold for the best prices obtainable. The proof shows the original prices, the sums realized from resales, the amount of freight charges which defendant agreed to pay, and the cost of storage and insurance.

To justify the judgment of dismissal, defendant insists that the record shows plaintiff has no legal capacity to sue. This point is based on the following propositions: The petition alleges that plaintiff is an Illinois corporation. Incorporation is denied by the answer. Plaintiff has not complied with the law permitting non-resident corporations to transact business in this state. To the introduction of testimony defendant interposed a demurrer *ore tenus*. The peremptory instruction for defendant, however, cannot be sustained on this ground. Defendant admitted that it entered into the contracts of purchase, and in the answer containing the admission their validity is not questioned. Through these contracts plaintiff was induced to buy, sell to defendant, and ship the fruit. Under such circumstances defendant will not be heard to question plaintiff's legal capacity to sue. *Union Pacific Lodge v. Bankers Surety Co.*, 79 Neb. 801.

It is further argued that plaintiff, being a foreign corporation, was not entitled to a recovery without becoming a domestic corporation by filing its articles of association with the secretary of state, and by complying with other statutory provisions before transacting business in Nebraska. Comp. St. 1907, ch. 16. In this respect there is nothing in the record to show that plaintiff had not complied with the statute cited. Noncompliance is a defense which, to be available, must be pleaded. No such plea having been made by defendant, it will be presumed that plaintiff complied with the law. *Northern Assurance Co. v. Borgelt*, 67 Neb. 282. It follows that the judgment cannot be upheld on this ground.

Defendant insists it had a right to cancel the contracts and exercised that right November 18, 1907, before the goods were delivered to the carrier. The foundation for this assertion is a letter written by defendant to, and received by, plaintiff's Omaha agents November 18, 1907. The argument is that notice to the agents is notice to the principal. The letter contained the statement that defendant had written to plaintiff to cancel the Marysville orders, and asking the agents to write to their principal and request it not to ship the goods. The proofs show that the agents promptly wrote the requested letter, which was not received by plaintiff until the afternoon of November 21, 1907, after the goods had been shipped. This does not amount to a rescission relieving the purchaser from its agreement to accept the fruit purchased or for the consequences of violating its contract.

Among other propositions advanced by defendant are these: Had a cause of action been stated, the measure of damages would have been the difference between the contract prices at Marysville November 18, 1907, when the fruit was delivered to the carrier, and the market prices at that place, where the contract was broken. The market price at the time and place mentioned is not pleaded and there is no proof of such prices anywhere. Plaintiff does not allege that it gave notice of the resales. They were made at Omaha, Hastings, Grand Island, Kansas City and Atchison, six months after the alleged breach of contract. Proof of such resales and of the prices realized was improperly admitted. If plaintiff had a right to make such resales, they should have been made at the time and place where the breach occurred. Since the measure of recovery is not pleaded or proved there can be no recovery.

In the present case there are reasons why plaintiff's rights should not be determined according to such views. The proofs show that, pursuant to a custom between the parties, the fruit was shipped in a car containing other goods. Under this custom defendant obtained the benefit of freight charges at car-load rates from the place of

shipment to Lincoln. The shipment was made in the usual course of business. Notice of defendant's purpose to countermand the orders was received while the fruit was in transit. No valid ground for rescinding the contract of purchase was given. Under such circumstances plaintiff was neither required by law nor morals to interfere with the consignments to other customers, nor to require the carrier to return to the place of shipment the goods purchased by defendant, because it broke its contract there. During the time the goods were in transit plaintiff tried to persuade the purchaser to keep its bargain. If a breach originally occurred at Marysville, defendant was nevertheless under obligation to accept the goods at Lincoln, and the absolute refusal to do so was also a violation of the contract. Defendant having arbitrarily refused to accept the goods anywhere, it became the duty of plaintiff to take charge of them for the purpose of lessening the purchaser's damages. Plaintiff was engaged in the business of selling dried fruit, and under the circumstances of this case the consignments were properly diverted to Omaha for storage and resale, there being a storage house and an agency at that place. In failing to allege notice of the resales the petition was not demurrable. It showed the absolute refusal of the purchaser to comply with the contract of sale. It also contained allegations showing that defendant had notice of facts under which plaintiff's right to make the resales existed. Plaintiff was not required to allege notice under the circumstances disclosed. *Ingram v. Matthien,* 3 Mo. 209; *Rosenbaums v. Weeden, Johnson & Co.,* 18 Grat. (Va.) 785; *Waples & Co. v. Overaker & Co.,* 77 Tex. 7; *Lindon v. Eldred,* 49 Wis. 305; *Clore v. Robinson,* 100 Ky. 402. If the goods were not resold in either Lincoln or Omaha, the proof shows without contradiction that they were resold in neighboring markets for the best prices obtainable. This was sufficient evidence of the market value to make, in that respect, a *prima facie* case. *Ingram v. Wackernagel,* 83 Ia. 82; *Waples & Co. v. Overaker & Co.,*

77 Tex. 7; *Rickey v. Tenbroeck,* 63 Mo. 563; *Gehl v. Milwaukee Produce Co.,* 116 Wis. 263; *Moody v. McTaggart,* 29 Pa. Super. Ct. 465; *Lewis v. Greider,* 49 Barb. (N. Y.) 606; *Anderson v. Frank,* 45 Mo. App. 482. Whether a resale is unreasonably delayed depends upon the facts and circumstances of each case. *Almy v. Simonson,* 52 Hun (N. Y.) 535; *Lewis v. Greider,* 49 Barb. (N. Y.) 606; *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.,* 91 Wis. 667. In determining whether there was an unreasonable delay in reselling the goods, and whether plaintiff should recover the expense of storage and insurance as elements of damage, it was proper for the trial court to take into consideration judicial knowledge that there was a general depression in business after the goods were delivered to the carrier at the time disclosed by the proofs, and the fact that financial conditions arising unexpectedly after the goods were purchased led to defendant's attempt to countermand the orders. It was proper also to inquire whether a careful dealer would make a hasty sale during such a period, and whether conditions justified the expense of storage and insurance. Without regard to such expenses, the payment of freight charges, which defendant agreed to pay, was a direct and natural result of his breach of contract, and such charges are recoverable as damages. For the mere idle purpose of being able to prove that the goods had been tendered to defendant at Lincoln, plaintiff was not required to incur the additional expense of shipping them to that place, since defendant had refused absolutely to accept them in any event. The freight charges to both places were the same. *Lex neminem cogit ad vana seu inutilia peragenda.*

Failure of plaintiff to deliver the goods to the carrier according to the terms of the contract is another reason urged by defendant to justify the peremptory instruction in its favor. This position is also untenable. As already shown, plaintiff is seeking to recover damages for defendant's breach of contract to accept the fruit purchased. The only reason offered by defendant for attempting to

cancel the order was the condition of the money market and inability to pay the purchase price. Rejection of the goods on other grounds need not therefore be considered. *Ginn v. W. C. Clark Coal Co.*, 143 Mich. 84; *Littlejohn v. Shaw*, 159 N. Y. 188.

The petition states a cause of action. Plaintiff's proofs are not contradicted. Both parties, by requesting a peremptory instruction, invited the judgment of the court on the issues and facts. The judgment should have been in favor of plaintiff, and must for that reason be reversed. In the further proceedings, however, the trial court should not retry the case or retrace its steps beyond the point where the error in directing a verdict in favor of defendant was committed, but should render judgment in favor of plaintiff for the damages proved.

REVERSED.

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E. S. JOSEPHINE TAYLOR, APPELLEE, V. W. E. HARVEY ET AL., APPELLANTS.

FILED JANUARY 3, 1912. No. 16,849.

1. **Taxation: LIEN OF GENERAL TAXES.** Under the revenue laws of Nebraska, general taxes on real estate do not become a lien thereon until October 1st of the year in which they are levied. Comp. St. 1907, ch. 77, art. I, sec. 14.

2. **Deeds: COVENANTS AGAINST INCUMBRANCES: BREACH: TAXES.** In a warranty deed a covenant against incumbrances is not broken by grantor's nonpayment of taxes which do not become a lien on the land conveyed until after the deed is executed and delivered.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Affirmed.*

*William Morrow*, for appellants.

*L. L. Raymond, James E. Philpott* and *R. C. Hunter, contra.*

ROSE, J.

Foreclosure of a purchase-money mortgage on a tract of land in Scott's Bluff county is the relief sought by plaintiff. The trial court rendered a decree in her favor, and defendants have appealed.

September 14, 1908, A. O. Taylor, by warranty deed in which his wife, E. S. Josephine Taylor, joined for the purpose of relinquishing her dower rights, conveyed the land to W. E. Harvey. The latter and his wife, Cora E. Harvey, are mortgagors, and A. O. Taylor is mortgagee. The mortgage was dated September 14, 1908, and was given to secure a 9,000-dollar note due March 1, 1916, and interest. The same day the mortgage was executed, mortgagee assigned it to his wife, plaintiff herein, and mortgagors deeded the land to the Scott's Bluff Irrigated Land Corporation. The mortgagors and their grantee are defendants. The mortgage provides: "If the taxes and assessments of every nature, which are assessed or levied against said premises, are not paid at the time when the same are by law made due and payable, then * * * the whole of said sum shall immediately become due and payable, without notice, at the election of the mortgagee." Under this provision plaintiff, for defendants' nonpayment of taxes which became a lien on the land October 1, 1908, declared the entire debt to be due and commenced this suit August 31, 1909. The warranty deed executed by plaintiff and her husband contained these words: "We do hereby covenant with the said W. E. Harvey, and with his heirs and assigns, that we are lawfully seized of said premises, and that they are free from incumbrances."

1. In arguing the first assignment of error, defendants assert: The taxes in controversy were assessed and levied and were an incumbrance on the land before plaintiff executed the deed September 14, 1908. Nonpayment thereof was a breach of her covenant against incumbrances. Having herself failed to pay the taxes, she is

not entitled to a foreclosure of her mortgage on account of defendants' failure to pay them. This view of the law cannot be adopted. Though general taxes on real estate are assessed and levied before October 1st, they do not become a lien or an incumbrance at an earlier date. The revenue law provides: "Taxes on real property shall be a first lien thereon from and including the first day of October of the year in which they are levied until the same are paid." Comp. St. 1907, ch. 77, art. I, sec. 14. The lien of taxes is a creation of the legislature. It attaches only at the time provided by statute. The parties made their contracts with reference to the existing laws. When plaintiff executed her warranty deed September 14, 1908, the general taxes for that year had not become a lien. At that time the land was free from the incumbrance of the general taxes for 1908, for the reason that the legislature fixed a later date for making them a lien. Her covenant, therefore, was not broken by her failure to pay them. On the other hand, mortgagors agreed to pay taxes and assessments of every nature when due and payable, on peril of subjecting the mortgage to foreclosure. The general taxes due and payable October 1, 1908, were not paid until after plaintiff sued defendants. In exercising her right to declare the entire debt to be due, therefore, she was within the terms of her contract.

2. Another defense urged is that the county treasurer would not accept the taxes on the mortgaged land without payment also of unpaid taxes on adjoining lands, which plaintiff herself was under obligation to pay. The evidence does not sustain this defense. It is shown without contradiction that taxes levied alone on at least a portion of the mortgaged land, and which became a lien October 1, 1908, were due and unpaid when plaintiff exercised her right to declare the entire debt to be due. For the reason no valid defense was established, a decree of foreclosure was properly rendered.

AFFIRMED.

## JOHN G. LOWE, APPELLEE, V. FRANCIS G. KEENS, APPELLANT.

FILED JANUARY 3, 1912. No. 16,926.

1. **Pleading**: INCONSISTENT PLEAS: APPEAL: WAIVER. Where defendant goes to trial on the issues raised by the pleadings as a whole, without attacking the reply in any form on the ground that it is inconsistent with the petition or that it changes the cause of action, it may be held on appeal that he waived those objections.
2. **Contracts**: ACTION ON SUBSCRIPTION: ESTOPPEL. In a suit on a subscription obligating defendant to pay one-fourth of the cost of the nave of a church edifice, plaintiff, under proper pleadings, may prove facts showing defendant was estopped by subsequent conduct and statements from urging the defense that the entire building, including such nave and the chancel, was constructed at one time, instead of the nave alone, as contemplated by the subscription and the original plans.
3. **Evidence**: COST OF CONSTRUCTION OF BUILDING. The cost of a nave constructed with the chancel and other parts of a church edifice may be shown by builders and contractors who are competent to testify to separate items comprising the total cost of the entire structure and to the proportion and amount attributable to the nave.
4. **Appeal**: EXCESSIVE RECOVERY. In an action at law, excess in the amount of the recovery should be called to the attention of the trial court by the motion for a new trial to make the error available on appeal.

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

*H. M. Sinclair* and *W. D. Oldham,* for appellant.

*J. N. Dryden* and *E. C. Calkins, contra.*

ROSE, J.

This is a suit on a subscription of which the following is a copy: "Kearney, Nebraska, June 7, 1907. I hereby agree to pay one-fourth the cost of the 82 feet of church edifice with tower, voted on April 11, 1907, to be built by

the building committee of St. Luke's Episcopal Church, to John G. Lowe, Treasurer of St. Luke's Episcopal Church Building Fund, for the benefit of St. Luke's Church, Kearney, Nebraska, and for the purpose of erecting upon their present site in the City of Kearney, Nebraska, a permanent church building; said subscription to be paid as follows: One-fourth the amount of each and and every builder's estimate when allowed and paid by the finance committee of said church building fund. Francis G. Keens."

Among other things, it is alleged in the petition: There was full compliance on the part of plaintiff with the terms of the contract. The total cost of that part of the church edifice described in the subscription was $18,907.96. Builders' estimates therefor were allowed and paid prior to April 28, 1909. Defendant made payments as follows: October 12, 1907, $175; December 4, 1907, $250. There was a prayer for judgment in the sum of $4,336.99—the balance due. The signing of the instrument is admitted in the answer, but defendant alleges that it was signed pursuant to subscriptions taken April 11, 1907, at a meeting of the vestry, the minutes of which showed it was moved and carried that "We procure plans for a church of about the following dimensions, viz., 130 ft. long, 48 ft. wide, 48 ft. high, and that we complete at this time a part equal to about 82 ft. in length, with the tower." In the answer it was further alleged, in substance: The rector invited gifts toward the expense of the building, and obtained defendant's pledge with that of twelve others for contributions to be expended upon the 82 feet of church edifice mentioned, commonly called the "nave." Afterward, but before defendant executed the contract, plans for the nave were procured according to the action taken by the vestry. Defendant signed and delivered the contract relying on such plans, and in accordance therewith the foundation was constructed. It was upon the cost of such foundation that defendant made his payments. He left the United States January 1,

1909, and was absent several months, but at the time of his departure no work of construction had been done except upon the foundation. During his absence, and without his knowledge or consent, the plans for the edifice to which he had subscribed were abandoned and others for a building materially different in dimensions, materials and foundation were substituted and used. It was a condition of his obligation that no debt should be incurred, unless funds for the payment thereof were provided, and that the edifice, when completed, should be free from debts or liens. In disregard of this condition the property was mortgaged for $8,000, and other debts were incurred, but not paid. Though the building committee was instructed to let to the lowest competent bidder a contract for the building of the superstructure of the nave, all bids were fraudulently rejected and the building was constructed by hired labor under direction of a superintendent, thereby making an excessive expense of $10,000, to which defendant did not agree to contribute. The reply is as follows:

"Now comes the above named plaintiff and, for reply to the answer of the defendant herein filed, says:

"(1) That it is true that defendant's subscription, as set forth in said petition, was made in pursuance of a pledge by him given at the meeting of the vestry of said church held April 11, 1907, the minutes of which are copied in defendant's answer.

"(2) That it is untrue that, before the execution of the defendant's contract set out in plaintiff's petition, plans were procured for the 82 feet constituting the nave of said church, or that such plans, or any plan, was submitted to the defendant as the one according to which said edifice should be erected.

"(3) That in truth and in fact the building committee of said church, which included the defendant, negotiated with an architect, named Guth, to prepare plans, elevations, working drawings, details and specifications for the erection of said church; and after discussing with

the said building committee the general features of the church to be erected, the said architect prepared a plan for the foundation of the nave and chancel of said church, according to which said foundation was constructed; but that he failed, neglected and refused to make and furnish any further plans, elevations, working drawings, details or specifications or any plan whatever for the superstructure of said church; and that no such plans were made until another architect was employed, who made and furnished the plans, other than the foundation, according to which said building was constructed.

"(4) That the said defendant, after such other architect was employed, and knowing that the building committee was proceeding with the erection of said church upon plans furnished by such second architect, when requested to attend the meetings of the building committee of which he was a member, told the other members of such committee that he did not care to attend such meetings, but that they should go on with the construction of said building, and that the money which he had subscribed would be ready for them.

"(5) That it is untrue that the obligation mentioned in said petition was assumed by defendant on condition that there should be no debt contracted in building said edifice unless there were funds provided for the payment thereof.

"(6) That after the commencement of said work, the church received a gift made for the purpose of assisting in the erection of a chancel at the same time with the nave of said church; and that it was thereupon determined to construct the entire church; and that at the time this determination was made the defendant was a member of the building committee, approved the same, and himself let the contract for constructing the foundation of the chancel.

"(7) That it is true that the building committee of said church, after having had and received bids for the construction thereof, employed a superintendent and erected

said church under his direction; but that it is untrue that the cost of said church was in excess of the lowest bid received from any person offering to erect the same by contract.

"(8) The plaintiff further replying to the answer of said defendant denies each and every allegation therein contained not hereinbefore admitted or denied."

The case was tried to the court without a jury, and there was a judgment in favor of plaintiff for $4,299.25. Defendant has appealed.

The record contains evidence tending to prove: The foundation for the nave and the chancel was constructed under separate contracts according to plans prepared by the architect first consulted, but the building committee was unable to procure from him plans for the superstructure. Another architect was employed for that purpose and prepared the plans used for the superstructure of the entire building, including the nave with tower and the chancel, which were constructed together under his supervision. Different parts of the work were let to different contractors. One-fourth of the cost of the 82 feet of edifice with the tower, as described in the subscription, was shown by estimates of contractors and builders. There was also proof tending to show facts estopping defendant from asserting nonliability on account of changes and of the construction of all instead of a part of the church edifice.

It is first argued that the judgment should be reversed because the allegations of the petition are not sustained by the evidence. In an abbreviated form some of the propositions discussed by defendant under this head are: Plaintiff was only entitled to recover, if at all, upon the contract pleaded in the petition, and there is no evidence that the building committee complied therewith. It was not shown that the nave with tower—the part of the building to which defendant's subscription applied—was built according to the terms of the contract. On the contrary, the proofs show that a church 132 feet long, includ-

ing the nave with tower and the chancel, was constructed at one time as one building. While defendant subscribed to part of a church, to be completed according to the terms of his agreement, "at this time," the proofs show that an entire church to which defendant did not subscribe was built at one time. Defendant relies on the terms of his contract and insists that it must be strictly construed. To sustain the position thus taken, he insists that the reply is inconsistent with the petition and contains an attempt to change the cause of action on the written contract, in violation of the rules of pleading, and that consequently incompetent evidence in support of the reply does not establish defendant's liability on his contract. Without attacking the reply by motion or otherwise, defendant went to trial on the issues raised by the pleadings as a whole. While the pleadings were in that condition both parties adduced their proofs. Defendant had abundant opportunity to meet the case made by plaintiff, and it will be held on appeal that he waived the objections he now makes. *Miner v. Morgan,* 83 Neb. 400.

It is further contended that it was the purpose of the vestry, as shown by the minutes of its meeting April 11, 1907, to first erect the nave and tower; that defendant gave his subscription with that understanding, and that the erection of the entire building at one time under one plan of construction, including the separate part to which alone he agreed to contribute, was a departure from the contract, which released him from liability. It is apparent from the subscription, from the minutes and from other evidence that the vestry did not limit itself to any particular time for the construction of the chancel. The testimony indicates that, after defendant entered into his obligation, an incident arose which encouraged the vestry to undertake the building of the entire edifice at one time. To the construction of the chancel alone the sum of $5,000 was contributed from an unexpected source. There was nothing in the terms of defendant's subscrip-

tion to prevent the immediate use of this fund or the completion of the chancel. At the time it was received defendant was a member of the building committee, and as such participated in the making of a contract to enlarge the foundation to an extent sufficient for the chancel. A portion of the new fund, with defendant's knowledge and consent, was used for that purpose and the balance was reserved for the superstructure. Defendant, himself, therefore, was a participant in the change which extended the building operations beyond the nave and tower to which his subscription applied. That this was consistent with defendant's subscription was evidently the interpretation of both parties. In addition to defendant's contract, it is proper to look into his subsequent conduct to see if he is estopped to deny liability on account of the departure from the original plans. The purpose to ultimately build the chancel as well as the nave was clearly shown. In common with others defendant was active in a concerted effort to build the church edifice. The proof shows that he obtained a large part of the subscriptions. He was present at a meeting of the vestry when the subscription for $5,000 was appropriated exclusively to the construction of the chancel, and was an active member of the building committee when the foundation for the entire structure was built. Though he afterward declined to act with that committee, and made a trip around the world, he allowed the work to progress under the directions of his associates without making any protest or denying liability under his contract. There is also direct testimony that he said to one of the members of the building committee: "You can go ahead and build the church and get the plans. I don't want anything more to do with it. You are welcome to my money, but I don't want anything more to do with it." The evidence as a whole fully justified a finding by the trial court that defendant estopped himself by his conduct from making the defense that the dimensions, plans, and the time for construct-

ing the chancel had been changed. The doctrine of estoppel applies to subscriptions, and this is a proper case for its application. *Petty v. Trustees of Church of Christ,* 95 Ind. 278; *McCleary v. Chipman,* 32 Ind. App. 489; *Booker, Ex parte,* 18 Ark. 338; *Hall v. Thayer,* 53 Mass. 130.

The manner in which plaintiff was permitted to prove "the cost of the 82 feet of church edifice with tower" is also challenged as erroneous. The trial court admitted testimony of builders and contractors to show the cost of the separate items comprising the total cost of the entire structure and to show the proportion and amount attributable to that part of the building, one-fourth of the cost of which defendant agreed to pay. It has already been held that defendant is liable on his subscription. The amount of such liability could only be ascertained by some method of estimating the cost of the nave with tower, since that part of the edifice was not separately constructed. There is proof tending to show that a separate construction of the nave as contemplated by defendant would have cost more than the amount estimated by plaintiff's witnesses. The method approved by the trial court in estimating the cost of construction is one frequently employed, and seems, under the circumstances, to be fair and proper, and one of which defendant has no just ground to complain. *Lambert v. Sanford,* 55 Conn. 437.

It is also insisted that in any event the recovery was excessive, but this question was not presented to the trial court by the motion for a new trial, and for that reason will not be considered on its merits here. *Hammond v. Edwards,* 56 Neb. 631.

No valid defense was established, and no prejudicial error has been found in the record.

AFFIRMED.

LONZO D. WHITFORD, GUARDIAN, APPELLANT, V. HENRY KINZEL ET AL., APPELLEES.

FILED JANUARY 3, 1912. No. 16,574.

1. Domicile: CHANGE OF DOMICILE. Where a wife, of sufficient mind to understand the nature and import of her act, in 1886 voluntarily leaves her home in this state, the title to which is in her husband, and returns to her kindred and former home in Indiana, and shortly thereafter the husband also permanently removes to such state, and both there reside, either together or separate and apart, this will amount to a change of residence of both, although five or six months after such removal the wife is adjudged insane and committed to a hospital for the insane; and the home of both, at the time of such commitment, would be in Indiana.

2. Homestead: ABANDONMENT: CONVEYANCE. And in such a case where the evidence is sufficient to show that at the time of their departure from this state neither had any intention of returning thereto, and that at said time the wife had no intention of ever again asserting her homestead rights in and to her home here, *held* an abandonment by her of her home and of her homestead rights in the land which constituted the same, and that the husband thereafter may convey the same by his individual deed.

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

*William V. Allen, William L. Dowling* and *F. D. Hunker,* for appellant.

*A. R. Oleson, contra.*

FAWCETT, J.

The controversy in this case is over the east half of the northwest quarter of section 5, township 23, range 5, in Cuming county. David C. and Frances E. Browand were husband and wife. In 1878 they settled upon the west half of the quarter section above described, and resided upon the same until 1885 or 1886. In 1882 David purchased the 80 acres in controversy, and from that

time until 1885 or 1886 both eighties were used by him in the support of his family. The major portion of the cultivated land was upon his eighty, the buildings and improvements all being upon the west eighty, which at the time they settled upon it was, and at all times since has been, the property of Mrs. Browand. One of the contentions is that, when David purchased the east eighty and brought it into servitude in the support of his family, it thereby became a part of the homestead and thereafter the homestead right attached to both eighties. In 1885, or the spring of 1886, Mrs. Browand left Nebraska and returned to the former home of both herself and husband in Noble county, Indiana, where on October 18, 1886, she was adjudged insane and a few days later was committed to the hospital for the insane at Indianapolis, Indiana. On October 21, 1891, plaintiff was by the Indiana court appointed guardian of her person and estate, and on March 6, 1909, ancillary letters of guardianship were issued to him by the county court of Cuming county, this state. On May 7, 1906, Mr. Browand conveyed the land in controversy to defendant Kinzel. In July, 1906, Kinzel and his wife conveyed a part thereof to defendant Emley, and on the same day Kinzel and wife and Emley and wife conveyed to defendant Gordon. This suit was instituted to set aside the three deeds above set out, to quiet the title in Mrs. Browand, to award plaintiff possession of the land, and for an accounting of the rents and profits. The trial resulted in findings and a decree adverse to plaintiff and quieting the title to the land in defendant Gordon. Plaintiff appeals.

The main questions argued are: (1) Did the land in controversy, purchased by the husband several years after the homestead had been established upon the west eighty, become a part of the homestead, and thereby foreclose the husband of the right to subsequently sell and convey the land without his wife's joining in the deed? (2) Did Mrs. Browand, at the time she left Ne-

braska in 1885 or 1886 for Indiana, take her departure with the intention of never returning to Nebraska, and thereby abandon her home in this state and her homestead rights in and to the land in suit? As the conclusion we have reached upon the second point is decisive of the case, we do not deem it necessary to consider the first. No good purpose would be subserved by setting out the evidence at large in this opinion. An examination of it shows that, while Mrs. Browand, as early as 1885, manifested some pecularities, she was fully competent to take care of herself, and was not in any manner restrained of her liberty by her husband; that when she departed for Indiana she made the trip alone, visiting with a married sister in this state the night before her departure. Upon returning to Indiana she made her home with her people. Some time later Mr. Browand returned to Indiana and made his home with his people, in the same community where Mrs. Browand was then residing. Neither ever again resided in Nebraska. They continued to live in this manner, separate and apart, until she was admitted to the insane hospital. The fact that he did not go to her nor she to him, and that they seemed to have had no communication one with the other during that period of time, indicates quite strongly that they had separated as husband and wife at the time Mrs. Browand left Nebraska, and that they had both left their home here with no intention of ever again returning thereto. The evidence is insufficient to show that at the time Mrs. Browand left Nebraska she was insane, or that her mind was so unsound or unbalanced that she was not competent to understand the nature and import of what she was doing; but it is sufficient to show that she voluntarily left her husband and abandoned her home and any right of homestead that she may have had in the lands in suit, with no intention of ever returning or of ever again asserting those rights.

The judgment of the district court is therefore

AFFIRMED.

## MARTIN HOLMVIG, APPELLEE, V. DAKOTA COUNTY, APPELLANT.

FILED JANUARY 3, 1912. No. 16,590.

1. **Drains: COUNTY COMMISSIONERS: EMPLOYMENT OF ENGINEER.** When a board of county commissioners, in establishing a drainage ditch, by resolution duly entered upon its journal, employs an engineer, as authorized by section 5506, Ann. St. 1903, and it appears that by oral direction of individual members of the board such engineer had, with the knowledge of all of the members of the board, already performed a part of the work necessary under his general employment, and that the county will receive the benefit thereof, *held* that the official employment by the board will relate back to the time of the beginning of the work under such oral direction, and will entitle the engineer to reasonable compensation for such work.

2. ———: ———: POWERS. Paragraph 2 of the syllabus in *State v. Ross*, 82 Neb. 414, reaffirmed.

3. ———: ———: LIABILITY FOR SERVICES OF ENGINEER. Where a county board, after having established a ditch and employed an engineer to survey and report upon the same, under the provisions of sections 5500, 5506, Ann. St. 1903, subsequently rescinds its action establishing such ditch, but fails to notify the engineer of its subsequent action, such engineer will be entitled to reasonable compensation for services and expenses subsequently and in good faith performed and incurred by him in the line of his employment.

4. **Appeal: CONFLICTING EVIDENCE.** In a law action, where the evidence upon any disputed question of fact is sufficient to sustain a finding either way, the finding of the trial court thereon will be sustained on appeal.

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

*J. J. McAllister*, for appellant.

*P. A. Sawyer, contra.*

FAWCETT, J.

This is an action to recover for services and expenses

as engineer for defendant, in the survey, location and establishment of a drainage improvement in Dakota county. Upon a trial to the court without the intervention of a jury, there was a judgment for plaintiff for the amount of his claim, and defendant appeals.

One contention made by defendant is that it was not liable in any event for the services performed by plaintiff, but that he must look to the petitioners for the ditch improvement for his pay. This point has been decided adversely to defendant's contention. *State v. Ross,* 82 Neb. 414.

That the board of commissioners had authority to act is clear. Section 5500, Ann. St. 1903. That it had authority to employ plaintiff as its engineer is also clear. Section 5506. That plaintiff performed the services embraced within the itemized claim introduced in evidence is not disputed; but it is urged that a portion of the service was performed and expenses incurred prior to his employment and appointment by the board, and a portion after the board had rescinded its former action and denied the prayer of the petitioners for the ditch. The record of the proceedings of the board of commissioners shows that plaintiff was formally appointed as engineer December 9, 1905. Items aggregating $66.15 are for services and expenses prior to that date. Plaintiff testifies that such services were rendered and expenses incurred at the oral instance and request of two of the commissioners. It also appears that the other commissioner knew that plaintiff was acting under such oral employment, and it was known by all the members of the board at the time of the appointment of plaintiff, on December 9, that the services already performed would be used by him as a part of his general employment and be included in his report, and that the board would thereby obtain the benefit of the services already rendered. Such being the case, we think his official employment, December 9, should be held to relate back to May 5, the date of his oral employment and commencement

of his work. It follows that defendant's contention that individual commissioners could not, under the circumstances in this case, orally bind the county cannot be sustained.

On March 2, 1907, the resolution adopted in 1905, establishing the ditch, was rescinded by the board of commissioners, and upon a reconsideration of the case at that time the prayer of the petitioners for the ditch was denied. It is conceded that no official notice of this action by the board was ever given plaintiff. The county clerk testifies that about a week or ten days subsequent to such action he read the resolution, adopted by the board, to plaintiff. This, plaintiff positively denies. The evidence upon this point being, therefore, squarely conflicting, and this being an action at law, we cannot disturb the finding and judgment of the trial court. If plaintiff was not notified of the abrogation by the board of its resolution of 1905, under which he was working, the court did not err in allowing his claim for services and expenses subsequent to the date of such abrogation.

AFFIRMED.

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MARY M. GOFF, APPELLEE, V. SUPREME LODGE ROYAL ACHATES, APPELLANT; SARAH E. LIPPS, INTERVENER, APPELLANT.

FILED JANUARY 3, 1912. No. 16,717.

1. Insurance: CONSTRUCTION OF POLICY: STATEMENTS IN APPLICATION. In construing a contract of insurance in a fraternal beneficiary association, for the purpose of determining whether the statements made in the written application therefor were intended to be representations or warranties, the court will take into consideration the situation of the parties, the subject matter, and the language employed, and will construe a statement made therein to be a warranty only when it clearly appears that such was the intention of the contracting parties, and that the mind of each party consciously intended and consented that such should be

the interpretation of his statements. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

2. ———: ACTION ON POLICY: DEFENSES: STATEMENTS IN APPLICATION: PLEADING AND PROOF. And in order that the statements in such application shall constitute a defense to an action upon the certificate of membership or policy of insurance, issued to such applicant, it is incumbent upon the association to plead and prove that the answers were made as written in the application, that they were false in some particular material to the insurance risk, and that the association relied and acted upon those answers. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

3. Contracts: VALIDITY: PUBLIC POLICY. A contract between an adult man and woman, not related to each other, that, if the latter will enter the home of the former and act as his housekeeper, he will support her and at his death leave her his estate, is not, where the relations between them are at all times moral and proper, forbidden by law or obnoxious to public policy.

4. Insurance: CONSTRUCTION OF POLICY: "DEPENDENT." Where a woman, who is without means, in good faith leaves her own home and work and assumes and for years faithfully performs the duties of a housekeeper for a member of a fraternal beneficiary association, not related to her by consanguinity, under an agreement that in consideration for such services he will support her and at his death leave her his estate, and no evidence is offered showing any improper relations between them, *held* that she thereby becomes a dependent upon such member, and as such is eligible as a beneficiary in a certificate of membership issued to him by the association of which he is a member.

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

*A. H. Burnett,* for appellant.

*J. C. Kinsler* and *F. H. Woodland,* for intervener.

*Smyth, Smith & Schall, contra.*

FAWCETT, J.

From a judgment in favor of plaintiff upon a certificate of membership, issued by defendant to Joseph A. Lipps, and payable by its terms to plaintiff, defendant and intervener separately appeal.

The petition alleges that defendant is a corporation under the laws of Nebraska; that on December 11, 1901, it issued a certificate for $1,000 upon the life of Joseph A. Lipps, in which it agreed to pay to plaintiff, "a dependent and niece," at the death of said Lipps, $1,000; that all assessments were duly paid from time to time, and that said Lipps died January 17, 1908; that shortly after the death of Lipps defendant refused to furnish plaintiff any blanks upon which to prepare proofs of death, denied all liability to plaintiff upon such certificate and refused to pay the same. Prayer for judgment. Intervener, Sarah E. Lipps, filed her petition, asking to be allowed to intervene, for the reason that she was the wife and widow of the deceased; that at the time of his death plaintiff did not and could not have an insurable interest in the life of said Lipps, and could not be a beneficiary in said contract, and that, "under the law and the terms and provisions of the by-laws and articles of incorporation of the defendant, she is entitled to the proceeds of said policy." Defendant filed its answer to the petition of plaintiff, in which it admits its incorporation, the issuance of the certificate to Lipps, in which "it agreed, among other things to pay to Mary M. Goff a sum not exceeding one thousand ($1,000) dollars on the death of said Joseph A. Lipps," the correctness of the copy of the certificate attached to plaintiff's petition, the payment of all the assessments, the death of Lipps as alleged, the request of plaintiff for blanks on which to make proof of death, the refusal to furnish the same, and the refusal to pay the money or any part thereof to plaintiff.

The answer then alleges that the defendant is a fraternal beneficiary association, and that the certificate was issued upon a written application made by Lipps, and on the conditions named in his application, one of which was that plaintiff was his niece; that the statement made by Lipps as to the relationship of plaintiff was false; that they were not in any manner related by

consanguinity, and that plaintiff was not in any manner dependent upon Lipps. It then sets out *in extenso* the statements made in the application, the conditions contained in and indorsed upon the certificate, and the agreement therein that all such statements and conditions should constitute the basis for and form a part of the certificate, and making the same warranties on the part of the applicant, and an agreement that any untrue statements or answers contained in the application or made to the examining physician, or any concealment of facts or failure to comply with the laws, rules and usages of the order should render the certificate void, and that all rights of any person thereunder should become forfeited. Plaintiff replied to the answers of both intervener and defendant; said replies being substantially general denials.

The trial proceeded to the court and a jury upon the issues thus framed. When all parties had rested, each moved the court for a peremptory instruction. The court thereupon made the following order: "I will excuse the jury and take the case from the jury, a question of law solely being in the case." To this order the intervener alone excepted. This action of the court having been invited by all of the parties, neither can now predicate error thereon.

As it appears to us, the case involves but two simple propositions: (1) Was the statement in the application, that plaintiff bore the relation to the applicant of niece, a warranty, the falsity of which would, regardless of its materiality to the risk, render the certificate void? (2) Was plaintiff a dependent within the meaning of the constitution and by-laws of defendant, and of the statute in relation to such societies? We will consider these two points in the order named.

1. The wording of the application is: "I hereby direct that the amount of the beneficiary fund, to which my beneficiaries may be entitled at my death, shall be paid to Mrs. Mary M. Goff, residing at 1110 South Eighth,

related to me as niece." Authorities are cited by defendant, from other jurisdictions, which sustain its contention that a false answer avoids the policy, where the application provides that all of the answers of the applicant contained therein are express warranties, and that, if any of them are shown to have been false, the policy is void. It would serve no good purpose to refer to those cases here, for the reason that this court is, by repeated decisions, committed to the rule that, "In construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject matter, and the language employed, and will construe a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements." *Ætna Ins. Co. v. Simmons,* 49 Neb. 811. In the opinion in that case (p. 842) we said: "We reach the conclusion, therefore, that in order that the answers under consideration—made by the assured—constitute a defense to this action, it was incumbent upon the insurance company to plead and prove not only that the answers were made as written in the application, but that they were false; that they were false in some particular material to the insurance risk; and that the insurance company relied and acted upon these answers." The rule there announced has been followed in *Kettenbach v. Omaha Life Ass'n,* 49 Neb. 842, *Ætna Life Ins. Co. v. Rehlaender,* 68 Neb. 284, *Bankers Union of the World v. Mixon,* 74 Neb. 36, and in a number of other cases, which we will not encumber this opinion by citing. While this rule, when originally announced in the *Simmons* case, may have been a "blazed trail," it has now become a beaten path in which we are content to travel. That the statement in the application here, that plaintiff bore the relation to the de-

ceased of niece, was not material to the insurance risk seems clear. The falsity of that statement in no manner shortened the life of the deceased, and hence did not increase the hazard assumed by defendant. If plaintiff had been required to prove this relationship, in order to bring herself within the class which defendant was permitted to insure, then there could have been no recovery by her; not because of the falsity of the statement, but because of the fact that she was not one of a class who. under the statute and the constitution and by-laws of the defendant, could lawfully become a benficiary. This brings us to a consideration of the second point.

2. Section 94, ch. 43, Comp. St. 1909, provides: "No fraternal society created or organized under the provisions of this act shall issue beneficiary certificate of membership to any person under the age of eighteen years, nor over the age of fifty-five years. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member." The constitution and by-laws of defendant follow this statutory requirement. Was plaintiff "dependent upon the member," within the meaning of the statute and of the laws of the order?

The evidence shows that plaintiff is the widow of one James O. Goff, who died in Kansas, leaving plaintiff and three children surviving. Shortly thereafter one of the children died. After the death of this child plaintiff lived for two years with a sister-in-law in Missouri and for four years with a brother, the latter two of such years in "Dakota," during all of which time she kept her two children with her. The brother with whom she was living having removed from "Dakota," she remained there, working at day's work to support herself and children. When the older of the two boys was able, he went to work in "Dakota." From "Dakota" she came with her other child to Nebraska, and after stopping a while at Norfolk went to Columbus. While working

there, supporting herself and son, she met the deceased. Her boy was then 15 years of age. At the time she met deceased he was selling sewing machines. In the preparation of a lease for a machine which she had purchased from him, he asked her name and the name of her mother, and, upon being informed, told plaintiff that he had a niece who married a man by the name of Goff. She told him her mother's name was Nancy Lee, and he said he had a half-sister by that name. He told her that she was raised by a family by the name of Lee, and that he was her uncle. It appears that she knew little of her family record. About a month or so later plaintiff became seriously ill, which illness lasted about four months. Deceased went to her house and, with the aid of her son, took care of her. She testified that, after she had recovered, deceased said to her: "If I would come and keep house for him, we would work together and have a home together, he would have a home and I would have a home. He said I was not able to work and support myself, but that I could keep house for him and we would live together and he would support me, and at his death I should have what he had;" that, when deceased obtained the certificate of insurance in controversy, he gave it to her, and it remained in her possession until his death; that he also executed a will in her favor; that he did not stay at her house when he was in town before she went to keep house for him, but stayed at the hotel; that after she assumed the duties of housekeeper they, together with her boy, resided at different places named when they settled in Omaha, where they lived for several years and until the death of Mr. Lipps. One year of the time, prior to settling in Omaha, was spent at Papillion. Her son always lived with her in the same house, and her other son sometimes visited them. Mr. Lipps had a wife and son residing in Omaha during at least the last three years of Mr. Lipps' life.

The charge is made that Lipps had abandoned his wife and children, and that he and the plaintiff lived to-

gether illicitly for years and up to the date of his death. We have before us three abstracts, the main abstract prepared by defendant, a supplementary abstract by intervener, and one by plaintiff. These abstracts are barren of any proof to sustain either of these charges against plaintiff. It is claimed in the briefs that the trial court found that the relations between plaintiff and Lipps were illicit. We do not think the language used by the trial judge will bear any such construction. For him to have made such a finding, he would have been compelled to go outside of the evidence and indulge in conjecture not warranted thereby. This the learned trial judge did not do.

Cases are cited in which persons, situated somewhat similarly to plaintiff, have been held not to be dependents within the meaning of statutes not materially unlike our own; but in every such case the relations between the claimant and the deceased were shown to have been meretricious. No case has been cited, nor do we think one will ever be decided, holding that a woman, who, without means, in good faith leaves her own home and work and assumes and for years faithfully performs the duties of housekeeper for a man who agrees, in consideration therefor, to support her and at his death leave her his estate, does not thereby become a dependent upon him; and especially so where there is an entire absence of evidence to show any improper relations between them.

The right of a plaintiff to recover in an action like this is fully sustained in *James v. Supreme Council of the Royal Arcanum,* 130 Fed. 1014, and *McCarthy v. Supreme Lodge New England Order of Protection,* 153 Mass. 314, 11 L. R. A. 144, which case is cited and followed 15 years later in *Wilber v. Supreme Lodge New England Order of Protection,* 192 Mass. 477.

Our attention has been called to the recent case of *Royal League v. Shields,* 251 Ill. 250. That case was decided by a divided court. The majority opinion

held that plaintiff was not entitled to recover. The dissenting opinion (by three of the justices) makes out a strong case in favor of a recovery, even under the facts disclosed in that case. A single quotation from the majority opinion will show that, had the facts been as they are here, plaintiff's action would have been sustained. The opinion states: "Frieda Wassmann was not related in any way to Michael Shields. She was not his daughter by nature or adoption. *She had at no time been a member of his family or his household.* He could not legally have been compelled to assist in her support, nor was he morally bound to furnish her support or leave her this money. *Had she been at the time of his death a member of his household* a different situation might have been presented, and the case of *Wilber v. Supreme Lodge New England Order of Protection,* 192 Mass. 477, cited by appellant, might then have been in point." (The italics are ours.) In the dissenting opinion it is said: "He voluntarily assumed the burden of contributing to her support in a regular and substantial manner and did so regularly for nine years before his death. In my opinion these facts bring appellant within the definition of a dependent, and as such made her eligible as a beneficiary under the statute and the by-laws of the Royal League and entitled her to the money paid into court by the association." It thus appears that both the opinion and dissenting opinion sustain a recovery in this case.

We think the language in *Keener v. Grand Lodge, A. O. U. W.,* 38 Mo. App. 543, is apt: "I would not restrict dependents to those whom one may be legally bound to support, nor, yet, to those to whom he may be morally bound, but the term should be restricted to those whom it is not *unlawful* for him to support." That it was lawful for Lipps to bind himself to support plaintiff under the circumstances shown cannot be doubted. That he did so bind himself is equally clear. That such a contract is not obnoxious to public policy is beyond question.

The reasoning of the above cited cases appeals to us as eminently sound. Without pursuing the matter further we hold: (1) That the answer of the deceased in his application, that plaintiff bore to him the relation of niece, whether it be termed a representation merely or a warranty, was not material to the risk, and hence did not avoid the policy. (2) That plaintiff was, at the time the application was signed and the certificate issued, and at the time of the death of Mr. Lipps, dependent upon him for her support, and that she is therefore competent to take as the beneficiary named in the certificate in suit.

The judgment of the district court is therefore

AFFIRMED.

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JOHN W. DORRINGTON, SR., ET AL., APPELLEES, V. DAVID W. SOWLES, APPELLANT.

FILED JANUARY 3, 1912. No. 17,101.

1. **Appeal:** CONFLICTING EVIDENCE. In a law action, where the evidence is sufficient to sustain a judgment either way, the judgment of the trial court will be sustained on appeal.

2. **Forcible Entry and Detainer:** NOTICE TO QUIT. Section 1022 of the code, requiring at least three days' notice as a condition precedent to the commencement of an action of forcible entry and detention, confers upon a tenant a right, which he may either rest upon or waive.

3. ———: ———: WAIVER. And if, upon the trial of such an action, he objects to the introduction of a notice, defective in that particular, which has been duly served, upon other specific grounds only, he will be held to have waived such defect.

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

*Clarence Gillespie* and *Edwin Falloon*, for appellant.

*Reavis & Reavis, contra.*

FAWCETT, J.

This action, of forcible entry and detention, was instituted in justice court and appealed to the district court, where it was tried to the court and a jury. When both sides had rested, each moved for a directed verdict. The motion of defendant was overruled and that of plaintiffs sustained. The judgment was entered for plaintiffs, and defendant appeals.

Defendant now urges that the court erred in taking the case from the jury. The rule that, where such action of the court below is invited by all of the parties, neither can predicate error thereon, is now too well settled in this court to longer require citation of authorities or reference to the rule in the syllabus.

The petition alleges the ownership of the property in controversy; that defendant had been a tenant from month to month; that on February 1, 1910, plaintiffs notified defendant in writing that his tenancy would end on March 1, 1910; that on March 1 they gave defendant a further notice in writing to quit and deliver up possession of the premises within three days of that date, and that defendant still forcibly and unlawfully retains possession. The answer denies every allegation not specifically admitted, admits the ownership of the building and the service of notice to vacate within three days, and alleges that defendant was holding the property in controversy under a lease expiring August 1, 1913, a copy of which is set out, but which need not be set out here. The answer contains some other allegations which we do not deem it necessary to refer to. The reply is a general denial, with a special denial that the defendant was holding under any written contract or that "he is anything other than a tenant of said property by sufferance."

It appears from the abstracts that defendant had been a tenant of the premises for many years. Mr. Dorrington, one of the plaintiffs, and the one who seems to have had the chief control of the property, testified that he re-

turned from a trip to Washington in May, 1907; that at that time defendant was behind some with his rent; that "he told me he wouldn't pay any of the rent unless I took in a shed he had built at the end or back of the store building, as he could get no special benefit from making ice cream unless I allowed that amount of money. I asked what it was, and he wanted us to pay for the shop. I didn't think it was right, we had fixed the room up, and I objected to it; but he insisted so strong, I said, 'All right, if I do you will have to pay me $50 a month for the building' (the rent prior thereto had been $40 a month), and he objected to that, and we finally compromised on $45 a month. There was no other reason why that rent was raised to $45. There was nothing said at that time about a long lease." On October 5, following, defendant prepared and signed the written lease, referred to in the answer, and submitted it to plaintiffs. Mr. Dorrington testifies that when he received it, on the evening of October 5, he was busy preparing to again visit Washington; that he signed the lease and left it with Mr. Towle, the husband of one of the other joint owners of the property. Before signing the lease Mr. Towle wrote in above the signature of defendant the words: "Said Sowles not to sublet said premises or any part thereof without the written consent of W. E. Dorrington." The lease was then witnessed and dated October 5, 1907. Below the signatures was written the notation: "The interlineations and changes made in foregoing contract were made by consent of both parties to same." This was dated "Oct. 5, 1907," and signed at that time by Mr. Dorrington. The testimony of Mr. Towle is: "I took the leases to Mr. Sowles the next morning. He looked them over, and said he would consider them, or he didn't know whether he would sign them or not. I didn't know whether he would agree to the contract as amended or not. I left the instrument with him. I conferred with him several times subsequently, and he kept putting me off. He said his boy

wanted him to sell out, and he was talking about taking a hotel in Fairbury first or probably in St. Joe. They wanted him to take charge of it. And I went in four or five times to get him to sign the contract and give us the duplicate, but he kept them and wouldn't sign it. When I asked him to sign the contract he made excuses. This was about a week or two afterwards." Defendant testified that, when Mr. Towle returned the leases to him, "I was busy and told him I would look the lease over and sign it. Mr. Towle called twice afterwards, within a week. When he called the next time I told him I hadn't signed it, as I was about to take a hotel at Fairbury, and in case I didn't get that I would continue there and sign the lease." The duplicate leases remained in the custody of defendant from that time until after plaintiffs had served him with the notice of February 1, 1910, when he produced the leases, signed as above shown. He says he had left the lease in a drawer, "and in rummaging around in the drawer I found it one day;" that he then signed it on the date shown under his signature, viz., August 10, 1909. He further testified: "I know the contract was written on the strength of the $5 raise."

The above extracts from the testimony of these witnesses show that there was a square conflict in the testimony upon the point as to whether defendant was ever, with the knowledge of the plaintiffs, in possession of the premises under the lease, or that the instalments of rent, which he subsequently paid, were paid by him under the supposition that they were being paid under the lease. If the evidence clearly showed that he was in possession under the lease, then the payment of rent by him and the acceptance thereof by plaintiffs would have bound both parties, even though defendant had never signed it, for the one year provided in the lease; and in like manner a payment of rent by defendant and acceptance of the same by plaintiffs without objection, after the expiration of the one year, would have made the lease good for the full period of five years. In such case the contention

of defendant and the authorities cited by him would be in point, and, had the trial court so found, we could not have disturbed such finding; but having found against defendant upon those points, upon testimony so substantially conflicting, we are in like manner concluded by such finding.

It is further objected by defendant that neither the justice court, the district court, nor this court has jurisdiction, for the reason that the notice served on March 1 to vacate within three days was insufficient, the suit having been commenced on March 4. Ordinarily this point would be good; but in the present case we think defendant has waived the right to insist upon this assignment. Upon the trial in the district court, when plaintiff offered the notice (exhibit 2) in evidence, defendant made this objection: "We admit that about March 1st, 1910, exhibit 2 was served upon the defendant, but object to its introduction because it is not a notice provided by law and that he should have been served with a six months' notice." This objection was properly overruled. It did not challenge the sufficiency of the notice upon the ground now urged. Defendant had been insisting all the time that he was in possession under a lease that would not expire until 1913, and that in any event he was a tenant from year to year, and as such was entitled to a six months' notice, and the objection above noted was in line with that contention.

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

AFFIRMED.

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JENNIE E. BROWN, APPELLANT, V. ORLANDO W. WEBSTER, ADMINISTRATOR, ET AL., APPELLEES.

FILED JANUARY 3, 1912. No. 17,203.

1. **Wills:** RECIPROCAL WILLS: PAROL CONTRACT INTER VIVOS. Where a husband and wife, possessed of separate estates, orally agree that

upon the predecease of either the survivor shall thereupon become the owner of all of the estate, both real and personal, of such decedent, and at the same time, and in pursuance of, and for the expressed purpose of providing a proper method of carrying such agreement into effect, simultaneously execute reciprocal wills, in each of which the other spouse is made sole devisee and legatee, *held* that the oral agreement and the execution of the wills constitute a single transaction, that each is an integral part of one contract, and that such contract cannot be said to rest entirely in parol.

2. ———: ———: ———: CONSIDERATION. And, in such a case, the contract of each is a sufficient consideration for the contract of the other.

3. ———: ———: ———: PERFORMANCE. And the continued reliance by plaintiff upon the contract, by permitting her will executed as a part thereof to remain in the family safe, unchanged and unrevoked, during the entire lifetime of the deceased, constituted full performance by her of the terms of the contract.

4. ———: ———: REVOCATION. And the wills, executed as a part of such contract, in equity, are not ambulatory, and may not be revoked by either party to such contract so long as the other party continues to perform the contract on his or her part.

5. ———: ———: PAROL CONTRACT INTER VIVOS: SPECIFIC PERFORMANCE. And where either party to such a contract commits a breach of the same by subsequently executing another will, devising and bequeathing his estate contrary to the terms of such contract, and dies, the survivor, upon proof of a continued performance thereof, in good faith, on his or her part, is entitled to a specific performance of the contract, as against the heirs, devisees, legatees, and executors of the decedent.

6. **Pleading.** The petition, set out in the opinion, examined, and *held* sufficient.

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

*Field, Ricketts & Ricketts,* for appellant.

*Charles O. Whedon* and *Perry, Lambe & Butler, contra.*

FAWCETT, J.

The petition alleges, substantially: That Erastus E. Brown, late of Lancaster county, died August 15, 1908,

possessed of a large amount of real and personal property, which is specifically set out; that he left no heirs of his body and that plaintiff is his widow; that at the time of her marriage to the deceased, in 1866, deceased did not own property exceeding in value the sum of $1,000; that at the time of her marriage, or shortly thereafter, plaintiff received from her mother's estate about $20,000, all of which she turned over to deceased, who managed, controlled and invested the same in his own name as if it were his own money; that nearly all the property purchased with such funds was taken in the name of deceased, and was by him held and transferred as his own; that from time to time, as convenience suggested, an occasional piece of property was taken in the name of plaintiff, the description of which property is set out. As to one of the pieces described, it is alleged that it was sold in 1882 at a profit of $8,000, and the consideration paid to and used by the deceased; that another piece described was also sold and the proceeds paid to and used by deceased; that in January, 1896, plaintiff had standing in her name real property of the reasonable value of $40,000 or $50,000; that at the same time deceased owned property and securities of the value of $50,000 or $60,000; that no accounting was had at any time between plaintiff and deceased of the moneys turned over by her to deceased or of the profits and income arising from the investment thereof; that in January, 1896 (30 years after their marriage), plaintiff and her husband had no children to whom to leave their property; that at the suggestion of the deceased at that time a parol contract was entered into by and between plaintiff and deceased, by the terms of which it was agreed that the survivor should, on the death of the other, become the exclusive owner of all the property, both real and personal, that should then be owned by the one who should first depart this life, "the agreement of one being the consideration for the agreement of the other;" that at the time the deceased suggested that "a proper method to

carry said agreement into effect was for each to execute a will, making the other sole devisee and legatee of all of the property of which he or she should die seized;" that, in pursuance of said agreement, the deceased caused wills to be prepared, one for himself to execute and the other to be executed by plaintiff, which wills were accordingly executed by plaintiff and deceased respectively, "each being executed in consideration of the execution of the other." A photographic copy of each of said wills is attached to the petition as a part thereof, and shows that they were both written by the same person, and, as it appears by comparison with the signature of the deceased, by the deceased himself. The will executed by deceased made plaintiff sole devisee and legatee of all of the property of which he might die seized, and that executed by plaintiff made the deceased sole devisee and legatee of all of the property of which she might die seized. The wording of the two wills is identical, except as to the change of name and sex. Both wills are signed in the presence of the same attesting witnesses. The petition further alleges that after the execution of the wills deceased caused them to be placed in an envelope and delivered to plaintiff for safe keeping; that they were placed by plaintiff in the family safe, where they remained until after the death of deceased; that in good faith and in full reliance on the agreement made and entered into by and between the parties, as above set out, "and the irrevocable character of said agreement, and of the wills executed by the respective parties in pursuance thereto, the plaintiff permitted the deceased to use and deal with the property of the plaintiff, held in her right, as hereinbefore alleged, as if it were his own property. He not only collected, invested and used, in his own name, the income arising from plaintiff's property, but, also, money received as consideration for the sale of her property, as if the same were his own money;" that in April, 1902, deceased sold the farm owned by plaintiff at the time of the agreement referred to, and received on

the contract price, between the date of sale and the time of his death, the sum of $7,750, all of which he kept and used as his own, and had not accounted to plaintiff for any portion thereof; that he used plaintiff's residence, in which had been invested the sum of about $40,000, for many years as the family home without rent or compensation, while the income from his other property, as well as that from plaintiff's property, was invested in his own name, thereby increasing his holdings at the expense of plaintiff's estate; that deceased at no time intimated or notified plaintiff that he wished to modify or revoke the will which he had made in plaintiff's favor in execution of said agreement; that plaintiff in all things fully kept and performed the agreement, made between herself and deceased, as alleged, in consideration for which he agreed to make plaintiff sole devisee and legatee of all property, real and personal, of which he should die seized, if he should first decease; that the will which she executed in due form in January, 1896, making deceased her sole devisee and legatee, is still in full force and effect and unrevoked; that "as the conditions on which plaintiff was to have and receive all of the real and personal property of the said Erastus E. Brown, as her own property, have come to pass, and as the plaintiff has fully kept and performed the agreement on her part, she has become the equitable owner of all the real and personal property of which the deceased died seized. And as the deceased, before his death, committed a breach of said contract, she is in equity entitled to have the same specifically performed by his estate, and those who claim under him;" that in the latter part of July, 1908, it was arranged between plaintiff and deceased to visit friends in the state of New York; that deceased also desired to visit his three brothers in and near Angola, Indiana; that by reason of the illness of a servant in their household, which they felt rendered it unsafe to then leave her alone, it was arranged between them that deceased should proceed to

Indiana and there visit his brothers, that plaintiff should remain at home until it was deemed safe to leave the servant, when she would proceed to northern Michigan and spend a few days with a friend, and then join the deceased at Angola, from whence they would proceed together to New York; that, in pursuance of said arrangement, deceased left home for Indiana on July 26, 1908; that plaintiff remained at home until August 2, 1908, when she proceeded to northern Michigan, where she remained until August 10, when she proceeded to Angola, reaching there on the evening of August 11; that on her arrival she found deceased dangerously ill from urinary trouble, with which he had been suffering for three or four days, but of which she had no notice until her arrival; that he survived until August 15, when he passed away; that on the afternoon of August 11, 1908, and before plaintiff reached the bedside of deceased, deceased executed another and different will from that made in pursuance of the agreement made with plaintiff, and by which latter will he gave plaintiff an interest for life in certain property, and gave all the rest and residue of his estate to the defendants Frank M. and Clinton M. Brown, sons of the deceased's brother, Ezekiel, and Charles W. Brown, Homer H. Brown and Laura E. Talmage, children of Warren Brown, another brother of deceased, except a small legacy of $1,500 to Augusta Kreitlow, a long-time servant in the house of plaintiff and deceased; that on January 26, 1911, the will of August 11, 1908, was approved and allowed in the county court of Lancaster county, Nebraska, as the last will and testament of the deceased; that no appeal has been taken from the order probating said will. A true copy of the will is attached to the petition. That by reason of the premises the defendants Brown and defendant Talmage have become vested with a legal title to all the real estate belonging to the estate of the deceased, and the right to receive on final distribution of said estate all of the personal property or its proceeds belonging to said estate,

subject only to the rights of plaintiff as widow in the estate of the deceased; that from the time deceased arrived in Indiana the defendant Talmage became his daily companion, went with him from the residence of one brother to that of another, and continued to be his constant and daily companion from the time of his arrival until plaintiff reached his bedside on the evening of August 11; that at some time prior to making his will deceased gave to defendant Talmage $3,000 in gas bonds which he had taken with him from Lincoln, and also gave to his brother William M. Brown a note and mortgage owned by deceased of $1,500, to be held by him for the use and benefit of the defendants Frank M., Charles W. and Homer H. Brown; that after plaintiff's arrival at the bedside of deceased he was more or less lucid mentally, yet neither he nor any other person notified or intimated to plaintiff that deceased had made and executed the will of August 11, or that he had given to defendants the securities above referred to, until after the demise of the deceased; that plaintiff declined to act as executrix of the will of August 11, and defendant Webster has been appointed administrator with the will annexed; that as such administrator defendant Webster is now in possession of the real estate belonging to said estate, and is collecting the rents and income therefrom; that he is also in possession of all of the personal assets belonging to said estate; that all of the debts of said estate, except a small claim of $25, which is still pending, have been paid, and all claims against said estate have been barred by limitations by order of the county court; that the instrument approved and allowed as the last will and testament of the deceased operated as a breach of his agreement with plaintiff; that no consideration passed from either of the defendants to the deceased for the provisions made in their behalf in said last will and testament, and that no consideration passed from defendants Talmage, Frank M., Charles W. and Homer H. Brown for the securities given to them, nor was the

deceased in any way legally or morally obligated to provide for any of said defendants by will or otherwise; that the provisions so made were entirely voluntary and without consideration; that plaintiff had duly renounced the provisions made for her in the instrument probated as the last will and testament of the deceased, and claimed such share in said estate as was given her by law; that the provision made for Augusta Kreitlow, in the will of deceased, met with the approval of plaintiff, and shortly after the death of deceased plaintiff paid to Augusta the sum of $1,500, the amount of the legacy in her behalf, and took from her an assignment thereof. Plaintiff prays that defendant Webster, as administrator, be restrained from parting with the possession of the whole or any portion of the real estate belonging to said estate and from making any distribution of the personal assets thereof, and that defendants Brown and defendant Talmage may each be enjoined from taking or attempting to take possession of any part of the real estate of deceased and from taking any order for the distribution of the personal assets of said estate, pending the final determination of this suit; that plaintiff be decreed specific performance of the agreement entered into between herself and the deceased, whereby she was to become possessed of the legal title to all the real and personal property of which deceased should die seized; that her title to the several pieces of real estate described and to all the personal assets of said estate be quieted and settled in the plaintiff, as against the several defendants and each of them; that defendants and each of them be foreclosed and barred from all right, title, interest or demand in and to any part or portion of the real and personal property belonging to the estate of said deceased; that defendant Webster, as administrator with the will annexed, and his successors in office may be ordered and adjudged to turn over and account to plaintiff on final settlement of said estate for all the personal property and personal assets belonging to said

estate, which have come into his hands as such administrator, and which have not been consumed in the settlement of said estate; and "for such other, further and different relief as may be necessary to fully vest in the plaintiff full and complete title to all of the estate, both real and personal, of the late Erastus E. Brown, or that may be necessary to forever bar the several defendants of all right, title, interest, claim, or demand in and to any portion thereof."

To the above petition the defendants, other than defendant Webster, demurred upon two grounds: "First. That the court has no jurisdiction of the subject matter in this action. Second. That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these demurring defendants." The first ground of demurrer was overruled and the second sustained, and, plaintiff electing to stand upon her petition, the suit was dismissed at her cost. From the judgment so entered, plaintiff appeals.

The objections to the petition urged by demurrants are, substantially: That the contract between plaintiff and deceased, that the survivor should become the owner of all of the estate, real and personal, of the deceased spouse, rests entirely in parol, and, as it affects the title to real estate, is void under the statute of frauds; that such contract was not aided by the execution of the reciprocal wills; that the oral contract and the wills are alike without consideration; that the will of the deceased was ambulatory in its character and revokable at his pleasure, and that the execution of the wills did not constitute part performance. These points are so interwoven that we will consider them together.

The fact that a contract, of the nature of the oral agreement alleged, would rest in parol would not necessarily render the same void. Section 3 of the statute of frauds (Comp. St. 1911, ch. 32), relied upon by defendants, is qualified by the exceptions noted in sections 4 and 6 of the statute. Section 4 provides: "The prece-

ding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law." Section 6 provides: "Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance." It will be seen by these two sections: First. That section 3 cannot be construed to affect in any manner the power of the deceased in the disposition of his real estate by a last will and testament, as was done by the will of January, 1896; and hence, even if it were to be conceded that the agreement by the deceased that, if he predeceased his wife, she should become the owner of all of his real estate, and the will executed by him to that effect were separate agreements, the execution of the will, if executed "in pursuance to said agreement," as alleged, would bring the case within the scope of section 4. Second. Under the provisions of section 6, if there was a part performance by plaintiff of the agreement on her part, then under the well-settled rule in this state section 3 of the statute of frauds would not apply. In this case we think there was not only part performance by the plaintiff, but that the performance by her of her part of the agreement was a complete performance. She at once executed the will provided for in her agreement with her husband, and never receded from it, but at all times, during the period of more than 12 years which elapsed before the death of her husband, acted upon it, and thereby continually affirmed it. This constituted not only performance by her, but a good and sufficient consideration for the contract. The deceased himself acted upon the contract, completed by the execution of the wills, and continued performance thereof from the time of its execution in January, 1896, until the 11th day of August, 1908—four days prior to his death. This action on his part shows that, during every day of that

period of more than 12 years, he was in effect asserting and relying upon the contract which he had entered into with the plaintiff. This constituted a sufficient consideration, and performance during that period, of the contract on his part, and, had the condition of the parties been reversed and plaintiff had died first, the deceased could and doubtless would have asserted his rights under the contract, as evidenced by plaintiff's will. It is unfortunate that he, in the absence of his wife, while in the hands of his collateral heirs, and in the face of a speedy demise, should have committed a breach of the contract which he himself had induced his wife to enter into with him. We are unable to consent to the theory that the agreement between the plaintiff and deceased, as to what should become of the estate of the one who should die first, and the execution of the wills were separate transactions. The so-called oral contract and the execution of the wills were made, entered into and executed at the same time. The allegations of the petition are that in January, 1896, "at the suggestion of the deceased" a parol contract was entered into by and between the deceased and plaintiff in the manner above set out, and that "the deceased at the time suggested a proper method to carry said agreement into effect was for each to execute a will, making the other sole devisee and legatee of all of the property of which he or she should die seized. He, therefore, in pursuance to said agreement, caused wills to be prepared and drawn, one for himself to execute, and one for the plaintiff to execute, which wills were accordingly executed," etc. It is a fact well known to the members of this court and admitted in the briefs of both sides that the deceased was an able lawyer of many years' experience. He desired that this contract be made. They had been married for 30 years, and had no children. They had no debts or any one dependent upon their bounty. The years had been passing, and he, realizing that death might at any time remove one or the other, with the care and forethought

characteristic of the man, desired to provide against such contingency. He therefore suggested this plan of disposing of their property. It was agreed to by his wife. His knowledge as a lawyer was such that he realized the importance of reducing the terms of this agreement to writing. He therefore suggested the making of reciprocal wills as the "proper method to carry said agreement into effect." This also was assented to by the plaintiff, and he, with his own hand, drew the wills and had them simultaneously executed in full compliance with the laws of this state. It would be a travesty upon justice to say that everything that was said and done on that occasion did not constitute a single transaction. It is not a question, therefore, of whether or not the execution of the wills aided an oral contract; the question is, were the wills an integral and important part of the contract? We hold that they were, and that from the moment the wills were executed the contract no longer rested entirely in parol. We also think it would be doing violence to every rule of equity to hold that the contract of each, of which the will was a part, was not a good consideration for the contract of the other. We think the consideration of each was both a good and valuable consideration; but, even if it were to be held that it did not constitute a valuable consideration, in the sense that no money was paid or property delivered or personal services performed by the one to or for the other, the contract would still be enforceable for the reason that it was supported by a good consideration. Conceding that a contract by A to make a will in favor of B, that upon A's death he would leave all of his property to B, could not be enforced by B, as against the creditors of A, or as against those having a superior equity to B, yet, if there are no creditors and no one possessing superior equities to B, then a good consideration would be sufficient to entitle B to enforce the contract after A's death. *Parsell v. Stryker*, 41 N. Y. 480, 485; Underhill, Law of Wills, sec. 285.

That a contract to devise real estate, where there has been performance by the promisee, is good in this state is settled in this court by *Kofka v. Rosicky,* 41 Neb. 328; *Teske v. Dittberner,* 65 Neb. 167, 70 Neb. 544; *Peterson v. Estate of Bauer,* 76 Neb. 652; *Peterson v. Bauer,* 83 Neb. 405; *Pemberton v. Heirs of Pemberton,* 76 Neb. 669; *Harrison v. Harrison,* 80 Neb. 103; *Cobb v. Macfarland,* 87 Neb. 408; *Johnson v. Riseberg, ante,* p. 217. That the execution of the wills satisfied the statute of frauds, see *Brinker v. Brinker,* 7 Pa. St. 53; *Shroyer v. Smith,* 204 Pa. St. 310; *Keith v. Miller,* 174 Ill. 64; *Bruce v. Moon,* 57 S. Car. 60, 35 S. E. 415. That the will of deceased was not, in equity, ambulatory or revokable, see *Teske v. Dittberner,* 70 Neb. 544, where, in the seventh paragraph of the syllabus, we held: "A contract to leave property by will is not ambulatory or revocable, as being testamentary in character, after the promisee has performed his part of the contract." See, also, *Bolman v. Overall,* 80 Ala. 451; *Johnson v. Hubbell,* 2 Stock. Ch. (N. J.) 332; and *Rivers v. Executors of Rivers,* 3 Desaus. Eq. (S. Car.) 190, where it is said: "By this agreement (to make a will of a particular tenor) he has renounced that absolute power of disposing of his estate at his pleasure, or even at his caprice, with which the law had clothed him; and I cannot doubt that he could bind himself to do so. * * * A man may renounce every power, benefit, or right, which the laws give him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral. * * * It appears to me that to make a will in a particular way, on proper considerations, is as much a subject of contract as any other; and he who makes a contract on this subject is as much bound thereby as he would be by any agreement on any other subject." See, also, *Bruce v. Moon,* 57 S. Car. 60, 71; *Parsell v. Stryker,* 41 N. Y. 480, 486, 487. The contention that plaintiff parted with noth-

ing, that the manner in which she permitted her husband to manage and control her estate and take title to property in his own name and hold the same and the proceeds from sales thereof, after the execution of the contract, was not different from the manner in which she had permitted him to handle her property prior to its execution, does not impress us as being of any force. The fact is admitted that, at all times after the execution of the contract, she in good faith relied upon it by permitting her will to remain as originally executed, without any attempt at modification or revocation. If, during the four days that intervened after the deceased had broken his contract, and while plaintiff was watching by his bedside, she had been stricken with paralysis and suddenly died, the deceased would, by the terms of the contract, have immediately become vested with the ownership of all of her estate, both real and personal, and that estate would have gone, under his will of August 11, to those of his blood who appear as defendants in this case; and, if the heirs of the blood of plaintiff had attempted to assert any claim to her estate, these heirs of the blood and devisees and legatees of the deceased would be here in the role of plaintiffs, seeking a specific performance of her contract. The record before us shows that when the plaintiff and deceased were married he was worth not to exceed $1,000; that she then had, or very soon thereafter inherited, $20,000, which she turned over to her husband and which he subsequently used as his own in the manner set out in the petition. This was the nucleus of his fortune. Without this start in life, who can say that the deceased would not have suffered the fate of many a good lawyer, and have died without leaving sufficient estate to fight over. Plaintiff not only furnished this start, but she permitted him to use it and its accumulations and the income therefrom, as if it were his own. For the last 12 years or more of their lives she did it in reliance upon this contract. The deceased proved to be a successful business man. She

trusted him in business, and trusted him in the arrangement of all of the details of their contract and in the preparation of the wills in consummation thereof. She trusted him until the moment of his death; and, if the allegations in the petition are established upon the trial, she should now receive the reward of that faith and trust which extended over a period of more than 40 years. This is not an attempt on the part of the court or of the plaintiff to make a will for the deceased. It is simply a case of holding him to the terms of a will which he himself voluntarily and freely made as a part of a contract which he induced his wife to enter into with him, and which she honestly and in good faith fully performed on her part.

Several minor questions discussed in the briefs are not thought to be material at this time and will not be considered.

The judgment of the district court in sustaining the demurrer of defendants is clearly wrong, and it is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

ROOT, J.

I concur in the majority opinion, in so far as it reverses the judgment of the district court and remands the cause for further proceedings, but I do not concur in the further direction, nor in all that is said in the opinion.

The opinion assumes that there is no defense to the petition, and the district court cannot upon a second hearing follow the opinion and at the same time enter a decree for the defendants, notwithstanding a perfect defense may have been pleaded and proved.

I do not agree to the statement that mutual wills executed in conformity to a preceding oral contract constitute, with the contract, an integral part of one transaction, nor that the respective testators are powerless

to revoke their wills. The wills may furnish written evidence to take the oral contract without the statute of frauds, and if either testator subsequently, in violation of his contract, revokes his will or devises to another the property described in the oral contract, the beneficiaries whose rights are last in point of time will hold the property as trustees for the benefit of the senior devisee.

Furthermore, a decree of specific performance, within the limits of legal discretion, may be granted or withheld according to the circumstances of the case. In the case at bar neither will refers to any contract, nor can it be ascertained from an inspection of them that they were executed in conformity to an antecedent agreement. If evidence competent to establish that essential link in the plaintiff's title be not produced upon a trial, she should not prevail. If that evidence be produced, still there may be proof of such fraud, mistake, unfairness, hardship, rescission, or of changed conditions, as will justify a judgment for the defendants.

For these reasons, I go no further than to say that the petition states facts sufficient to constitute a cause of action in the plaintiff's favor, and the district court erred in sustaining the demurrer.

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HENRY GLANTZ, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 3, 1912. No. 17,223.

1. **Customs**: EVIDENCE. Evidence that a certain course is "generally" and "usually" pursued in a particular manner is sufficient to establish a custom. It is not essential to show that the "particular manner" is never deviated from.

2. **Master and Servant**: INJURY TO SERVANT: TRIAL: DIRECTING VERDICT. Evidence examined and set out in the opinion, *held* sufficient to sustain the verdict of the jury.

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

*James E. Kelby, Byron Clark, A. R. Wells* and *M. V. Beghtol,* for appellant.

*Wilmer B. Comstock, contra.*

FAWCETT, J.

The facts in this case are stated in a former opinion, *Glantz v. Chicago, B. & Q. R. Co.,* 87 Neb. 60. The case was there reversed on account of errors in the instructions, the question of the sufficiency of the evidence being reserved. Upon retrial plaintiff again prevailed, and from a judgment on a verdict in his favor defendant appeals.

All questions of law were disposed of in our former opinion. The testimony offered upon the first trial was, by stipulation, read to the jury, and was supplemented by the testimony of the witness Snell, and additional testimony from the witness McCutchan. The one issue of fact reserved was presented to the jury in the following instructions:

"4. It is contended by the plaintiff that the defendant was guilty of negligence because at the time of the accident no man was stationed on the foot-board of the tender as a lookout to warn employees of the approaching tender.

"Touching this contention of the plaintiff, you are instructed that if you find from the evidence that at the time and place of the accident there was no rule or custom of the defendant company to keep such a man stationed on the foot-board as a lookout, having as one of his duties that of warning sectionmen and others in danger, and that this was known to the deceased, or was to plaintiff an obvious fact which he should have known, then in such case the failure of the defendant company to have a man stationed on the foot-board at the time of the accident

would not constitute negligence upon its part such as to create any liability against them, for the reason that the deceased by continuing in their employment under such circumstances would be held to have assumed any risk of danger arising from the fact that no man was stationed on the foot-board as a lookout.

"5. But it is contended by the plaintiff that there was a custom at the time and place of the accident, according to which the defendant company did keep a man stationed upon the foot-board as a lookout, and the plaintiff contends that at the time of the accident the deceased had a right to rely upon such custom, and that a man would be stationed on the foot-board who would warn him of his approaching danger. The defendant denies that any such rule or custom existed at the place where the accident occurred, their contention being that men were stationed on the foot-board only as their convenience or work required it, and that no man was stationed there for the purpose of a lookout to warn people. They contend that this was known and obvious to the deceased and others working, and that sectionmen understood that it was a duty devolving upon them to keep out of the way of approaching tenders and cars. This presents the sole question of fact which you are to determine from the evidence.

"If you find from the evidence that no such custom existed as contended by the defendant, then your verdict should be for the defendant in this action; and this would be true whether you think the failure to have a man stationed there would be negligence on the part of the railroad company or not, because by remaining in their employ under such circumstances he would have assumed the risk and waived any liability by reason of their failure to have a man stationed upon the foot-board.

"If, on the other hand, you find that there was such a custom upon the part of the railroad company at the time, to have a man stationed on the foot-board as a lookout, then you should direct your attention to the

question whether or not, considering the nature of the work that the plaintiff and the work that the defendant were engaged in at the time, the defendant was negligent in not having a man stationed on the foot-board as a look-out to warn sectionmen of the approaching danger. If you find that the defendant was guilty of negligence in this particular, and that such negligence was the proximate cause of the death of the deceased, and you further find that he was not guilty of contributory negligence upon his part and that the plaintiff has been damaged by the death of the deceased, then the plaintiff would be entitled to recover in this action in the amount of their damages."

Some objection is made to instructions 1, 2 and 3, but we do not think they are open to the criticisms made upon them. The main contention of defendant is that the evidence is so clearly insufficient to sustain a verdict in favor of plaintiff that the court should have directed a verdict in favor of defendant. In this contention we are unable to concur. By instructions 4 and 5, above set out, we think the court properly submitted the important question involved, viz., whether there existed in the yards at Havelock, at the time of the accident in controversy, a custom, upon which deceased had a right to rely, to have a man stationed on the foot-boards of its switch engines when at work in the yard, for the purpose of guarding against injury to employees or other persons who might be upon or in dangerous proximity to the defendant's tracks. In a yard as busy as that at Havelock is shown to be, where the switching "is always around a curve," it ought not to require strong evidence of such a custom to warrant the submission of the case to a jury. The dictates of common humanity would seem to demand such a custom; and when we consider that in every switching crew there are not less than two men, in addition to the engineer and fireman, the practicability of the custom becomes apparent.

Let us take the testimony of the witnesses as set out in

defendant's brief. Upon the former trial the witness Langdon was asked if he was familiar with the custom generally and habitually followed by railroad companies in regard to keeping a man on the front car of a string of cars being pushed in front of an engine, to which he answered, "Yes." When asked to state that custom, he said: "Why, an engine shoving a string of cars, a man is supposed to stand on the front car, the head car, and give signals to the engineer, also at the hind end, shoving and pushing the cars. Q. To give signals to the engineer, you say? A. Yes, sir. Q. What kind of signals and for what purpose? A. Why, it all depends on where we are going. Forward, shoving a string of cars, and we are going in on a side-track, going in on a track, of course he will give me a signal to slow up, to stop and go into that switch, if we was going to put a car in there, or if we saw anything; anything like that, would give that signal to the engineer, whatever signal I got from my foreman, or the man working it, that is the one I give to him. Q. Now, just challenge your attention particularly to the matter I desire to have you speak concerning. Is the purpose of this man on the end of the car also to give warning to the engineer in case a person or object is on the track in front? A. Why, yes." On cross-examination we have the following: "Q. Was it a custom to have a man on each end of the engine, on one end of the engine away from those cars, and then on the front end of those cars, to warn people to keep out of the road? A. Why, not exactly to warn people, no, but we always have, because it is always around a curve the way we are going." After testifying as to their custom when running through the shops, we have the following: "Q. But I am talking about going out in the yards, doing switching in the yards outside of the building. A. Yes, sir. Q. Is there any custom out there? A. No, sir; only just the way we are going. If we are backing up, of course, if we have a string of cars we are on the cars. Q. You get on the cars? A. Yes, sir. Q. If you are going on the cars, is

there any custom to go on the front end there? A. Whichever way we are going; of course, if we haven't any cars going with a lone engine, we generally go on the front end. Q. Go whichever way the engine is going, you generally get on the foot-board in that direction? A. If the engine is going that way we get on the front end. If going this way, backing up, and we had hold of any cars, we get on the hind end. That is the way we generally do." On his recross-examination he testified: "Q. But you say this custom does not exist except in the blacksmith shop when you are running through the building, of keeping— A. Well, it is a rule of our own. It is a custom to ourselves whichever way the engine is going, we always took it, we always rode that way, that is, mostly, but in this certain place in this blacksmith shop, we always—I don't think there was a time the engine went through there but what one of the men was on the front of the engine." On redirect: "Q. But it was done, the custom, you rode the foot-board, the way you were going? A. Yes, sir." Upon the second trial, as shown also by defendant's brief, the witness Snell on direct examination, testified: "Q. Did you see men riding on the foot-board of this engine? A. Yes, sir; they got all the time men on the foot-board behind and in front." On cross-examination he was asked: "Q. Did you tell Mr. Comstock a few minutes ago that they had men on each end? A. Yes; they have got men on each end when they are switching around. Q. What do you mean; each end of the yard or each end of the engine? A. Of the engine. * * * Q. Well, at other times when you see men on the foot-board at each end, what is their business? A. Lookout. Q. Is that what they were there for? A. Yes, sir." The above is, of course, an abbreviation of the testimony of these witnesses. The record contains more from them of similar import.

The burden of defendant's cross-examination seems to have been to get the witnesses to testify that an employee, when riding upon the foot-board of an engine, was not

there for the purpose of warning persons who might be upon the track, but for his own protection. To our minds that is a distinction without a difference. While thus riding to protect himself and the other members of his crew, and his engine also, if he saw a human being upon the track ahead, apparently oblivious of danger, it would make no difference whether he shouted a warning to the one in danger and thus cleared the track, or by signal to the engineer caused the engine to be stopped in time to avoid an accident. As the former of these two courses would be a saving of the time of the entire engine crew, and thus be of greater value to the company it is reasonable at least to suppose that that course would be pursued. However that may be, either course would ordinarily result in preventing an accident. In answer to the question propounded to the witness Langdon, one of the switching crew, "Is the purpose of this man on the end of the car also to give warning to the engineer in case a person or object is on the track in front?" he answered, "Why, yes." It would seem to us to be the duty of the company to require the man on the running-board, if he saw a person upon the track, to shout to that person, *and* to signal to the engineer. In this case neither was done. If a man had been stationed upon the foot-board on the front of the engine as it was running that day, he in all probability would have seen the deceased in time to have performed this duty, and thus a human life would have been saved, and this litigation avoided.

We think the testimony above outlined was sufficient to take the case to the jury upon the question as to whether or not at that time there existed in the yards of the defendant at Havelock a custom, usually followed, of keeping a man stationed upon the front of a car when a string of cars was being switched, or upon the foot-board on the front end of the engine when it was proceeding forward alone, or upon the foot-board on the rear of the engine when it was backing up, for the purpose not only of "lining up the switches," but for the further double

purpose of signaling to the engineer if any obstruction, whether human or otherwise, was observed upon the track, and also to sound a note of warning to anyone whom they might discover upon the track in a position indicating that that person was oblivious of his danger. If no such custom existed, as these witnesses have testified to, it would have been a very easy matter for the defendant to have shown that fact by a multitude of witnesses. That it did not attempt to do so was a circumstance which the jury would be warranted in taking into account as a tacit corroboration of the testimony introduced by plaintiff. Under the evidence and circumstances above shown, we think it would have been error on the part of the district court to have directed a verdict for the defendant. If so, then the question of defendant's negligence was for the jury. The jury found for plaintiff upon the evidence and circumstances shown, and we do not feel at liberty to disturb their verdict.

It is urged that the amount of the recovery is excessive; but we cannot say that it is so clearly excessive as to warrant us in substituting our judgment for that of the jury and the trial court.

The judgment of the district court is therefore

AFFIRMED.

ROOT, J., took no part in the decision.

LETTON, J., dissenting.

I am of the opinion that the evidence is not materially changed from that produced at the former trial and is insufficient to justify the submission to the jury of the question whether the alleged custom existed.

BARNES, J., dissenting.

I cannot concur in the conclusion reached by the majority of my associates in this case. As a ground for a recovery the plaintiff alleged that it was the custom of

the defendant company to station a man upon the foot-board of its engines while switching cars in its yards in order to warn its trackmen to get out of the way of such engines and cars; and that it failed to observe that custom at the time the accident occurred. On this question the burden of proof was upon the plaintiff. As I read the record the plaintiff failed to carry this burden. The majority opinion contains a statement of some of the evidence introduced for that purpose, but not all of it. From this evidence it seems clear that the witness was an unlearned foreigner, unacquainted with the use and meaning of the English language, and failed to comprehend the questions propounded to him on his direct examination; for when matters were explained to him upon his cross-examination he answered squarely that when a member of the switching crew rode upon the foot-board of an engine he did so for the purpose of "lining up the switches." This was the truth of the whole matter, and agrees with that knowledge which is common to all men who have used their ordinary powers of observation. It is well known to every one of ordinary intelligence that in switching cars in railroad yards a member of the switching crew takes his place upon the foot-board of the engine, and thus rides from one switch to another for the sole purpose of throwing such switches as may be necessary when passing from one side track to another. Performing the work in that manner not only saves time, but the unnecessary expense of employing an extra man at every switch target in extensive railroad yards. Again, it is a matter of common knowledge, and has been frequently declared to be the law, that one who takes employment with a railroad company as a trackman assumes the risk arising from the passing of locomotives and trains upon the railroad tracks. In other words, he impliedly agrees that he will keep his own lookout, and get out of the way of passing trains. Notwithstanding this fact, in order to affirm what to my mind is an unjust and illegal judgment, the majority are driven to the

absurd position of holding, as it seems to me, without competent evidence, that it was the custom of the defendant to keep a man upon the foot-board of its engines to warn trackmen in its employ to get out of the way of its passing trains. The absurdity of this matter is apparent when we remember that oftentimes a switch engine is not attached to the front end of a string of cars; that it frequently pushes a string of cars ahead of it in switching operations. If so, how could a person placed upon the foot-board of the engine warn a trackman to get out of the way of such a train?

In the case at bar it was shown that the engine bell was ringing at the time the accident in question occurred. It was also shown that there was a great amount of noise being made by a passing freight train and so it may be said that if a man had been stationed upon the foot-board of the engine in question at the time this accident occurred he could not have made himself heard above the noise of the bell and the passing train so as to have given the deceased any warning at all of the approach of the engine.

Without extending this dissent to any greater length I conclude by saying, that to my mind there is no competent evidence in this record to show the existence of the custom on which the plaintiff must rely in order to sustain the judgment of the trial court, and upon this question I appeal to the record.

It appears that at the close of the testimony the defendant requested the court to direct a verdict in its favor. I am of opinion that the request should have been granted; that it was error to submit the case to the jury, and the judgment of the district court should be reversed.

DIEDRICH H. R. STEINKE, APPELLEE, V. PAULINA DOBSON ET AL., APPELLANTS.

FILED JANUARY 3, 1912. No. 16,572.

1. **Vendor and Purchaser:** EXCHANGE OF LANDS: FRAUD: REMEDIES. One who has been defrauded in the exchange of property may elect to rescind the contract and return the property which he has received in the exchange, or to retain the property received in exchange and recover damages. He cannot retain the property received in the exchange and in an action for damages establish an equitable lien upon the property which he gave in exchange.

2. **Trial:** PROOF OF RELEVANT FACTS. A fact not itself directly in issue, but relevant to the issue being tried, may be proved without pleading it.

3. **Evidence:** LAW OF OTHER STATES. The common law of a sister state may be proved by "books of reports of cases adjudged in their courts." Code, sec. 420. To prove the law of Missouri, plaintiff offered the decisions of the supreme court of that state in certain cases named, with the pages and volumes in which the decisions are reported; the trial being to the court, it is *held* that this evidence was properly admitted, and, the record showing nothing to the contrary, it will be presumed that the court examined and acted upon these decisions.

4. **Damages:** EVIDENCE. In an action for damages, if the evidence shows substantially that the plaintiff was damaged in at least the amount found by the trial court, the judgment will not be reversed because the exact and full amount of the plaintiff's damages is not definitely shown.

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

*Morning & Ledwith,* for appellants.

*F. A. Boehmer* and *I. P. Hewitt, contra.*

SEDGWICK, J.

The plaintiff made an exchange of real estate with the defendants, and in that exchange received from the defendants a warranty deed conveying a tract of land in

Atchison county, Missouri. The deed from the defendants to the plaintiff described the land as the southeast quarter and east half of southwest quarter of section 7 and all of the north fractional half and all of the south fractional half of section 18, all in township 66, range 42, approximating in all 773 acres, subject to incumbrance of $5,750. The plaintiff alleged in his petition that the defendants agreed to convey to him 773 acres, and that the land described in the deed is in fact only 545 acres, being 228 acres less than the amount of land agreed by the defendants to be conveyed; that the agreed price and value of the land was $50 an acre, and that the plaintiff was damaged in the sum of $12,200. The case was tried by the court without a jury, and the court found generally for the plaintiff, assessing his damages at $3,000, and entered a judgment accordingly. From this finding and judgment both parties have appealed to this court.

1. The plaintiff, after alleging the shortage in the land, alleged that the defendants still have a part of the land which was conveyed to them by the plaintiff in the exchange, and that other parts of the land so conveyed had been conveyed by the defendants to other parties in exchange for certain specified real estate described in the petition, and the plaintiff asked for a judgment for damages, and that the same be declared a lien upon the lands conveyed to the defendants in the said exchange and also upon the lands which the defendants had received in exchange for the lands so conveyed to them by the plaintiff. The trial court found that the plaintiff could not enforce a lien upon the lands of the defendants in this action for damages, and the plaintiff now complains of this action of the trial court. We think this finding of the trial court is right. If the plaintiff was defrauded in the exchange, as alleged, he might rescind the contract of exchange and return the property received by him and insist upon the return of the property which he had conveyed in the exchange; or the plaintiff might keep the property which

he had received and bring his action at law for the damages which he had sustained. He chose the latter course, and could not in such an action enforce the return of the property which he had conveyed to the defendants or establish a lien thereon.

2. The defendants insist that they conveyed to the plaintiff the full amount of land agreed upon, and that therefore the plaintiff was not entitled to recover any damages whatever. The land in question lies along the Missouri river. In times past there have been great changes in the banks of the Missouri river along the boundary of this land. There was a large amount of evidence taken. Several surveys have been made of the line of this land along the bank of the river, and the evidence is somewhat conflicting and mystifying as to where the true boundary of the land is. The defendants insist that the land extends to the thread of the stream, and it appears that, if it should be so found, the tract contains nearly, if not quite, the full number of acres specified in the deed. The plaintiff insists that the defendants did not have title beyond the river bank. If this contention of the plaintiff is sustained the tract does not contain the number of acres contracted to be conveyed within something like 200 acres. The question arose upon the trial as to whether, under the law of Missouri, riparian land on a navigable stream extends to the thread of the stream or only to the bank.

The record recites the following: "The plaintiff now offers in evidence the decisions of the supreme court of the state of Missouri in the following cases"—naming *Rees v. McDaniel,* 115 Mo. 145, *Hahn v. Dawson,* 134 Mo 581, *Frank v. Goddin,* 193 Mo. 390, and other decisions of the supreme court of that state. The defendants objected to the offer "as incompetent, immaterial and irrelevant, and no foundation laid, and nothing in the petition to warrant the introduction of this kind of evidence, this issue not being tendered by the pleadings, and hearsay evidence." The objection was overruled, and the defend-

ants excepted. None of the decisions in the cases cited appears in the record, nor does the statute mentioned in the offer. It is contended that it is not sufficiently proved that the law of Missouri limits riparian ownership of land to the bank of the river, and that the court should have found that the defendants had title to the thread of the stream as they might under the law of this state, and that the deed conveyed that title to the plaintiff.

It is contended that the evidence was incompetent because the law of Missouri was not alleged in the petition. The issue being tried was whether the tract of land conveyed by the deed contained the number of acres represented. The land was described by government divisions and fractions thereof. The evidence showed that these subdivisions lay next to the river, and that the land lying outside of the river and within these subdivisions did not comply with the terms of the deed and the representations of the defendants. The defendants then offered evidence tending to show that if the lines of these subdivisions were extended to the thread of the stream they would include the number of acres specified in the deed. The plaintiff in rebuttal offered the evidence as above recited. In this condition of the pleadings and evidence, we think it was not an abuse of discretion on the part of the trial court to allow this rebutting evidence. The ultimate fact to be established was the quantity of land actually conveyed by the deed. If the defendants had no title to that part of the land lying in the river they could not convey it. If, under the law of Missouri, the defendants could not have title to this land, that was a fact relevant to the question in issue, but was not itself directly in issue. This was substantially the same condition as existed in *Barber v. Hildebrand,* 42 Neb. 400, in which it was necessary to show title in land as a fact relative to the issue being tried. The action was to recover commission as a real estate agent, and there was no allegation in the pleadings as to the title of the land, nor as to the law of Iowa, but the court held that evidence in regard to the

law of Iowa was proper as bearing upon the question of title, and said: "Wright's property was in Iowa. The law of Iowa determined his title. The law of Iowa, as applicable to the facts shown by the abstract, was a fact in this case and, except as to statute at least, the proper subject of expert testimony."

We think also the evidence was competent and properly admitted. Section 420 of the code provides: "The unwritten law of any other state or government may be proved as fact by parol evidence, and also by the books of reports of cases adjudged in their courts." The record shows that decisions of the supreme court of Missouri as found in well-known books of authority were received in evidence by the court. These decisions show that in Missouri the defendants could not own the land lying in the bed of the river. It is true that the bill of exceptions is defective in not containing these decisions. It would, however, be highly technical to assume that the trial court did not see and predicate his decision on these authorities, or to refuse to take notice of the authorities referred to as containing the law of that state.

It being established then that the defendants did not have title, and could not and did not convey to the plaintiff the amount of land agreed upon and described in the deed, it follows that the plaintiff has been damaged and is entitled to recover in this action.

It is objected that the evidence is not definite and certain as to the number of acres for which the plaintiff is entitled to recover, nor as to the value of the land. There is substantial evidence, however, as already indicated, that the land actually conveyed to the plaintiff was from 175 to 200 acres less than the amount agreed upon, and the evidence as to the value is that the parties considered and agreed in their exchange that the land to be conveyed to the plaintiff was of the value of $50 an acre. The court did not consider this land to be of equal value with that actually conveyed, but apparently estimated the plaintiff's damages from a consideration of all the lands conveyed and agreed to be conveyed.

This finding of the court is not so clearly wrong as to justify a reversal of the judgment.

AFFIRMED.

REESE, C. J., took no part in the decision.

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ANTELOPE COUNTY BANK, APPELLEE, V. CHARLES WRIGHT, APPELLANT.

FILED JANUARY 3, 1912. No. 16,588.

Notes: ACTION: PARTIES. The holder of a promissory note for collection may maintain an action thereon in his own name, if the note is duly indorsed in blank by the payee named therein.

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

*J. B. Smith,* for appellant.

*J. F. Boyd, contra.*

SEDGWICK, J.

The plaintiff recovered a judgment against the defendant in the district court for Antelope county upon a promissory note. The trial court, after the evidence was concluded, instructed the jury to return a verdict for the plaintiff, which was done and judgment entered thereon. The defendant has appealed.

The only error assigned in the brief is that the evidence as to the plaintiff's ownership of the note is conflicting, and that the question should have been submitted to the jury as to whether the plaintiff is the real party in interest. The note is dated April 24, 1896, and is in the ordinary form; was in the possession of the plaintiff and presented at the trial and received in evidence on behalf

of the plaintiff. One W. W. Hobbs is named as payee in the note, and his indorsement appears on the back of the note. The president and cashier of the plaintiff bank both testified that this was the genuine indorsement of the payee, Hobbs, and that the note was the property of the bank. The defendant produced several witnesses who testified that they had seen and examined the note some five months after the date of the note and some time before the note became due, and that it then had no indorsement on the back thereof, and that the president of the bank then told the witnesses that the bank was not the owner of the note, but held the note for collection. In this condition of the evidence the court did right in instructing the jury to find for the plaintiff. If the bank held the note for collection it might maintain an action in its own name for that purpose. Comp. St. 1911, ch. 41, secs. 36, 37; *Roberts v. Snow*, 27 Neb. 425. See, also, *Meadowcraft v. Walsh*, 15 Mont. 544, 39 Pac. 914; *United States Nat. Bank v. Geer*, 53 Neb. 67, 55 Neb. 462.

The judgment of the district court is

AFFIRMED.

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## IN RE ESTATE OF WILLIAM HOPPER.

## WILLIAM C. HOPPER ET AL., APPELLEES, V. DANIEL G. HOPPER, APPELLANT.

FILED JANUARY 3, 1912. No. 16,605.

1. **Wills: PROBATE: EXECUTION: EVIDENCE.** If an instrument purporting to be the will of a deceased person is offered for probate and is signed by the decedent and by two or more persons as witnesses, oral evidence is admissible to prove the circumstances surrounding the execution of the instrument, and that it was in fact executed by the decedent as his will, and that the provisions of the statute in regard to the formal execution of a will were complied with.

2. ———: **INCLUSION OF WRITING BY REFERENCE.** A writing in existence at the time of executing a will, or made at the same time

and as part of the same transaction, may, by reference, be made a part of the will, if it is described and fully identified by the terms of the will itself.

3. ———: ———: PAROL EVIDENCE. Oral evidence is competent to prove the signatures of witnesses who signed such writing referred to in the will and made a part thereof, and to prove that the writing offered is the same instrument so identified by the signatures of such witnesses.

4. ———: ———: DEVISE: VALIDITY. Certain lands, and the intended devisees, were fully specified and described in deeds executed with the will; these deeds were described and identified in the will and duly witnessed and deposited with the will as a part thereof. The will provided that the lands so deeded to the said grantees therein "shall be held and possessed by them thereafter (after the death of testator) absolutely in fee simple." *Held* a valid devise of the lands so described to the grantees so named.

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

*Smyth, Smith & Schall,* for appellant.

*Baldrige, De Bord & Fradenburg, contra.*

SEDGWICK, J.

An appeal was taken to the district court for Douglas county in the matter of probating a will as the last will of William Hopper, deceased. Upon a trial in that court the will was admitted to probate, and the contestant has appealed.

There were offered, as the will of the deceased, nine several exhibits, the first being a document executed in the ordinary form prescribed by statute for the execution of wills; the second to seventh documents, inclusive, being in form warranty deeds, executed by William Hopper, as grantor, to each of six of his children, respectively, as grantees, and each in form conveying certain real estate to each of the said six children, respectively. Two of said exhibits were executed as codicils to the will of the deceased. The contention is that these six documents

in the form of warranty deeds do not constitute a part of the will and were improperly admitted to probate as such. The case was tried to the court without a jury, and much of the evidence was received under objections that it was incompetent, and many of the questions so presented are reserved and discussed in the briefs. Without discussing these numerous assignments in detail, it is perhaps sufficient to say: First, oral evidence is incompetent to contradict or vary the express terms of any of these written documents; second, oral evidence is competent to explain ambiguous, or otherwise unintelligible, terms and expressions in these documents; third, if a document is offered as the will of a decedent and is signed by the decedent and by two or more competent persons as witnesses, oral evidence is competent to show the circumstances surrounding the execution of the document, and that it was in fact executed by the decedent as his will, and that the provisions of the statute in regard to the manner of its execution were complied with. *Williams v. Miles,* 68 Neb. 463. It may be further observed that some of the examination of witnesses that was objected to was competent for the purpose of showing the knowledge that the witness had in regard to the transaction and his competency as a witness.

It appears that the deceased left nine children and heirs surviving him, and that he desired and intended to divide his property equally among them, so far as was practicable under the existing conditions. He considered that the husband of one of his daughters was irresponsible, and he desired to place the property given to that daughter beyond the reach of her husband. It is not necessary to state the details of his plan to carry out this intention. It resulted in his making specific devises and bequests to this daughter and to one of his sons. To each of his seven other children he executed a deed of real estate as above stated. The eighth paragraph of the first document referred to is as follows: "I have made and executed conveyances by warranty deed of certain of my

remaining lands in Douglas county, Nebraska (not above devised to my two children, Daniel Gilbert Hopper and Lomila McLean) to my other seven children giving to each an equal amount of land in value as near as I am able to estimate the same and said seven deeds to said seven children, to wit: Mary Jane Witte, Bryan B. Hopper, Hanna Crook, Sarah Ellen Spicer, Alice Walsh and William Charles Hopper are hereby delivered to said trustees who are hereafter named as my executors of this my last will and testament and are deposited with this will with the county judge of Douglas county, Nebraska. I direct that upon my death and as soon and immediately after said executors shall be appointed by the county court of said county and have qualified as such executors, said executors hereby made trustees for that purpose shall deliver the said deeds above mentioned to the said grantees therein severally named and that the lands so deeded to said seven children shall be held and possessed by them thereafter absolutely in fee simple. Having in that manner provided for said seven children no specific bequests are made to them hereby."

The seven deeds to each of seven of his children were executed as stated in this paragraph, but in reciting the names of the seven children the name of his daughter Eliza M. Deerson was omitted. This the evidence shows was a mere oversight of the writer of the will. These seven deeds and the principal document describing them were prepared and executed at the same time. Mr. Seymour M. Sadler prepared these documents at the request of the deceased, and also signed them as a witness, together with Mr. Cooper and Mr. Mayne. The deeds were witnessed by Mr. Sadler and Mr. Cooper; and Mr. Mayne, who was a notary public, took the acknowledgment and signed the deed in his capacity as notary public. When these persons were called to witness the will, these several documents were together on the table before the deceased. Two of these witnesses testified that the deceased told them that these papers were his will. Mr. Mayne

does not remember whether the witnesses used that particular expression, but they all agree that they were requested to witness the will of the deceased, and for that purpose they signed all of these documents as witnesses. The deceased first signed all of the documents, and afterwards each of the witnesses signed them all in his presence and in the presence of each other.

Afterwards, the deceased made two several changes in his will by codicil. In the first codicil he recites that he has made other provisions for one of his sons, and he has therefore canceled and destroyed the deed to that son "mentioned in clause No. 8 of said will," and he reaffirms said clause No. 8 "as to the six (6) deeds therein referred to." In the second codicil he makes still another change as to the devise to the same son referred to in the first codicil, but makes no other change in the terms of his will. All of these documents as constituting his will were kept together and by the deceased deposited with the probate court. The six deeds admitted as a part of the will and now being contested were all, as has been seen, executed at the same time with the main document of the will. They were all in existence at the time the will was completed and at the time of the death of the decedent, and were identified beyond question by the signatures of the witnesses and by their oral testimony at the trial. They specify and truly describe the property given to each of the devisees respectively. The language of the eighth paragraph of the will quoted above, "upon my death * * * said executors hereby made trustees for that purpose shall deliver the said deeds above mentioned to the said grantees therein severally named and that the lands so deeded to said seven children shall be held and possessed by them thereafter absolutely in fee simple," is sufficient, when construed with all of the other provisions of the will, to devise the lands specifically identified and described in the documents executed with and a part of the will. Various expressions contained in the will and in the codicils, and circumstances surrounding

the execution of the will are referred to by the contestant as showing that it was the intention of the decedent to transfer the title of these lands by the deeds themselves as such, and not as a part of his will, and it is argued that the deeds by themselves are not a compliance with the statute in regard to the execution of wills and, not having been delivered to the grantees in the lifetime of the decedent, are ineffectual to pass the title. We are satisfied, however, that the will cannot be so construed. It is manifest that these papers together were intended and executed by the deceased as his will, and that the witnesses so understood it from the declarations of the deceased, and so signed these documents as such witnesses at the request of the deceased and in substantial compliance with the provisions of the statute.

The judgment of the district court admitting this will to probate is amply supported, and is

AFFIRMED.

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E. L. KIRK, APPELLANT, V. STATE BOARD OF IRRIGATION, APPELLEE.

FILED JANUARY 3, 1912. No. 17,008.

1. Waters: CONTROL OF BY STATE. In this state, the water of running streams is *publici juris;* its beneficial use belongs to the public and is controlled by the state in its sovereign capacity.

2. ———: APPROPRIATION BY RIPARIAN OWNERS. Riparian owners cannot appropriate the water of running streams without the permission of the state.

3. ———: ———: REGULATION BY STATE. If the state grants the right to appropriate the waters of its running streams for beneficial use, it may do so under such limitations and conditions as it finds to be necessary and proper to subserve the public welfare.

4. ———: ———: USE CONFINED TO STATE: INTERFERENCE WITH INTERSTATE COMMERCE. In granting the right to appropriate water of a running stream for power purposes, it is within the discretion of the state, through its proper officers, to limit the rights granted

so as to prevent the transmission or use of the power beyond the confines of the state. Such limitation does not violate the federal constitution as interfering with interstate commerce.

5. ———: ———: CONTROL OF STATE BOARD OF IRRIGATION. The state board of irrigation, highways and drainage, in acting upon an application for the appropriation of the waters of the state, is given a reasonable discretion to so limit the grant that it will not be detrimental to the public welfare.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Affirmed.*

*E. A. Houston* and *W. A. Meserve,* for appellant.

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

SEDGWICK, J.

The appellant filed with the state board of irrigation an application for a permit to appropriate the waters of the Niobrara river for power purposes. The state board of irrigation indorsed its approval upon the application, and in that indorsement specified certain limitations and conditions of the approval. Among those specifications of limitations and conditions was the following: "(7) This grant is made subject to the provisions of section 42, article 2, of the Nebraska Irrigation Law, and power generated under and by virtue of this permit must not be transmitted or used beyond the confines of the state of Nebraska." The section of the statute referred to in this specification is as follows: "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided." Comp. St. 1911, ch. 93*a*, art. II, sec. 42. The applicant appealed to the district court for Knox county, complaining of this seventh paragraph of the limitations and conditions of his grant. Upon a hearing in that court the

action of the state board of irrigation in this particular was approved and the appeal therefrom was dismissed, and the applicant appealed to this court.

1. It is contended that this order ought to be reversed because: First, it is invalid as interfering with interstate commerce; second, the state board of irrigation has not been given power or authority by the state to impose such conditions and limitations.

In *Manufacturers Gas and Oil Co. v. Indiana Natural Gas and Oil Co.*, 155 Ind. 545, the supreme court of that state held that the statute, which attempted to "prohibit the owner of natural gas from transporting the same by safe methods out of the state, contravenes the federal constitution relating to interstate commerce, and is void, since natural gas, when reduced to possession, is an article of commerce." The defendant was taking natural gas from its own wells on its own land, and the action was brought to enjoin it from transporting this gas through pipes to any point without the state. The statute considered provided: "It shall be unlawful for any person or persons, company, corporation or voluntary association to pipe or conduct natural gas from any point within this state to any point or place without this state." This statute was held to violate the federal constitution by interfering with interstate commerce. The decision was put upon the ground that the gas, as well as the land from which it was taken, was the property of the defendant, and that the state, representing the public, had no property interest or rights therein. The court distinguishes the case from *Geer v. Connecticut*, 161 U. S. 519, and in doing so used this language: "In the case of wild animals, before they are reduced to possession, the ownership is in the public, and not in any private person, and they are, therefore, held to be subject to the protection of the sovereign. The privilege of taking, killing, and transporting them may, on this ground, be regulated by the legislature. As to natural gas, however, the public has no title to or control over the gas in the ground. On the

contrary, so far as it is susceptible of ownership it belongs to the owners of the superincumbent lands in common, or, at least, such landowners have a limited and qualified ownership in it to the entire exclusion of the public." In *Geer v. Connecticut, supra,* the supreme court of the United States held that the statute of Connecticut prohibiting the transportation of game outside of the state, although the game was lawfully killed within the open season, was not affected by the interstate commerce clause of the federal constitution, and that the ownership of the wild game within the limits of a state, so far as it is capable of ownership, is in the state for the benefit of all its people in common. The court said that, the ownership of wild game being in the state so far as it was capable of ownership, the state might transfer the full ownership thereof to a citizen, or a qualified ownership, as the state saw fit, and that the effect of the Connecticut statute was to transfer limited or qualified ownership of game to one who took such game in the open season, and to reserve such ownership as would enable the state to prevent the removal thereof from the state. The opinion was by Mr. Justice White (the present Chief Justice), and was concurred in by a bare majority of the court, two of the justices of the court being absent, and Justices Field and Harlan dissenting. The ground of their dissent, as stated in the opinion of Mr. Justice Field, appears to be that "animals within a state, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the state in any respect; they are not the property of the state or of any one in a proper sense. * * * A bird may fly at such height as to be beyond the reach of man or his skill, and no one can then assert any right of property in such bird; it cannot then be said to belong to any one." If the state never had and could not have any property in or power of disposition of wild animals, taken with the consent of the state in the open season, it would not transfer any

right of property to the defendant, and therefore would not and could not reserve any interest therein or control over the same. We understand that if it had been considered by the dissenting justices that the state had or acquired ownership of wild game so taken, or the right to control the same as property, they would also have held that it might have reserved such an interest therein as to enable it to prevent its transfer without the state. The opinion of the court, at least, was that, when a state has an interest in or control over property within its limits, it may transfer a qualified ownership, and prevent the transportation of the property without the state. We are concluded by opinions of that court upon federal questions, and we may be allowed to say that, if we were not so concluded, the reasoning of the opinion would control our judgment.

In this state, running water is *publici juris*. Its use belongs to the public and is controlled by the state in its sovereign capacity. *Meng v. Coffee*, 67 Neb. 500. A riparian proprietor cannot appropriate it without permission of the state. This state then has such a proprietary interest in the running water of its streams and in the beneficial use thereof that it may transfer a qualified ownership or right of use thereof. When it grants such ownership or right of use it may impose such limitations and conditions as its public policy demands. Under such circumstances the state may reserve such a right of ownership and control of the beneficial use of the running waters of the streams as will enable it to prohibit the transmission or use thereof beyond the confines of the state.

2. Has the state granted to the state board of irrigation power to impose such conditions upon the appropriation of the water of its streams to beneficial use? We think there is no doubt of the power and duty of the state board of irrigation to determine such questions. "If there is unappropriated water in the source of supply named in the application, and if such appropriation is

not otherwise detrimental to the public welfare, the state board, through its secretary, shall approve the same." Comp. St. 1911, ch. 93*a*, art. II, sec. 28. Thus the state board of irrigation is made the guardian of the public welfare in the appropriation of the public waters of the state, and this necessarily devolves upon that board a large discretion in such matters. If the public welfare demands it, they may grant a qualified and limited right of appropriation and in the beneficial use of the water so appropriated.

We think that the board has not exceeded its powers in the order complained of, and the judgment of the district court dismissing the appeal is

AFFIRMED.

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SIDNEY S. MONTGOMERY, APPELLANT, V. QUINTILLA M. DRESHER, APPELLEE.

FILED JANUARY 24, 1912. No. 16,575.

1. **Contracts:** ABOLITION OF PRIVATE SEALS. Since the use of private seals has been abolished in this state, all contracts are upon the same footing as simple contracts.

2. **Alteration of Instruments:** FILLING BLANKS. The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority so to do.

3. ———: ———. The right to fill blanks in written instruments after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker.

4. **Mortgages:** VALIDITY: INSERTION OF NAME OF MORTGAGEE. Where a mortgage was executed with the blanks for the name of the mortgagee unfilled, the mortgage delivered to the person to whom the indebtedness secured by the mortgage ran, the filling in of his own name by such person would not invalidate the mortgage.

5. ———: BONA FIDE PURCHASERS: EVIDENCE. Upon an examination of the evidence, it is found that plaintiff is a *bona fide* purchaser of the notes and mortgage sued upon.

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

*William Baird & Sons*, for appellant.

*Duncan M. Vinsonhaler, contra.*

REESE, C. J.

This is an action to foreclose a mortgage on lot 17, in block 2, in Hanscom Place, an addition to the city of Omaha. The petition is in the usual form, and is based upon two promissory notes, each bearing date December 31, 1907—one for $500, due January 1, 1909, the other for $1,200, due January 1, 1910—secured by the mortgage set out in the petition, all issued to one Becker and indorsed and assigned to plaintiff. The answer consists of (1) a general denial of all unadmitted facts alleged in the petition; and (2) alleges the perpetration of a fraud upon defendant by Becker in the exchange of properties by fraudulently misrepresenting the quality, character and value of the property involved in this action, and for the price of which the notes described in the petition were in part given; that the notes and mortgage when executed did not contain the name of Anson E. Becker, as payee and grantee, and that they have been changed and altered after delivery by the insertion of Becker's name therein where they were left blank at the time of execution and delivery; that defendant would not have signed the same had his (Becker's) name been there. The averment in the petition that plaintiff is a *bona fide* owner and holder of said notes and mortgage is also denied; and it is alleged that he had full knowledge of their defects when executed, that they were without consideration, that he is not the owner thereof, and his pretended purchase of them was the carrying out of a fraudulent conspiracy, entered into

with the said Becker, to aid in the perpetration of a further fraud upon her. There are other averments in the answer which it is not deemed necessary to notice here. By the reply plaintiff denied any knowledge of the exchange of property as alleged in the answer, or of any fraud therein, or that the name of the payee and mortgagee had been inserted after delivery; averred that the filling of the blanks therein by the insertion of Becker's name was by the authority of defendant, that plaintiff was a *bona fide* holder and owner thereof by their purchase for value before the maturity of the notes. Other averments of this reply need not be here noticed. There was a trial to the district court, which resulted in a finding and decree in favor of defendant, dismissing plaintiff's petition, canceling the mortgage, and quieting defendant's title. The findings of the decree are to the effect that plaintiff did not acquire the notes and mortgage for a valuable consideration in the due course of business, that there had been a material alteration in the mortgage subsequent to its execution and delivery, and that the mortgage casts a cloud on defendant's title which she is entitled to have removed and her title quieted. A decree was accordingly rendered. The decree provides that it is without prejudice to plaintiff's right of action on the notes, but no judgment is rendered thereon. Plaintiff appeals.

From an examination of the evidence contained in the bill of exceptions, we conclude there are but three controlling questions involved in this case. (1) Was the insertion of the name of Becker as payee of the notes and grantee in the mortgage a material alteration of said instruments? (2) If so, were the blanks so filled by the authority and consent of defendant? (3) Is plaintiff a *bona fide* holder of said instruments?

Since the use of private seals has been abolished in this state (Ann. St. 1911, sec. 11851) all contracts are upon the same footing as simple contracts. Therefore, the same rule should be applied to all. The filling in of a

blank in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in, it is a question of authority so to do. *Waldron v. Young*, 56 Tenn. 777. The right to fill in blanks in written instruments is based upon an assumption of consent. The leaving of a blank space is considered to imply authority to fill it. *Inhabitants of South Berwick v. Huntress*, 53 Me. 89; *Smith v. Crooker*, 5 Mass. *538; New *England Loan & Trust Co. v. Brown*, 59 Mo. App. 461; *Porter v. Hardy*, 10 N. Dak. 551. In *New England Loan & Trust Co. v. Brown, supra*, it is said, quoting from *Mackey v. Basil*, 50 Mo. App. 190: "The rule of law is now everywhere well settled that the leaving of blanks in a contract, and the delivery of the instrument with such blanks, creates an agency in the receiver to fill the blanks in the way contemplated by the maker. The authority to fill in the blanks will be implied"—citing a number of cases and authorities. See, also, *Augustine v. Schmitz*, 145 Ia. 591; *Chapman v. Veach*, 32 Kan. 167, 4 Pac. 100; *Field v. Stagg*, 52 Mo. 534; *Pence v. Arbuckle*, 22 Minn. 417; *Van Etta v. Evenson*, 28 Wis. 33; 2 Reeves, Real Property, sec. 1085 *et seq.*; *Roe v. Town Mutual Fire Ins. Co.*, 78 Mo. App. 452; *Ragsdale v. Robinson*, 48 Tex. 379; *McClain v. McClain and Davenport*, 52 Ia. 272. There are many cases holding to a different doctrine, but we are persuaded that the more modern holdings are more reasonable, and more consistent with justice, viz., that the executing and delivery of a mortgage with the name of the mortgagee left blank is an implied authority to the person to whom the delivery is made to fill the blank with the name of the proper mortgagee, where no fraud or violation of instructions can be shown.

In this case the person whose name was entered in the blank space was the identical person with whom defendant was dealing and whose name would naturally have been written in the blanks. The reason, as explained by Becker, for the omission was that as Bennett was a part owner of the real estate transferred to defendant, and on

which the mortgage was given, he desired to consult him before filling the blanks. This explanation was reasonable and may be correct. At any rate, the mortgage as filled out corresponded with the dealings between the parties to the transaction, and should be held to be a valid mortgage, even as between the parties to it. The right to fill the blanks in the notes by the insertion of the name of the payee is given by section 9213, Ann. St. 1911 (Comp. St. 1911, ch. 41, sec. 14), and their validity cannot be questioned. In addition to the implied authority to fill the blanks in the notes and the mortgage, the evidence strongly preponderates in favor of an express authority therefor and consent thereto by defendant.

Is plaintiff a *bona fide* holder of the notes and mortgage? Courts are required to decide causes upon the evidence. Plaintiff testified that he purchased the notes and mortgage in good faith, for value, before maturity, and without any knowledge of the previous transactions between the parties or notice of any defense defendant might have; that the price paid was $1,600, which was within $100 of the face of the notes. Plaintiff's check for the sum of $2,000, payable to W. V. Bennett, from whom the purchase was said to have been made, was introduced in evidence, and the testimony of plaintiff and Bennett was that $400 was to be applied on an indebtedness to Bennett from plaintiff, and the remaining $1,600 to the purchase price of the notes and mortgage. The check bears date January 17, 1908, which was before the maturity of the notes, and is indorsed by Bennett and stamped "Paid." Bennett testified that he received the money, and plaintiff swore that the check was returned to him by the bank canceled. There was some delay in the indorsement of the notes and assignment of the mortgage, but that was explained by evidence that Becker had assigned the mortgage to Bennett, and that he was out of the country temporarily, and it was deemed best to await his return, when the assignment to Bennett could be taken up and one made to plaintiff, thus saving recorder's

fees. The notes are indorsed by Becker to Bennett "without recourse"; but, as Bennett was already the owner of a half interest in them, the indorsement, of itself, cannot be held as evidence of unfair dealing or of fraud. True, a relationship by marriage was shown to exist between plaintiff and Bennett, but this circumstance alone does not conclusively show the absence of *bona fides* in the purchase of the notes.

We are not unmindful of the charges of fraud made by defendant as against Becker and Bennett in the exchange of properties which gave rise to the execution of the notes and mortgage, and which may be well founded, yet we are unable to see how the facts alleged can, under the evidence, have any controlling effect upon this case. That subject is therefore not discussed. Since section 681*a* of the code requires this court to try questions of fact *de novo* and "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court," etc., we conclude that the evidence supports the *bona fides* of plaintiff's purchase of the notes and mortgage, and that he is entitled to a decree foreclosing his mortgage.

The decree of the district court is therefore reversed and the cause remanded to that court, with directions to enter a decree of foreclosure.

REVERSED.

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NORA SHANAHAN, ADMINISTRATRIX, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JANUARY 24, 1912. No. 16,578.

Carriers: INJURY TO PASSENGER: EVIDENCE: INSTRUCTION. Plaintiff's intestate took passage on a through-freight train from a point in Iowa to a point in this state, accompanying live stock and household goods, traveling in the car as a caretaker. When the train

came to the city of H., in this state, the car was detached and placed on a proper side-track in the track yards, to be taken to its destination by a local train the next morning, the through freight not stopping at the point of destination. During the intervening night deceased sought his car, and there was some evidence tending to show that he found it, and afterward left it and was found in a fatally injured condition by the side of the main-line track, a considerable distance from his car. At about the hour of 2 o'clock A. M. a fast passenger train came in from the west, running at the rate of 25 to 35 miles an hour. The fireman on the engine saw an object about 140 feet ahead of the train, outside of the track and on his side thereof, but was unable to detect what it was. As the engine passed it, it assumed the shape and form of a human being, but lying outside and free from the track. After the train had passed on to the station, he informed defendant's employees of what he had seen, and they went to the spot and found deceased injured and lying outside of, but near, the track. The defendant asked the court to instruct the jury, in substance, that if they found that deceased reached his car, and afterward left it and wandered upon the tracks and placed himself on the ground near enough to the main-line track to be injured by a passing train, he would be a trespasser, and the enginemen were not bound to expect his presence there, nor look out with a view to discover him, and the defendant would not be liable for not stopping the train before passing him. *Held* error to refuse such instruction.

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

*James E. Kelby* and *Frank E. Bishop*, for appellant.

*R. A. Batty, W. D. Oldham* and *Adams & Adams*, *contra.*

REESE, C. J.

This action is for damages resulting from the death of plaintiff's intestate, which is alleged to have been caused by the negligence of defendant. Plaintiff recovered a judgment. Defendant appeals.

The uncontroverted facts may be stated to be that Thomas E. Shanahan, the deceased, was a passenger on a freight train from Coburg, in the state of Iowa, to the

village of Axtell, in this state; that his right to travel on a freight train grew out of a contract with defendant for the shipment of a car-load of property, consisting in part of a horse, and household furniture, and by reason thereof he remained with the car for the purpose of caring for the shipment. The car was placed in a fast through-freight train which did not stop at Axtell, and when it arrived at Hastings in the afternoon it was cut off the train and sidetracked, to be picked up and carried forward by a local train the next morning. The track yards at Hastings are large, and the car was placed upon a track remote from that of the main line. The deceased left the car in the evening and went into the city, remaining there until about the middle of the night, when he attempted to return to his car. In his effort to do so he sought the assistance of the yardmaster of the track yards, who directed him how to reach his car. There is some evidence tending to prove that he was, to some extent, under the influence of liquor, but that is not deemed material to the inquiry as to the giving or refusing of the instruction hereinafter set out. When directed as to the location of the car he requested the yardmaster to accompany him thereto, but the yardmaster being busy declined to do so. So far as is shown by the evidence, this was the last seen of him until about 2 o'clock the next morning, when the through-passenger train came in. This train was running rapidly—at the rate of from 25 to 35 miles an hour. The fireman was called as a witness by the plaintiff, and testified that, upon looking ahead of the train from the window on his side of the cars, he saw some object by the side of the track and outside of the rails some 140 to 150 feet ahead, which he took to be a pile of cinders, or a drawhead, but as the engine passed it he thought it assumed the form of a man, lying with the head near the end of the ties and the feet away from the track, the body lying perpendicular to the track. This was probably a mile from the station. When the train arrived at the station, he informed the employees of de-

fendant of what he had seen, when a switch engine was run out, and the deceased found, yet living, but badly injured, his feet being toward the track, and without any coat on or about him. One of defendant's employees was left with him until an improvised stretcher—a grain door—was procured, when he was taken to the station, and an ambulance or a conveyance was called, when, with the surgeons in attendance upon him, he was removed to a hospital and died the next day. Upon an examination of his clothing, it was found that one of his trouser's pockets was drawn from its place and turned inside out. His pocket-book, containing a sum of money, was found on the opposite side of the track from where he was lying, but appears not to have been otherwise molested. How, or by what means, the pocket was turned and the pocket-book placed where it was found is not known. At the time he entered the yards he had with him a coat, and protruding from the pockets of which, it is said, were two beer bottles. Two broken beer bottles were found near where he was lying. On the examination of his car the next morning, a coat answering the general description of the one he had when entering the track yards was found hanging therein, and his cot appeared prepared for occupancy, but had not been occupied. A number of empty beer bottles were found in the car. His injury consisted in part of one of his legs being crushed or cut off, as though run over by a car wheel. If the plaintiff's principal witness, the fireman on the train, was not mistaken, it seems improbable that the injury could have been caused by that train, unless deceased, in an effort to rise, had cast himself upon the track and thus brought himself in front of the rapidly moving wheels of the train; but there is no evidence of such an effort, and he was under the eye of the fireman from the time he was first seen until the engine had passed him. He had been hurt before that train reached him, or the injury must have been caused in some way by the cars following the engine. The above is substantially a correct statement of the facts,

but without detail as to the evidence, as it is not our purpose to review it. It is claimed that defendant was negligent in not accompanying deceased to his car, and in not caring for him after discovering him, as he should have been cared for. But these questions need not be discussed here.

Defendant asked the court to give instruction numbered 9, of those asked by it, but which the court refused to give. It is as follows: "The jury are instructed that if Thomas Shanahan went to his car, or put his coat in the car, after he had been directed to it by the yardmaster, and after that wandered away from the car over to the main-line track where he lay upon the ground dangerously near to or in the way of the train passing on that track, then in that position he was a trespasser, and the enginemen were not bound to expect his presence there, nor to look out with a view to discover him, and the defendant is not liable because the train could not be or was not stopped before reaching and passing him." There was some evidence which tended to prove, inferentially, that deceased had found and entered his car after meeting the yardmaster. If this were true, it would eliminate all claim of negligence on the part of the yardmaster in not accompanying Shanahan to his car. Also, if this were true, it would terminate all obligation and responsibility of the defendant to him as a passenger. The relation of carrier and passenger, as between them, would not exist, for the reason that, by leaving his car and going upon the tracks, he would be acting upon his own volition disconnected with his carriage, and would, in that sense, be a trespasser. True, he had the right, as such passenger, to be within the track yards, but as such only in connection with his car and the care of his property therein. Then if he wandered away from his car over to the main-line track, which was shown to be quite a distance from his car, where he lay upon the ground dangerously near to the track, his presence there would not ordinarily be expected, nor would a special lookout

be required with reference to him. As we view the conceded facts in the case, we are of opinion that the instruction should have been given in substance, and that it was prejudicial error to refuse it.

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

REVERSED.

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## FRANK ERDMAN V. STATE OF NEBRASKA.

FILED JANUARY 24, 1912. No. 17,291.

1. **Criminal Law**: ATTEMPTED HOMICIDE: PRESERVATION OF EVIDENCE. In a criminal prosecution, based upon the explosive quality of a substance, which it was alleged was placed upon a porch of an occupied dwelling house for the purpose of committing a murder, the utmost care should be taken in preserving the substance and its identity, in order that no mistake be made, and all uncertainty removed.

2. ———: EVIDENCE. The paper wrapped around the substance charged to have been dynamite bore the brand of a well-known manufacturer of dynamite. It was shown that at the stone quarries, near the city of Louisville, the same brand of dynamite was used, and that the depository in which it was kept was not secured by lock and key. The accused was seen in Louisville a few days before the perpetration of the alleged crime, but it was not shown that he knew where the dynamite was deposited, nor that he was seen near there, nor that any of the dynamite there stored had been taken away. *Held* too remote and of no probative force.

3. ———: ———: PREJUDICIAL ERROR. A trunk dealer was called as a witness, who was permitted to testify that, prior to the day on which the alleged crime was committed, he had two suit cases in stock similar to the one offered in evidence as the one placed upon the porch of the dwelling house, and some time thereafter there was but one; the other not having been sold, so far as he knew. There was no proof that plaintiff in error had been to the store, nor that he knew of the existence of the two suit cases, nor that the supposed missing one had been sold or stolen. The objection by the defendant to this testimony should have been sustained. The evidence was immaterial and irrelevant and prejudicial to the accused.

4. ———: WITNESSES: EXAMINATION: PREJUDICIAL ERROR. The state called a witness in rebuttal. She had previously made a written statement to detectives representing the state as to the time of day when a certain picture was taken, but which she stated upon the witness-stand she had, upon reflection, concluded was erroneous. Thereupon the county attorney proceeded to read to her, in the presence of the jury, her statement taken by the detectives. *Held*, under the circumstances set out in the opinion, erroneous.

5. ———: ———: REFRESHING MEMORY. A witness who was called by the defense stated that at the time of the commission of the alleged offense he was a reporter for a local newspaper, was present when the contents of the suit case were examined by the police, and made certain notes of the condition of said contents. His testimony was asked upon a material question, when he responded that the facts had been correctly reported and the report published in the paper as furnished; that after the publication of his report he examined the article in the paper and found it correct; that the original notes were thrown aside or destroyed, but the facts as to the condition of the contents of the suit case had left his mind. He was asked to refresh his memory by a reference to the published report. Objection by the state was sustained, the court holding that he could refresh his memory only by reference to his original notes. *Held* error.

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

*John O. Yeiser* and *Charles E. Foster*, for plaintiff in error.

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

REESE, C. J.

An information consisting of three counts was filed in the district court by the county attorney of Douglas county, the first count of which charges plaintiff in error with having made an assault upon Thomas Dennison on the 22d day of May, 1910, with intent to murder the said Dennison. No further specification of the manner of the assault is contained in the count. The second count is for the same offense, but contains the averment that the as-

sault was made by placing a suit case, containing dynamite and a loaded revolver, upon the porch of Dennison's residence, the contents of the suit case being so arranged that, when lifted, the revolver would be discharged causing the dynamite to explode. The third count is similar to the second, except that the condition and contrivance of the suit case and its contents are stated with more elaboration, and which need not be here stated. A jury trial was had, which resulted in a verdict finding accused "guilty as charged in the information of the crime of assault with intent to murder." A motion for a new trial was filed, which being overruled, a motion in arrest of judgment was filed, which was also overruled, when plaintiff in error was sentenced to confinement in the penitentiary for the term of 15 years. He brings error to this court.

Testimony was introduced to the effect that on Sunday, May 22, 1910, at about 10 minutes before 3 o'clock in the afternoon, a suit case was discovered standing on the porch of Thomas Dennison; that a screw-eye had been screwed into the porch floor, and a string or cord projecting through a hole in the bottom of the suit case was tied to the screw-eye. It is shown that a few minutes before the suit case was discovered parties were on the porch and no suit case was there. During the time, up to the discovery, persons were in the house, but they knew nothing of the suit case being placed there. A dog was in the house, and the witness who was within heard the dog growl or make some alarm, and she soon afterward went to the door and the suit case was seen. The suit case was picked up by one and dropped to the floor, kicked over by another, picked up again by another and dropped down, and finally was left lying on its side on the porch floor after having been opened, when the parties all went away so leaving it. Later in the afternoon, perhaps about 6 or 7 o'clock, upon the return home of Mr. Dennison, who had been absent during the afternoon, certain policemen were called, who untied the string

from the screw-eye, and carried the suit case a short distance from the house and opened it, when certain sticks of substance, said to be dynamite, were discovered, and with them a pistol, said to have been loaded with powder and dynamite, which was so placed that by pulling the string the hammer would be raised as if to discharge the pistol, the force of the discharge reaching the dynamite, and thus producing an explosion. The sticks were removed from the suit case, placed in a bucket, and the whole, with the suit case, carried to the police station, where it was placed in a room in the upper story of the barn used in connection with the police station for the purpose of storing stolen property and such like. Later, during the succeeding week, all the sticks, about 25 in number, were removed to the foundation of a building in the city of Omaha, which was being wrecked, and were exploded in tearing down the foundation of the old building.

Assuming, as we do for the purposes of this opinion, that the contents of the said suit case was taken to the police station, it is unfortunate that some of the sticks were not at once placed in the hands of a competent chemist for analysis. It is insisted that the evidence is not sufficient to show that the sticks were so carefully kept as to render it certain that those used in wrecking the wall referred to were the identical sticks taken from the suit case. It is apparent that the strictest care should have been taken in that regard. It is also unfortunate that the police officers allowed all to be removed from their charge and care and be destroyed in blasting the wall, if they were so destroyed. Some portion at least of the "sticks" should have been carefully preserved in safe hands and presented upon the trial, in order that the fullest and most careful examination might be then made. This was not done, and an element of uncertainty, under the evidence, was presented that might have been avoided. Certain officers and others who saw the sticks testified that they were dynamite, largely basing their judgment

on the appearance of the "sticks" and their contents. Some of them testified to having used that substance, but their own testimony showed that they could easily have been mistaken, for a substance was presented to them while on the witness-stand in cross-examination which upon inspection they declared was not dynamite, but which a competent chemist analyzed and found to be that substance. Thus was the probative force of their testimony somewhat at least impaired.

As we have seen, the suit case must have been placed on Mr. Dennison's porch by some one, probably at from 2:30 to 2:45 in the afternoon, while persons were in the house and on the same level of floor. Plaintiff in error is charged with so placing it. The question of his identity becomes a most important one. He is said to have been seen in the neighborhood of Mr. Dennison's home the day and night of the day before (Saturday) and on Friday, two days before. It is shown that he was in the employ of an organization, known as the "Civic Federation," as a detective, and that his duties were to discover and unearth violations of the law in Omaha and elsewhere, and the mere fact of his presence in that part of the city, if he were present, might not raise any presumption that he was there for an unlawful purpose. It is also insisted that he was seen at and near the home of Mr. Dennison about the time the suit case was left on the porch, and one witness testified to having seen him on the porch, but saw no suit case, and did not see his face, except a side view. This witness also testified to having seen some one standing in the street in that neighborhood at about the hour of 12 o'clock, midnight, a night or two before the Sunday in question. His testimony is that he slept in an upper room, and, at the hour named, had occasion to arise to answer a call of nature, when he opened a front window of his room and from which he relieved himself. It was shown that there was a bath-room and water-closet nearly opposite his bed-room, across a hall of about three feet in width, the door of which was not more than seven or eight feet from the head of his bed.

Two witnesses, sisters, testified that on the afternoon of the Sunday in question they had been to a church building in the city, in order to have a picture of a confirmation class taken, and of which one of them was a member. One was 17 and the other 11 years of age. They stated that after leaving the church, which was some distance from their home, they walked home, and on the way they fell in behind a man on the sidewalk near the Dennison residence, who was carrying a suit case similar to the one in evidence, and, after walking near him for some distance, they turned off the walk and went to their home. They did not speak to him nor see his face, they having walked behind him, but they thought they subsequently recognized Erdman as the man. As we have seen, the suit case was discovered upon Mr. Dennison's porch ten minutes before three. No one was seen at or near the suit case, which had been left there a short time before its discovery. Some little time, at least, had been required to place it, for Mr. Dennison testified that the screw-eye was so firmly screwed into the floor that it was necessary to use a claw-hammer in unscrewing it. At least ten minutes were required for the girls to walk from the church to where they followed the man with the suit case. The picture of the class was taken on the front steps of the church. The photograph was introduced in evidence, and the elder of the two sisters was clearly identified in the picture. On the photograph is shown a shadow of the eaves of a building cast upon the side of the church. There was a difference of opinion as to just when the picture was taken, no one of the parties present being able to more than estimate or approximate the time, and, as expressed by some, "guess" at it. The professor of astronomy of the Creighton University made a careful calculation as to just what time the shadow was cast on the place shown in the photograph, and it was found to be 21 minutes and 12 seconds after 3 o'clock, which was after the discovery of the suit case on the porch. We must also add the time required to make such preparation

for departure from the church as girls of that age usually take, and the time occupied in the walk referred to. It thus appears that the person seen by the girls was not the one who placed the suit case upon the porch.

We find it impossible to review all the evidence submitted to the jury without extending this opinion to an unreasonable length, and, as the cause will probably be tried again, it would be improper for us to do so, but these suggestions are made as calling attention to what seem to us to be more or less vital questions involved. There was testimony to the effect that plaintiff in error had made threats against Mr. Dennison, claiming that Dennison had been the cause of serious losses to him. These were proper to be considered, but Mr. Dennison testified that he had never had any dealings or transactions with Erdman at any time.

The papers or wrappers around the "sticks" of the contents of the suit case were of the brand of a known manufacturer, the sticks being of a shape different from others and peculiar to the product of that factory, although not unknown to the trade. The stone quarries at Louisville, in Cass county, were visited by detectives, and it was found that the dynamite in use there was of the make or brand referred to. It was also shown that one of the depositories of dynamite was some distance from the city of Louisville, and was not protected by being locked in the place of deposit. A short time before the Sunday on which the crime is alleged to have been committed, plaintiff in error was seen in Louisville, but the state offered no evidence that he was seen near where the dynamite of the quarrying company was kept, nor that any portion of the dynamite had been missed or removed therefrom. We must confess we are at a loss to see the materiality of that evidence. There is no shadow of proof that plaintiff in error was in Louisville for any improper or unlawful purpose, nor that he even knew of the location of the unprotected dynamite. Of a similar nature was the testimony of a trunk dealer in Omaha, who testified that

prior to the 22d day of May, 1910, he had two suit cases of the same kind as the one introduced in evidence; that after that date he was visited by detectives for the state, when but one was found in stock; that he had not sold the other himself, and had no record of it having been sold; that he had clerks and employees whose business it was to sell his goods, none of whom were called to testify. There was no proof that plaintiff in error had been seen at the store, nor of any fact which could by any course of reasoning lead to the conclusion that he had in any way procured the suit case claimed to have been missing. Nothing could possibly result from this evidence, unless it might be to raise a suspicion without proof that plaintiff in error may have stolen the dynamite from the quarries at Louisville, and have purloined the missing suit case from the store. That the evidence was too remote, and, as offered, wholly immaterial, must, we think, be conceded.

Miss Alma Stuft was called by the state as a witness on rebuttal. She was a member of the class of girls whose pictures were taken on Sunday, May 22. She was not called as a witness in chief by the state. The subject presented to her was as to the time when the pictures were taken. As with others upon the same subject, she was uncertain as to the exact time, but gave her judgment, which fixed it later than what was claimed by the state. She was asked by the county attorney if she had not given a written statement to the city detective who called upon her. She answered that she had, but upon more mature reflection she was satisfied she had made a mistake in time, whereupon the county attorney proceeded to read to her, in the presence of the jury, certain extracts from the statement prepared by the detective in her presence. We copy the following: "Q. Did you make a statement and sign a statement about this? A. Yes, sir; I did. Q. I will ask you to look at this paper and state if that is the statement you made." After some discussion, followed by a ruling in favor of the state, but without an

answer, she was asked: "You identify this as the statement? A. Yes, sir. Q. And it is correct, is it? A. Yes, sir. Q. You read that, and signed it? A. Yes, sir." After further objections by the defense, and the rulings of the court thereon, the county attorney proceeded: "But in this statement was this (reading from statement): 'We had four pictures taken altogether of the confirmation class, and the preacher was in the first picture which was taken by Otto Timme.' What do you say about that? A. I don't remember just exactly if he was in the first picture, or not; I think he was in the second picture. Q. This is the statement you made at that time, is it not?" (Not answered.) "Q. Then do you say the preacher left after the first picture was taken; that was shortly after 2 o'clock?" (Not answered.) "Q. What do you say about that? A. I think the preacher left after the second picture was taken. Q. And you say (reading), 'The Hageleit girls left after the second picture was taken, which was not later than 2:30 P. M.' What do you say to that? A. Yes; I know the Hageleit girls left after the second picture was taken. Q. Then you say (reading), 'We had two other pictures taken after 2:30 P. M.' What do you say about that? A. Well, I do not know just exactly what time it was, but I know they left after the second picture was taken—the Hageleit girls. Q. (reading) 'I know they were all completed before 3 o'clock.' A. Well, I don't know. Q. Didn't you say this a month ago? A. Yes, sir. Q. Well, is that true?" (No answer.)

There is no suggestion that this witness is unfriendly. She simply stated that upon more "serious" reflection, after making the statement, she had been mistaken. She was not called by the defense, but was the state's witness. Objections were made and overruled at every point in this examination. By this action on the part of the county attorney he succeeded in getting before the jury the *ex parte* statement made by the witness to the detective in contradiction of her testimony while being examined by him. We know of no rule of evidence which will permit

this. It is the same in principle as the course pursued in *Masourides v. State,* 86 Neb. 105, and which was condemned in that case, and in which we said: "A moment's reflection must show the fallacy of the contention of the state and ruling of the court upon this question. The necessary effect of the course pursued must have been either to discredit and, to that extent, destroy the credibility of the state's own witness, or to substitute for her evidence the former statements alleged to have been made by her." While the whole of the paper was not read to the jury, as in the *Masourides* case, yet, to the extent pursued, the vice was the same.

A reporter for the Omaha Bee was called as a witness on the part of the defense. After testifying that he was present at the time of the examination of the contents of the suit case, he was asked as to how many cartridges were in the pistol found in the suit case. His answer was, in substance, that it was impossible for him to remember the details of what he saw in making that examination; that he wrote out what he had seen and furnished it to the paper for publication; that his writing was accurately published, but the original manuscript was not kept; that he could refresh his memory from the published article and testify to what he saw in the examination made, but that he could not otherwise do so, having no present recollection of the matter suggested by the inquiry. The court, upon objection, refused to allow the evidence, holding that the witness could refresh his memory only from the original memorandum. In *Topham v. M'Gregor,* 1 Car. & Kir. (Eng.) 320, the writer of articles in a newspaper testified that all the articles written by him were true, and it was held that the newspaper containing the article under consideration might be placed in his hands for the purpose of refreshing his memory, and that he might be asked whether, looking at the articles, he had any doubt that the fact was as therein stated. See, also, *Hawes v. State,* 88 Ala. 37; *Clifford v. Drake,* 110 Ill. 135; *Commonwealth v. Ford,* 130 Mass. 64; *Jackson v. State,* 66

Miss. 89; 1 Wigmore, Evidence, sec. 760; Jones, Evidence (2d ed.) p. 1122 *et seq.*; 3 Russell, Law of Crimes (7th Eng. ed.) p. 2303.

A number of questions, arising upon the impaneling of the jury, as well as those upon and during the trial, are presented, but as the law of this state is well settled upon most, if not all, of them, and they may not occur in the further proceedings of this case, they will not be noticed. It is insisted that, under the statutes of this state, the facts stated in the information do not constitute a crime, but counsel have not seen proper to brief the law on that subject, and we need not discuss it.

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

REVERSED.

BARNES, J., dissenting.

I am unable to concur in the conclusion of my associates. By the majority opinion it is held, as one of the grounds for reversing the judgment of the district court, that it was reversible error to submit to the jury the testimony by which it was sought to connect the defendant with the dynamite contained in the suit case which was placed on the porch of the Dennison home. It was shown by the testimony that the dynamite in question was contained in a particular kind of wrapping which was used only by the firm that manufactured that kind of explosive; that the only place in the vicinity of Omaha where that kind of dynamite was being used was in a certain quarry at the near-by town of Louisville; that a quantity of that brand of dynamite was stored there in a place accessible to any one who might for any reason desire to obtain it. It was also shown that, a day or two before the suit case was placed on the Dennison porch, the defendant was seen at Louisville, near the place where the dynamite was stored, and his presence there was wholly unexplained. Now the state had introduced testimony tending to show that the defendant was seen with a suit case like the one in ques-

tion at or near the Dennison home, at or about the time the suit case which contained this same brand of dynamite was discovered upon the Dennison porch. It was therefore proper for the jury to consider the circumstances above described, with all of the other evidence, as tending to establish the defendant's guilt. In this case, as in all other crimes of this nature, the prosecution is compelled to rely upon circumstantial evidence, and it should be remembered that a dynamiter does not go into the open market to procure his explosives, but, in order to avoid detection, is compelled to procure them in the most secret and surreptitious manner. Therefore, the state was entitled to the benefit of every circumstance which tended in any way, however remote, to aid the jury in determining the guilt or innocence of the defendant. The probative force of this evidence was a question for the jury alone, and not one to be determined, declared or commented on by a court of review.

The majority, as another reason for reversing the judgment of the district court, hold that it was error to receive the evidence of the trunk dealer of the city of Omaha that just previous to the time the suit case in question was placed on the Dennison porch he had two suit cases in stock similar to the one found at the Dennison home, that he missed one of them, and that neither he nor his clerks had sold it, so far as he knew. It is said that this evidence was immaterial and irrelevant, and was prejudicial to the accused.

It should be remembered that one contemplating the commission of the crime of dynamiting the home of another would necessarily observe the same secrecy in obtaining a suit case, or other receptacle in which to inclose his infernal machine, as he would in obtaining the explosive with which to charge it, and when it was shown that defendant was seen at or near the Dennison home with a suit case like the one in question, and which may have been the one which the dealer missed from his stock, it would seem that this circumstance was properly given

to the jury to aid them in correctly solving the main question under consideration.

The third ground on which the reversal is predicated is that the court erred in allowing the county attorney in the examination of a witness to read to her excerpts from her former written statement, in order to refresh her recollection. The contents of the written statement was neither read to her in the presence of the jury, nor was the jury permitted to examine it. In other words, it was not offered or received in evidence. I am of opinion that this was not reversible error, but was in all respects in accordance with the correct practice and the well-established rule that a memorandum or written statement made by a witness may be used to refresh his recollection. I am unable to see how this was in any way prejudicial to the rights of the defendant.

The fourth reason for the reversal is that the court erred in not permitting the Omaha Bee reporter to use or read an article published in that newspaper to refresh his recollection of what he saw at the time the suit case in question was examined. As I read the record, this witness testified that he could not recollect what he saw or just what transpired at the time the suit case was opened; that he wrote an account of the matter at the time, which was published in his newspaper; that what he wrote was correctly published; that he had lost his original notes taken at the time, but he failed to state that what he wrote was the truth of the matter, and therefore it would seem that the court properly refused to allow him to testify from the published article, because this was secondary evidence which was not clearly shown to reflect the truth of the transaction in question. Again, this ruling could not have resulted in any prejudice to the accused, for the transaction was treated by the witness as so wholly inconsequential that the facts there disclosed made no lasting impression on his mind.

Finally, and in concluding this dissent, I feel constrained to protest against so much of the majority

opinion as discredits the probative force of the evidence produced by the state, and which seems to indicate that it was insufficient to sustain the verdict of the jury. I do this because the case is remanded for further proceedings, and the opinion will make another conviction impossible. We should not thus destroy the power of those charged with the duty of enforcing our criminal laws to properly perform that duty. It would seem that the main question for this court to determine in cases like the one at bar is, has the defendant been accorded a fair trial? Upon that question, an examination of the record satisfies me that the defendant was not only accorded that right, but was given an unusual latitude in presenting his defense. The jury found him guilty, and I am persuaded that the evidence sustains the verdict. In such cases a reviewing court should not reverse the judgment for trivial causes, or technical errors.

For the foregoing reasons, I am of opinion that the judgment of the district court should be affirmed.

FAWCETT, J., concurs in this dissent.

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## WILLIAM W. KEMPLIN V. STATE OF NEBRASKA.

FILED JANUARY 24, 1912. No. 17,352.

1. **Criminal Law:** INDORSEMENT OF WITNESSES ON INFORMATION. Where in a criminal prosecution the case was called for trial in the district court, the names of three jurors were called and the jurors took their places in the jury box, but, before they were sworn or interrogated as to their qualifications to serve as jurors, the court, over the objections of the accused, permitted the name of an additional witness to be indorsed upon the information, but no application was made for the postponement of the trial, and no prejudice was shown, *held* prejudice will not be presumed.

2. **Burglary:** EVIDENCE: MALICE. In a prosecution for burglary by breaking and entering a dwelling house, it was shown that the doors of the house were closed in the morning when the family

residing there left for the day; that upon their return in the evening the house had been entered and certain articles stolen therefrom. *Held*, There was sufficient proof of malice and of the breaking and entering.

3. ———: ———. The evidence is examined, and *held* sufficient to sustain the verdict of guilty.

ERROR to the district court for Garden county: RALPH W. HOBART, JUDGE. *Affirmed.*

*Sullivan & Squires* and *T. M. Wimberley*, for plaintiff in error.

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

REESE, C. J.

Plaintiff in error was prosecuted in the district court for Garden county for the crime of burglary, committed on the 23d day of December, 1910, by breaking and entering the dwelling house of D. A. Kingery, with intent to steal certain personal property therein. A trial was had, which resulted in a verdict of guilty, and on the 13th day of May, 1911, he was sentenced to imprisonment in the penitentiary for the term of four years. He brings the cause to this court for review by proceedings in error.

After the case was called for trial in the district court, and after three jurors had been called into the jury box, before they were sworn on their *voir dire* as to their qualification to sit as jurors, the county attorney asked permission to indorse the name of the sheriff upon the information as a witness on behalf of the state. Permission was given, and exception was taken to the order of the court. Said order is now assigned for error.

It is contended that, as the statute requires the names of witnesses to be indorsed "before the trial," the indorsement made at the time stated was after the trial had commenced, and the order was therefore erroneous. There was no showing of prejudice, nor was any postpone-

ment of the trial asked. This was necessary if the accused were prejudiced or surprised by the action of the court in permitting the indorsement to be made. *Barney v. State,* 49 Neb. 515; *Rauschkolb v. State,* 46 Neb. 658; *Trimble v. State,* 61 Neb. 604. The present case is to be distinguished from *Wilson v. State,* 87 Neb. 638. In that case the county attorney was permitted to indorse ten names of witnesses upon the information after the case was called for trial. It was a capital case. The fact of that number of witnesses being indorsed at the moment of calling a case for trial would of itself raise a presumption of prejudice and a possible lack of fair dealing, and the granting of 24 hours of time in which to investigate as to the facts to be proved would be little less than mockery.

It is next insisted that the evidence does not sustain the verdict of the jury. Little light is thrown upon the subject, as the brief is apparently limited to the contention that malice and forcibly breaking and entering are not shown. The evidence discloses that when the family residing in the dwelling house left it in the morning they carefully closed the doors; that upon their return in the evening they found that the house had been entered and articles of value stolen therefrom. If plaintiff in error is guilty of the theft of the articles said to have been stolen, there can be no reasonable doubt as to legal malice, or the breaking and entering. Owing to the importance of the case, we have carefully read all the bill of exceptions, as well as the abstract. The weight of the testimony was for the consideration of the jury. While there are some features of the case which, to the mind of the writer, are unsatisfactory, yet there was sufficient, if believed by the jury, to sustain the verdict. That the dwelling house was broken into and certain trunks broken open and articles of small value taken, there seems to be no doubt. One of the principal contests upon which there is a conflict in the evidence is as to the identification of certain coins found on the person of plaintiff in error at the time of his arrest. They were positively identified as

the stolen coins by witnesses for the state, while plaintiff in error and his witnesses identified them as having been in his possession before the burglary. This question was for the determination of the jury, and they resolved it against plaintiff in error.

We find no prejudicial error in the proceedings. The judgment of the district court is therefore

AFFIRMED.

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CHARLES GRAHAM V. STATE OF NEBRASKA.

FILED JANUARY 24, 1912. No. 17,264.

1. **Criminal Law**: INSTRUCTIONS. Where the district court has by his instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, he is not required to give further or additional instructions requested by the defendant.

2. ———: EVIDENCE: REVIEW. If the record contains competent evidence from which the jury could reasonably find the defendant guilty of the crime charged in the information, a reviewing court will not be justified in setting aside such a verdict.

3. ———: TRIAL: LIMITATION OF ARGUMENT. It is within the discretion of the district court to reasonably limit the time allowed counsel in which to argue his cause to the jury, and, unless it appears that there has been an abuse of such discretion, such a limitation does not afford sufficient reason for reversing the judgment of that court.

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

*T. J. Doyle* and *G. L. De Lacy*, for plaintiff in error.

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

BARNES, J.

The state prosecuted Charles Graham, hereinafter

called the defendant, on an information charging him with having abandoned his wife, without good cause, and with wilfully, feloniously and unlawfully neglecting and refusing to maintain and provide for her support. A trial in the district court for Lancaster county resulted in his conviction. On the 6th day of May, 1911, defendant's motion for a new trial was overruled. At his request, sentence was suspended and he was released on a bond conditioned that he would properly support and provide for his wife. On the 8th day of July, 1911, it having been made to appear to the district court that the defendant had failed to abide by the conditions of his bond, and had at all times failed, neglected and refused to furnish his wife with any means of support, he was brought into court, and, having failed to show any cause why the judgment of the court should not be passed upon him, he was sentenced to serve a term of one year in the state penitentiary. From that judgment he has appealed to this court.

Defendant contends that the district court erred in refusing to give the jury instructions numbered 4, 5, and 6, requested by his counsel. The substance of instruction 5 was that there could be no conviction under the statute upon which the prosecution was based if it should appear that the husband, by reason of lack of property, money or estate, was unable to support his wife; that such a condition amounts to good cause and constitutes a complete defense to the prosecution of such a charge. By instruction numbered 6 it was stated, in substance, that if the jury believed from the evidence the husband had reason to believe that the wife was unfaithful to him, or that the wife neglected to prepare his meals and attend to the household duties when she was in good health and able to do so, and caused the husband to go to his work each day without having any breakfast, or spoke disrespectfully and in profane language of the mother of the husband without just cause or provocation for so doing, each of said acts, if found to exist by the jury and taken seriously

by the husband, would be a good cause for his conduct, and the jury should return a verdict of not guilty.

It appears, however, that the district court, upon his own motion, instructed the jury as follows: Instruction No. 6. "Abandonment under the statutes upon which this prosecution is based is an actual, wilful desertion, followed by a wilful neglect or refusal to contribute to the support of the wife, and there can be no conviction, even if there is an abandonment as above defined without good cause, unless such actual, wilful desertion, followed by a wilful neglect and refusal to contribute to such wife's support, is without good cause. The state must prove these several facts beyond a reasonable doubt, and, in addition to this proof, must prove, beyond a reasonable doubt, that at or about the time alleged the defendant was possessed of money, property or other means available for the maintenance and support of such wife, or had at least the earning capacity and the opportunity to work at the times alleged, and at the times alleged refused, without good cause, to maintain and support such wife."

We think this instruction covered all of the points contained in defendant's request numbered 5, that it conformed to the evidence in the case, and is a correct statement of the law. Therefore the court did not err in refusing to give that request.

It appears that the court, upon his own motion, also gave instruction numbered 7, which reads as follows: "You are instructed that primarily it is the duty of the husband to provide reasonable support for his wife, and that any wilful failure and refusal, without good cause, so to do constitutes a breach of his duty in that regard, and if he also has abandoned his wife, without good cause, then he has committed a desertion as that term is used in the statutes and as set out in the first paragraph of these instructions. The expression, 'without good cause,' does not mean that the husband can abandon his wife or neglect or refuse to provide for her for some trivial reason; before the law justifies him in so doing,

he must have some substantial reason or cause which would cause or justify the ordinary person to neglect one of his most important duties."

It is contended that this instruction was too general, and did not explain or define the meaning of "without good cause," and it is insisted for that reason that the court erred in refusing to give paragraph 6 of the instructions requested by the defendant, the substance of which has been heretofore stated. To our minds the instruction given by the trial court was sufficient, and the request presented by the defendant was open to the objection that it directed attention to a portion of the evidence only, and gave too much importance to the defendant's own testimony. It appears that the defendant, by his own statements, attempted to create the impression that his wife had been unfaithful to her marriage vows, and that she had been somewhat neglectful in performing her household duties. A careful reading of the record satisfies us that the defendant made no serious complaint of any of those matters until after he had determined to abandon his wife, and, but for this prosecution, he would not have seriously considered those matters. His insinuations of infidelity on her part seem to be wholly unsupported by the testimony and without merit, while the other matters cannot be said to constitute a good ground for his failure and refusal to support his wife, although they might be considered a reason for his refusal to live with her. As we view the record, the instruction above quoted was a proper one, and the refusal to instruct the jury, as requested by the defendant, was without error.

It is further contended that the evidence was insufficient to sustain the verdict. There is sufficient evidence in the record tending to show desertion and neglect on the part of the defendant towards his wife. It appears that she was frequently left alone at night at her home, while defendant stayed out on the street or at his mother's house; that on December 21, 1910, he left home, leaving his wife a written note, stating, "I won't be home

for supper. See?" that he remained that night at his mother's house; that his wife called him up the following morning and wanted to talk with him, but he refused to go home or have anything to say to her; that thereafter she repeatedly sought interviews with him and requested him to come home; that she asked him for $5 with which to aid in her support, and he answered, "I haven't seen $5;" that thereafter, at all times, he has refused to contribute anything towards her support or towards the support of her child, which was born at a later period. The testimony clearly shows that he was an able-bodied man; that he had been earning money at the rate of $48 a month. It is true that he had, before leaving his wife, contributed to her support, and that she had no complaint to make in that respect until after the desertion took place; that at the time he deserted his wife he had $43 in the bank, and that within a few days thereafter he secured a job with the traction company; that he was still working for the company at the time his trial took place; that he was then earning and has continued to earn from 18 cents to 20 cents an hour; that he spent the money which he had in the bank at the time he deserted his wife for a uniform and other things, and refused to contribute anything to her support, declaring, as his excuse, that he had no money.

Finally, it is contended that the court erred in limiting his counsel to 40 minutes' time in his address to the jury. We think this contention is without merit. That matter was clearly within the discretion of the trial court, and we are unable to say that the limitation was an abuse of such discretion.

A careful examination of the record satisfies us that it contains sufficient evidence to support the verdict, and the jury were justified in finding defendant guilty, as charged in the information. So far as we are able to discover, the record contains no reversible error, and the judgment of the district court is

AFFIRMED.

MABEL MCGEE, APPELLEE, V. ARAH L. HUNGERFORD, APPELLANT.

FILED JANUARY 24, 1912. No. 16,997.

Quantum Meruit: SUFFICIENCY OF EVIDENCE: REVIEW. In this an action to recover the reasonable value of personal services as a stenographer, the fact that the jury awarded a less sum than claimed by the plaintiff to be due her does not establish that her testimony was disbelieved, and that therefore the verdict is not supported by the evidence.

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

*J. E. Porter,* for appellant.

*A. W. Crites, contra.*

LETTON, J.

Action to recover for services rendered by the plaintiff as stenographer, typewriter operator and clerk for the defendant. It is alleged that these services were of the reasonable value of $8 a week, were rendered for 18 weeks, and that there is due and unpaid a balance of $114. The defense is that services were not rendered to the extent alleged, and that full payment had been made of the wages which had been agreed upon between the parties.

The argument of appellant is mainly devoted to showing the indefiniteness and unreliability of plaintiff's testimony and the emphatic and positive nature of that of defendant. According to defendant's testimony, the plaintiff worked for him 25 days under a contract under which he was to pay her $8 a week, amounting in all to $28.30, and this amount has been paid; while, according to plaintiff's testimony, she worked 120 days at $8 a week, on which she has credited $33, leaving a balance due of $114. Appellant argues that since the jury only allowed

plaintiff $75, and not $114 as she claimed, that the evidence does not sustain the verdict.

It appears, however, that plaintiff, while in the defendant's service, wrote letters and did other stenographic and clerical work for other persons, for which she was paid by them, and it seems clear that the jury believed that the reasonable value of her services should be reduced on that account. The action was on a *quantum meruit,* and the fact that plaintiff was not allowed all she demanded does not leave the verdict without support. It would serve no good purpose to set forth the evidence in detail. The question is one of fact which was submitted to the jury upon conflicting evidence, and their verdict must be upheld. Appellant argues that the verdict "may probably have been the result of the misguided chivalry of the average western ranchman toward the fair sex, especially this rather handsome and petite young litigant." We cannot take judicial notice of personal pulchritude or of western chivalry, and hence this plaintive plea cannot avail.

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

AFFIRMED.

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STATE, EX REL. SILAS R. BARTON, RELATOR, APPELLEE, V. FARMERS & MERCHANTS INSURANCE COMPANY, RESPONDENT, APPELLANT.

FILED JANUARY 24, 1912. No. 17,183.

1. **Receivers:** APPOINTMENT: EQUITY JURISDICTION. The power to appoint a receiver by a court of equity in a proper case is one which exists in such courts independent of any statute.

2. **Insurance:** INSOLVENT COMPANY: DISSOLUTION: APPOINTMENT OF RECEIVER. In an action brought by the attorney general on the information of the auditor of public accounts, under the provisions of section 28, ch. 43, Comp. St. 1911, the court may, after a decree for the dissolution of an insolvent insurance corporation

and the winding up of its affairs, under the provisions of section 266 of the code, appoint a receiver to close up its business.

3. ———: ———: ———: ———. The power to bring such an action by the attorney general and the power of the court to decree a dissolution and distribution of its effects in an action so brought must be conferred by statute, and, in the absence thereof, such a proceeding is not within the jurisdiction of the court. But, after such decree has been rendered, if under the circumstances of the case the court in the exercise of its discretion believes that the object and purpose of the action would be better subserved by the appointment of a receiver to wind up the affairs than by permitting the business to be closed by the managers or directors of the insolvent corporation as trustees, under sections 62-66, ch. 16, Comp. St. 1911, it is within its power to appoint a receiver.

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

*A. L. Chase,* for appellant.

*Grant G. Martin, Attorney General,* and *Field, Ricketts & Ricketts, contra.*

LETTON, J.

The attorney general for the auditor of public accounts filed a petition in the district court under the provisions of section 28, ch. 43, Comp. St. 1911, setting forth facts tending to show that the defendant, which is a fire insurance company, is insolvent, and unable to meet its obligations or to continue in a solvent manner to transact the business for which it was organized. The prayer was that "upon a hearing of this petition said company be dissolved and a receiver appointed to wind up its affairs and to make distribution of its assets as provided by law, under the direction of this court; and for such other and further relief as the court may deem just and equitable." A rule to show cause on the 23d day of January was duly served upon the defendant, and on that day the parties appeared and stipulated that all informalities and irregularities in the service and notice were waived, a general

appearance was entered by the defendant, and it was agreed that the case might be continued, and that the day to which it was continued "would be the day upon which the order dissolving said company might be made and a receiver appointed." The case was continued from time to time by consent until the 30th day of January, when, as the record recites, "the parties aforesaid were in court, and the defendant represented by its attorney and its vice-president suggested the appointment of a particular person for receiver; that the defendant has been unable and has refused to show any cause why said defendant company should not be dissolved and a receiver appointed; the court finds upon the evidence that the facts stated in plaintiff's petition, as alleged are all true, that the defendant is insolvent," and further found that the assets are insufficient to justify continuance of the company in business, that the company was unable to meet its obligations, and adjudged that the corporation "is insolvent and that a receiver should be appointed." Charles T. Knapp was thereupon appointed receiver, and directed to take possession of all the property of the company, to proceed to wind up its affairs, and to make distribution of its effects.

On February 2 a motion for a new trial was filed by respondent, and also a motion by the relator for a *nunc pro tunc* judgment ordering the dissolution of the corporation. The motion for a new trial was overruled, the motion for a decree *nunc pro tunc* sustained, and a decree entered, as of date January 30, dissolving the corporation.

A number of errors were assigned in the motion for a new trial and are presented on appeal, but the argument is practically confined to the question whether the district court had power to appoint a receiver in a case where the action is brought by the attorney general, under section 28, ch. 43, Comp. St. 1911, acting for the auditor of public accounts, for the purpose of dissolving the corporation and distributing its effects. The respond-

ent's position is that the district court has no jurisdiction to appoint a receiver in such a case because there is no statute authorizing the appointment of a receiver of an insolvent insurance corporation in such a proceeding Under the provisions of section 28, ch. 43, Comp. St. 1911, the auditor of public accounts, if it shall appear to him from an examination that the assets of an insurance corporation are reduced or impaired more than 20 per cent. below the paid-up capital stock, "may direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition; or he shall communicate the fact to the attorney of state, whose duty it shall then become to apply to the district court, or, if in vacation, to one of the judges thereof, for an order requiring said company to show cause why their business should not be closed," and, after a hearing, if it appear that the assets are insufficient or that the interest of the public require it, the court "shall decree a dissolution of the company and a distribution of its effects." Respondent argues that, no express authority having been granted by the statute under which the right to bring the action is conferred, no power exists in the court to do more than the statute allows, viz., to decree that the corporation shall be dissolved and its effects distributed; and that other provisions of the statute govern the distribution by its former officers; that under such provisions the control of the property is not arbitrarily taken away from its directors, who are presumably best fitted to administer the affairs of the corporation, and that it is in the interest of stockholders and creditors that its affairs be wound up in as economical a manner as possible and without the necessary expenses and sacrifices incident to a forced disposition by the hands of an officer of the court.

On the other hand, it is contended by the attorney general that the district court of this state, being a court of chancery as well as of common law jurisdiction, has inherent power to appoint a receiver. It is also argued

that, while the special proceeding provided for by the statute has some of the characteristics of an action in *quo warranto*, it is not really such an action; that the attorney general by virtue of the statute represents not only the public at large, but the creditors and stockholders of the corporation which he seeks to dissolve; that by the provisions of section 266 of the code a receiver may be appointed in the following cases: "(3) After judgment or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal. (4) In all cases provided for by special statutes. (5) In all other cases where receivers have heretofore been appointed by the usages of courts of equity"—that under the third and fifth subdivisions of this section there is ample statutory authority for the appointment of a receiver.

There is much force in the respondent's contention that unless there is a statute permitting the law officer of the state to apply for the dissolution of a corporation on the ground of its insolvency, and for the distribution of its effects and the appointment of a receiver, a court of equity has no such powers.

An examination of the reports of other states shows that, in nearly every instance where the statute provides that an officer of the state may apply to the courts to dissolve a corporation, the right to appoint a receiver is directly conferred in the same statute. Basing in large part their decisions upon this fact, some courts have held that, unless the statute conferring the power upon the court to entertain such an action expressly provides that a receiver may be appointed to distribute the assets of the dissolved corporation, the power to appoint does not exist. Perhaps the most exhaustive discussion of this question is to be found in the cases of *Havemeyer v. Superior Court*, 84 Cal. 327; *Harrison v. Hebbard*, 101 Cal. 152; *State Investment & Ins. Co. v. Superior Court*, 101 Cal. 135. Other cases are collected in notes to sections 288, 289, High, Receivers (4th ed).

To determine this question, we think it wise to examine the course of legislation in this state in relation to insolvent corporations of this nature, and, also, the proceedings in our courts in connection with the provisions of the civil code, in order to ascertain what seems to be its declared policy in this regard.

The laws of this state governing the various classes of insurance companies have been passed at different times, and to some extent consist of amendments to former statutes. Some of them appear to be very loosely drawn, but all of them recognize the necessity of supervision by an officer of the state, and authorize the closing of the business and winding up of their affairs when it is against the public interest that the corporation should be allowed to continue. The statute under which this proceeding was brought has been in force since 1873. Following the enactment of this statute, which is general in its terms, a number of acts of the legislature providing for the incorporation and management of insurance corporations devoted to certain special lines of that business have been passed. Some of these laws are exceedingly minute and specific in their provisions with reference to the powers of the court upon an application by the attorney general at the request of the auditor of this nature, while others are general in their terms, apparently implying that, the power to close up the affairs being given to the court, the necessary powers to appoint instruments to do so were already possessed. Section 6562, Ann. St. 1911, relating to City Mutual Insurance Companies, provides: "If upon such examination it shall appear to the auditor that the condition of such company does not justify its continuance in business he may apply to the district court * * * for an order requiring the company to show cause why it should not be closed." Section 6586, relating to Mutual Hog Insurance, uses identically the same language as in the last section quoted. Section 6634, relating to Mutual Plate Glass Insurance Companies, uses the same language. Section 6691, relating to

Accident Insurance Companies, provides that after an examination if it be found by the auditor that the assets are insufficient he shall require the stockholders to make good the deficiency, and in default thereof "may proceed to wind up the affairs of said company in the manner provided by law." Section 6674, relating to Accident, Sickness and Funeral Insurance Companies, provides that upon a like application, "if it is found to be for the best interests of said certificate or policy holder that the affairs of said corporation, society or association be wound up, said court or judge shall so direct, and for that purpose may appoint a receiver." This section also provides: "No action or proceeding shall be instituted with a view to the appointment of a receiver or closing up the business of any such corporation, association or society by any other person, or in any other manner except as herein provided." Section 6480, relating to Mutual Benefit Associations and Life Insurance Companies, after like provisions as to examination, provides: "If it is found to the best interest of said holders of certificates that the affairs of said corporation be wound up, said court or judge shall so direct and for that purpose may appoint a receiver." In some of these statutes the appointment of a receiver is expressly mentioned, in others the right to appoint can only be implied, but the nature and purpose of the relief afforded in each is that the corporation be dissolved and its affairs wound up by the court.

The precise language of the section in question in this case is that the "court or judge shall decree a dissolution of said company, and a distribution of its effects." Comp. St. 1911, ch. 43, sec. 28. It is our opinion that, until the judgment of dissolution and the decree of distribution is entered, the court acts under the special powers conferred upon it by the statute, and, unless it had been so enacted, jurisdiction to act on the application of the attorney general would not exist; but we are also of the opinion that, having dissolved the corporation and being charged with the winding up of its affairs, the court may properly,

under the usages of courts of equity, call to its aid a receiver as an officer of the court for the purpose of carrying out the provisions of its decree. This is a power which exists in courts of equity independently of any statute (Alderson, Receivers, sec. 12; 5 Thompson, Corporations (2d ed.) sec. 6330), and is one which is often exercised in actions brought under the general equity powers of the court by a stockholder or creditor to dissolve the corporation. This is the view of the supreme court of the United States. The Sherman Anti-Trust Act (26 U. S. St. at Large, ch. 647, p. 209) does not by its terms provide for the appointment of a receiver in cases brought to dissolve unlawful combinations, or corporations formed for unlawful purposes, but in *United States v. American Tobacco Co.*, 221 U. S. 106, 186, the court say: "We might at once resort to one or the other of two general remedies —(*a*) the allowance of an injunction * * * or, (*b*) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination," etc. A receiver was not appointed in the case because the court thought the desired result might better be accomplished by further decree, but the excerpt from the opinion indicates the mind of the court as to the power.

The supreme court of California has taken a different view, saying: "The jurisdiction of the superior court to decree a dissolution of any corporation exists only by virtue of statutory authority. It does not possess this authority by virtue of its inherent general jurisdiction in equity * * * And, as its jurisdiction is derived from the statute, it is limited by the provisions of the statute, both as to the conditions under which it may be invoked and the extent of the judgment which it may make in the exercise of this jurisdiction." *State Investment & Ins. Co. v. Superior Court,* 101 Cal. 135, 146. So far we agree, but we cannot agree that, after a decree of dissolution has been made and the court is winding up the affairs of the corporation, it may not, if in its discretion it appears necessary, call a receiver to its assistance, not as a part

of the judgment, but as ancillary thereto and in aid thereof. *Supreme Sitting of Order of Iron Hall v. Baker*, 134 Ind. 293, 20 L. R. A. 210. A number of the cases cited by the California court merely decide that a temporary receiver cannot be appointed in such cases *pendente lite*, and are not authority on the real question before it. We think this is the view upon which our district courts have acted for years. *Wyman v. Williams*, 52 Neb. 833. The point was not involved, but the report shows what the practice has been in this state. Under sections 62-66, ch. 16, Comp. St. 1911, upon dissolution the property may be left in the hands of the officers as trustees subject to the control of the court, unless, as therein provided, "other persons be appointed * * * by some court of competent authority."

In construing a similar provision as to appointment of a receiver by competent authority, the supreme court of Alabama said: "The manifest general purpose of the legislature was to commit the affairs and properties of a corporation so dissolved to the persons who were its managers at the time of the dissolution; but the lawmakers recognized that there might be special circumstances or peculiar exigencies in a given case which would breed a necessity to take the corporate affairs and property out of the hands of such managers, and, to exclude any idea that the statutory designation of trustees should have the effect of ousting the ordinary jurisdiction of courts of chancery to appoint receivers upon such circumstances or exigencies being made to appear, they expressly saved this jurisdiction, though doubtless such reservation was in fact unnecessary. But, whether necessary to that end or not, the provision in the statute having relation to the appointment of receivers by courts of competent jurisdiction was in pure conservation of an existing jurisdiction, and in no sense creative of a new power and jurisdiction. It does not undertake to confer authority upon any court which it had not before, but it refers to courts already invested with 'competent authority.' The rule declared by the statute is that the managers of the corporation at the

time of its dissolution shall administer its affairs after its death, and the exception to this rule is the intervention of a receiver appointed by a court of competent authority." *Weatherly v. Capital City Water Co.*, 115 Ala. 156, 171.

The appointment is discretionary, and, unless an abuse of discretion has been shown, a reviewing court will not interfere. We may incidentally remark that this court has uniformly discountenanced the practice of taking property from its owners by the hands of a receiver against their consent except upon the clearest grounds. *Miller v. Kitchen*, 73 Neb. 711; *Ponca Mill Co. v. Mikesell*, 55 Neb. 98; *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 586; *Vila v. Grand Island E. L., I. & C. S. Co.*, 68 Neb. 222. It would seem that the respondent was of the opinion that the district court had power to appoint a receiver, for the record recites that it suggested a person to act in that capacity, who was denied appointment. The record also recites that it was agreed that the day to which the case is continued "would be the day upon which the order dissolving said company might be made and a receiver appointed." It was not until this day to which the agreement referred that respondent asked leave to file a showing next day why a receiver should not be appointed. Obviously no reason being apparent for this delay, the court did not err in refusing further time.

Objection is made here that Mr. Knapp is a relative of the judge who made the appointment. No objection was made to his appointment at the time for that reason, and no showing has been made that he is incompetent or untrustworthy, or even to prove the allegation that he is a relative of the judge, except a mere affidavit that the affiant is informed and believes that the receiver is a relative. This is insufficient, and under these circumstances we cannot consider these objections.

For these reasons, the judgment of the district court must be

AFFIRMED.

FAWCETT, J., dissenting.

Upon the question of the power of the district court to appoint a receiver in a case like this, I think the law is correctly stated in the California cases cited in the majority opinion. The fact that the legislature, in the several instances set out in the opinion, added to the provisions cited express authorization for the appointment of a receiver strengthens, rather than weakens, the contention that it did not intend to grant such authority in the statute under consideration. The legislature said that in a case like this the "court or judge shall decree a dissolution of said company and a distribution of its effects." There the legislature saw fit to stop, and there the court should stop. Where, upon examination of an insurance company, the auditor finds that its capital is impaired more than 20 per cent., the district court, in a proceeding instituted by the attorney general, may say to the company that the state will no longer sanction its continuing business as a going concern, and that it must immediately cease doing business as an insurance company and distribute its effects among those entitled thereto. Having done that, the law department of the state has performed its full duty, and the court has gone as far as authorized to go by the statute. It then becomes the duty of the directors of the insurance company to close the doors to general business and to immediately proceed to collect and distribute the assets of the company as ordered by the court. This in my judgment is a wise provision. A receiver is the most expensive luxury known to the law. The directors of the company, if they are honest, and they must be presumed to be so until the contrary is shown, can collect and distribute the assets of the company with far less expense than can be or ever is done by a receiver. Many corporations, the affairs of which have been administered by honest officials, have proved unsuccessful as business enterprises. Even if this lack of success be attributable to a want of capacity by the officers and direc-

tors of such corporation to successfully conduct a business undertaking, it by no means follows that they are not competent, when the further prosecution of the business is stopped, to collect and distribute the assets; and the court should not deprive them of that right by the appointment of a receiver, thereby unquestionably reducing the amounts of the dividends to the distributees, unless clearly and explicitly authorized to do so by express statute. If in the collection and distribution of the assets it appears that the directors are either incompetent, negligent, or dishonest, any one interested in the assets may apply for the appointment of a receiver. In such a case the court would have jurisdiction under the general statutes cited.

Since writing the foregoing, there has been added to the majority opinion a quotation from the opinion in *Weatherly v. Capital City Water Co.*, 115 Ala. 156. An examination of that opinion shows that, if it is to be followed as an authority by us, the judgment in this case must be reversed. The two sections of the syllabus applicable to the point under consideration read:

"(2) Under the provisions of the statute (Code of 1886, sec. 1691), after the dissolution of a corporation by its charter being adjudged forfeited, a receiver is not appointed as a matter of course; but the business and properties of the corporation so dissolved are committed to the persons who were its managers at the time of its dissolution, and they become entitled to the right, and are charged with the duties, of administering and settling its affairs.

"(3) The provisions of the statute (Code of 1886, sec. 1691), committing the estate of a corporation dissolved by forfeiture of its charter to those who were its managers at the time of its dissolution as trustees for its creditors and stockholders, do not oust the ordinary jurisdiction of courts of chancery to appoint receivers under the circumstances and exigencies which demand such appointment; but, in order to justify the appoint-

ment of a receiver of a corporation so dissolved, there must appear such facts as, under the general principles of equity jurisprudence, call the power into exercise; such as incompetency or unfaithfulness or mismanagement on the part of trustees or the absence of authority on their part to subserve some peculiar interest of the party complaining, by reason of which he is injured."

None of the reasons there assigned as being sufficient to justify the exercise by the court of its general chancery powers is alleged in the case at bar. Such being the fact, then, under the law as announced by the Alabama court, the managers of this company, at the time its dissolution was ordered by the court, became "entitled to the right" of administering and settling the affairs of the the company, and, nothing having been alleged to justify a refusal to grant them that right, the appointment of a receiver was unwarranted. The reasoning and holding of the Alabama court are in entire harmony with the views I have tried to express.

REESE, C. J., concurs in this dissent.

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## ROZELLA MCDONALD, APPELLEE, V. FOSTER BROWN, APPELLANT.

FILED JANUARY 24, 1912. No. 17,262.

1. **Bastardy:** NATURE OF PROCEEDING. Bastardy proceedings are civil and not criminal in their nature.
2. ———: EVIDENCE. The written examination of the complainant before the justice in bastardy proceedings may be given in evidence at the trial by either party.
3. ———: INSTRUCTIONS: VARIANCE. Where the plaintiff charged that the intercourse which resulted in her pregnancy was had upon September 28, and the evidence tended to show that if defendant was guilty at all it must have taken place on September 30, an instruction that the jury might find the defendant guilty whether the intercourse was had on either date is not erroneous.

4. New Trial: NEWLY DISCOVERED EVIDENCE. To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the applicant could not in the exercise of due diligence have discovered and procured such evidence at the trial. It must further appear, where the alleged newly discovered evidence is cumulative in its nature, that it is of such a weighty character as would probably change the result of the trial. *Hoffine v. Ewings*, 60 Neb. 729.

5. Appeal: MISCONDUCT OF COUNSEL: REVIEW. In order to review misconduct of counsel during the trial as a ground of error, the alleged misconduct must have been called to the attention of the district court, an adverse ruling had, and an exception taken.

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

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

*Story & Story* and *Burkett, Wilson & Brown*, for appellant.

*C. F. Reavis, contra.*

LETTON, J.

This is an appeal from a judgment of filiation. The first complaint is that the court erred in admitting in evidence the examination of plaintiff taken before the justice of the peace. The statute, however, provides: "At the trial of such issue the examination before the justice shall be given in evidence." Comp. St. 1893, ch. 37, sec. 5. This question was raised in *Stoppert v. Nierle*, 45 Neb. 105, and it was held that either party is entitled to offer the whole examination in evidence. In the opinion it is said that the words of the statute that the examination before the justice shall be given in evidence "are plain and direct in their import and no interpretation of them is necessary to ascertain their meaning. The statement is that 'the examination before the justice shall be given in evidence,' and to us it clearly authorizes its use by either party and its reception when offered by either." *State v. O'Rourke*, 85 Neb. 639.

We think what is said in the *Stoppert* case also disposes of the alleged error in the refusal of the court to give appellant's instruction No. 4 limiting the force and effect of this evidence. *Dodge County v. Kemnitz,* 28 Neb. 224; *Morgan v. Stone,* 4 Neb. (Unof.) 115.

As to the complaint made of the limitation of cross-examination and in striking out certain statements made by appellant to the witness Mrs. Dickenson: In the circumstances of this case neither the exclusion of this evidence nor the limitation of the cross-examination could be prejudicial, since the matters involved were otherwise proved, and taking all the evidence together were really immaterial.

It is also contended that the court erred in giving instructions Nos. 1 and 4. No. 1 told the jury that a proceeding in bastardy is a civil and not a criminal action, and that its purpose is to establish the parentage of the child and to provide that the father shall support it. This is a correct statement of the law. The gist of instruction No. 4 that, if the jury believed that all the material facts were proved against the defendant, they should find defendant guilty whether the sexual intercourse was had on either September 28, 29 or 30, 1909, is clearly correct, because proof of the exact date upon which the intercourse was had is not essential.

The principal contention is that the verdict is not supported by the evidence and is contrary thereto. The evidence is somewhat peculiar. The plaintiff and her father and mother testify that the defendant, driving a dun and a black horse hitched to a buggy, came to their home on the evening of September 28, 1909, about sundown, and invited complainant to take a ride, that she consented, and they departed, driving southward on the section-line road west of their house. Plaintiff testifies that, after proceeding about a half mile from home, he took her from the buggy, and that intercourse was there had. All three of these witnesses say that they were gone from an hour to an hour and a half, and got back between 8 and 9

o'clock, but it is not shown how the time of absence or of return was fixed in their minds. They also say that when he first came he spoke of having visited the plaintiff's sister, who was teaching in Kensington, Kansas, the previous week, and that they told him she had written he had been there. Three other witnesses, apparently disinterested, testified that one evening in the latter part of September, 1909, they saw the plaintiff and the defendant in a buggy driving southward from the McDonald home on the section-line road referred to, at about the same time in the evening as testified to by the plaintiff. Plaintiff testifies that after this occurrence she did not again see the defendant until about a month later, when she and her mother in driving past the home of his father met him and there informed him that she was pregnant as a result of the intercourse; that he then promised to come to their home that night and talk the matter over, but that he failed to do so, and afterwards left the state. The child was born June 20, 1910.

To meet this testimony the defendant proved, without dispute or contradiction, that on the 28th of September he was at Kensington, Kansas, a distance of over 150 miles from the plaintiff's home; that he returned to Pawnee county in the afternoon of September 29, and that night went with his father to his home, which is a few miles north and west from where plaintiff resided. The next day he took his father's team and left home in the morning to attend the Turkey Creek fair, which is held in Kansas, about 6 or 7 miles south of the town of DuBois, Nebraska; that he spent part of the day at the fair, and left in the afternoon. So far, his movements seem to be positively determined. What took place after this is the material inquiry. Defendant testifies that he left the fair intending to go directly to DuBois; that he reached DuBois about sundown, and afterwards registered at the hotel and took supper there. From there he drove straight home, a distance of about 6 or 7 miles westward and north, arriving home about 8 or 9 o'clock that night. The

landlord and a waitress in the hotel testified in corroboration, though both were somewhat uncertain as to the exact time they saw defendant. The landlord said it was about 6 o'clock, and afterwards that he came in a little late, a little after 8; that when he came out of the dining room the hotel was lighted, and that he stood there and talked for half an hour afterwards. The waitress testified that Brown had his supper after the others; that the lamps had been lighted when he came, and that he was the last one in for supper. Another witness testified that he was with Brown in the afternoon at the fair, and saw him about sundown drinking at the town pump in DuBois; that it was 6:30 when the witness left DuBois, and he saw Brown there 8 or 10 minutes before, which was about dark. Defendant further testified that he visited Miss McDonald's sister in Kensington, Kansas, a short time before he came home. He denies going to McDonald's home or meeting any of the witnesses who testify they saw him in company with the plaintiff. He also says that he first learned that Miss McDonald charged him with being the father of her unborn child on the Wednesday after the November election, and that he left the state the next day and remained away until the latter part of April, 1910. Defendant's home is about 6 miles west and 2 miles north of DuBois. McDonald's place is about 7 miles west of DuBois, and the Turkey Creek fair was 7 miles south of that town. On the afternoon of September 30, Fred Brackett, another witness, who had attended the Turkey Creek fair, was driving on a road $2\frac{1}{2}$ miles west of the straight road from Turkey Creek to DuBois, when he was overtaken by the defendant. After he passed this witness, the defendant drove westward in the direction of McDonald's, but the road did not run through, and he was compelled to drive back to the road running north, where he again passed this witness. Defendant also testifies to this.

The jury evidently believed that the defendant did not reach Pawnee county until September 29, and that the

plaintiff and the witnesses who testified that they saw the defendant on the evening of the 28th were mistaken as to the exact date. It also seems probable that, in weighing the testimony on behalf of the defendant, they considered the facts; that he was positively contradicted as to the color of the team he drove; that he first testified that after the fair he intended to and did drive directly to DuBois, but that, just before Mr. Brackett testified, he admitted that when he left the fair he was seen about 2½ miles west of DuBois driving west towards McDonald's till the road was blocked, and he then returned and drove north again and only determined to go to DuBois after he had passed Brackett the second time; as well as considering a number of other inconsistencies found in the defendant's testimony. Another circumstance, which no doubt had effect, is that defendant left the state immediately after he was accused. Whether the defendant went to DuBois that night or not, we think the evidence sufficiently justified the jury in believing that the defendant had sexual intercourse with the plaintiff on the evening of September 30, and that he was the father of her child.

It is next complained that the court erred in refusing a new trial on account of the misconduct of plaintiff's counsel. In this connection it is stated that the witness Davis, who testified for the defendant, was permitted to refresh his recollection from the hotel register. This was on March 15, 1911. The register was not introduced in evidence. That the next day, the witness not being present, plaintiff's counsel called for the register, and, finding it was not there, asked in a loud voice for a subpœna to be issued for Davis, which the court allowed, but no effort was made to subpœna Davis or to procure the register. It is also assigned that further misconduct of counsel took place by referring to the name upon the hotel register as evidently erased and making like statements during his address to the jury. The evidence of Davis, who was landlord of the hotel, showed that the name was blurred and bore some appearance as if an erasure had been made.

The evidence is not clear as to this, but Davis testified that the blurring or obscuring was caused by handling of the register by curious individuals after rumors of this case and of Brown's defense had become public property in the little village. The record does not indicate that the attention of the court was called to any claimed misconduct of counsel at the time, and it is not contended that anything said by the district judge prejudiced the defendant in any way. We can see no error here. The register was in the hands of defendant's witness, and might have been introduced in evidence by him if properly identified.

It is also contended that the motion for a new trial upon the ground of newly discovered evidence should have been sustained. In this motion it is alleged that since the trial defendant has discovered that one Miller, a clerk in a store at Seneca, Kansas, and one LaRue, a student at Lawrence, Kansas, were present in the hotel in DuBois at the time defendant took supper there, saw defendant there, and will testify to these facts. The affidavits of these persons are attached to the motion, and are to the effect that they attended the Turkey Creek fair, and that evening drove to DuBois to attend a dance at the DuBois opera house; that about dusk they went to the hotel for supper, and that a few moments before they left the dining room the defendant came in. The time they went into or left the dining room is not stated. The defendant must have thought that it was essential to his defense to establish his whereabouts on the evening of September 30, 1909. He produced the hotel proprietor, the waitress, and Hunsicker to show this fact, but apparently made no attempt to discover the identity of the two young men in the dining room until after the trial. He testifies he saw these men in the dining room, but did not know their names until given to him by Miss Nedela, the waitress. If it was important to him to have the evidence of the other witnesses as to his presence in the hotel at that particular time, it was equally necessary to have that of these men, unless he was prepared to take the

chance that the evidence of these witnesses would not be needed. The testimony offered is only cumulative in its nature, and not to such a degree that it is likely to change the result. We think that the district court did not abuse its discretion in refusing to grant a new trial on the ground of newly discovered evidence.

In conclusion, while the condition of the testimony is unusual, we think the well-known difficulty in fixing the exact time of an event by witnesses whose attention has not been called particularly to the time of its occurrence until months afterwards, with nothing special happening at or near the time to call their attention to the particular day or hour, explains to some extent the discrepancy in regard to dates and to the hour of the day. It is perhaps true that nothing in the realm of memory is so illusive and uncertain as the element of the lapse of time. This is pointed out in an interesting manner by Mr. Moore in his work on Facts, vol. 2, sec. 845 *et seq.* We are further of opinion that the contradictions and inconsistencies in the defendant's own testimony as to his doings on the afternoon and evening of September 30, the admitted fact that the next day after being accused he left the state and remained away for months, and the testimony as to his being seen with the girl under circumstances similar to those which she describes are sufficient to sustain the verdict. The defendant may be innocent, but the preponderance of evidence seems to justify a verdict based upon a contrary view.

The judgment of the district court is therefore

AFFIRMED.

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KATE SCHRADER, APPELLEE, V. MODERN BROTHERHOOD OF AMERICA, APPELLANT.

FILED JANUARY 24, 1912. No. 16,580.

1. **Insurance:** ACTION ON POLICY: DEFENSE OF SUICIDE: BURDEN OF PROOF. In an action upon a policy of life insurance, the burden

of proof is upon the defendant to prove by a preponderance of the evidence a controverted defense that the assured died as the result of poison, self-administered with suicidal intent.

2. ———: ———: ———: EVIDENCE. The defense in such a case is not made out unless the evidence clearly and unmistakably points to the conclusion of suicide, and to the exclusion of all reasonable probability of death by accident or from natural causes.

3. ———: ———: SUFFICIENCY OF EVIDENCE. The evidence adduced in this case is referred to and commented upon in the opinion, and *held* sufficient to sustain a verdict in the plaintiff's favor.

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

*J. G. Beeler,* for appellant.

*Wilcox & Halligan, contra.*

ROOT, J.

This is an action upon a certificate issued by the defendant, a fraternal life insurance company. The plaintiff prevailed, and the defendant appeals.

The sole defense is that the assured committed suicide by taking strychnine, and the sole important question here is whether the evidence sustains the verdict. The presumption is against suicide. *Hardinger v. Modern Brotherhood of America,* 72 Neb. 869; *Walden v. Bankers Life Ass'n,* 89 Neb. 546. Upon the issue of suicide, the evidence is in substance as follows: Schrader, the assured, a few days before his arrest on a charge of forgery, purchased 25 cents worth of strychnine from a local druggist, and said at that time that he intended to send it to his parents, who resided at Gandy. Schrader at the time of his death was confined in a jail. Schrader's fellow prisoners testify that a few moments before his fatal illness became evident he retired to a hydrant in close proximity to the latrine, a point which, it may be inferred from the evidence, is screened from the view of persons in the larger room used for a lounging room and

a dining room by the prisoners. These men are of opinion that Schrader, after opening the hydrant, flushed the latrine. Immediately thereafter Schrader returned to the larger room, where the noon-day meal was ready, and there swallowed coffee and ate a part of a slice of bread, but within a few moments was seized with convulsions and fell upon the floor, his muscles jerking, his limbs rigid, and bloody froth appearing upon his lips; then the man's muscles relaxed for a short time, and then subsequently the convulsions followed each other at short intervals; the stricken man called for water, cried out the name of a relative, became black in the face, his jaws became rigid, and within 15 or 20 minutes after the first attack he departed this life. A physician appeared about three minutes before mortal dissolution, and upon trial testified that in his opinion the man died from strychnine poisoning. On cross-examination this witness admitted that many of the symptoms present in Schrader's case would appear in an epileptic attack, and that he made no examination of the man's person. From the testimony of all of the witnesses present it is evident that there was no opisthotonos, but this is in a measure explained by the fact that several of the other prisoners restrained him while he was in the grasp of convulsions. None of the witnesses testify to that hideous distortion of the countenance generally observed in such cases. Dr. McLeay, a physician, in testifying on behalf of the plaintiff, said in substance that the symptoms would occur in a case of uræmia, and many of them would appear in epileptic attacks, and that, while they might indicate strychnine poisoning, they might also indicate morbid conditions produced by other and natural causes, and that an examination of the contents of Schrader's stomach would be necessary in order to make a correct diagnosis of the cause of the man's death. No remnant of any poisonous substance was found on Schrader's person or in his cell, no one saw him swallow anything more harmful than coffee and bread.

It is not shown that Schrader did not send the poison to his relatives. The deputy sheriff searched the prisoner at the time he was incarcerated in the jail, and testifies that he did not find a bottle or other container in the prisoner's clothing or on his person. The search was not so close as to preclude the possibility that the prisoner did not have crystals of the poison in his possession, but the tendency is to prove that he did not take the poison into the jail. It is also proved without dispute that Schrader's relatives had arranged to give a recognizance for his release, and that he knew this fact, and it further appears that after a conference with a Mr. Tanner, less than an hour before Schrader's death, he said to the jailer: "I have got this fixed up." "They will never take me to the penitentiary." These declarations may be ambiguous, but it was competent for the jury to deduce therefrom that Schrader was making satisfactory progress in the matter of securing his freedom, possibly for immunity from prosecution. No post mortem was held on the remains of the deceased, nor, so far as we are advised, was any request made by the defendant of Schrader's surviving relatives that such an examination should be held. Whether Schrader died as the result of poison, and, if so, whether it was self-administered with suicidal intent, must be ascertained from this record, if at all, by a process of deduction from the facts in evidence, sustained or contradicted, as the case may be, by the opinions of two physicians whose conclusions are not entirely harmonious. The jury's verdict that the evidence adduced did not overcome the presumption of accidental death, or death from natural causes, is in our opinion sustained by sufficient evidence. *Hardinger v. Modern Brotherhood of America, Walden v. Bankers Life Ass'n, supra.* The alleged erroneous admission of evidence was not argued at the bar, and should not be considered in the state of the record.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

FAWCETT, J.

The foregoing opinion, prepared by ROOT, J., while a member of the court, is now adopted by and filed as the opinion of the court.

SEDGWICK, J., dissenting.

Some of the facts disclosed by the record are stated in the majority opinion. The record also discloses that when the deceased was charged with forgery he obtained some strychnine at a drug store, stating that he intended to send it to his parents, at another town, to be used by them in killing rats. Afterwards he was arrested and confined in jail. There is no evidence that he sent the strychnine to his parents or that he ever intended to. While the other prisoners were at the dinner table, the deceased passed by the latrine, stopping for an instant, and then went to the dinner table. He was immediately seized with convulsions, as described in the opinion, and in a few moments died. It is shown that a member of his family had been afflicted with epilepsy, and that some of the symptoms which he manifested were also common to epilepsy, but not all of them. He had never been afflicted with epilepsy, and had made no complaint of being ill while in the jail, and had remarked to some of the prisoners, with confidence, that he would never go to the penitentiary. The expert evidence in the record shows that epilepsy is seldom fatal, especially in the first attack. The expert witness called by the plaintiff testified that he had never known of such an instance. It is not necessary to repeat the circumstances recited in the majority opinion, and perhaps unnecessary to mention other circumstances which appear to strengthen the evidence of suicide. If the question of poisoning were involved in a criminal prosecution for felony, this evidence would be regarded as establishing the use of poison beyond a reasonable doubt. This is a civil action, and the jury were required to find their verdict from the preponderance of

the evidence. I think it is clear that the jury has disregarded the evidence, and that the judgment ought to be reversed.

We ought not to establish precedents that lead the trial courts and juries to understand that suicide by poisoning cannot be proved in this state, and so deprive these fraternal societies of a defense to which they are justly and lawfully entitled.

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ELIZABETH HARMAN ET AL., CROSS-APPELLANTS, V. BENJAMIN FISHER ET AL., APPELLEES; JOHN KOLP ET AL., APPELLANTS.

FILED JANUARY 24, 1912. No. 16,961.

1. **Trusts: DEED: VALIDITY: ADVERSE POSSESSION.** An express trust with respect to real estate may not be created or declared by parol, yet if a parent conveys a tract of land to her son for the benefit of J., the grantee, and his brother B., and for more than ten years subsequently they occupy the land as tenants in common, B. tilling the farm and making lasting and valuable improvements thereon, under a claim of ownership, and J. conceding during that period that his brother owns one-half of the land, the heirs of J. will not be permitted to disturb B. in his possession and title to an undivided one-half of the real estate, notwithstanding there is no written evidence of a trust or of B.'s title and none was ever executed.
2. **Deeds: CONSIDERATION: PAROL EVIDENCE.** In a contest between heirs of the whole blood and heirs of the half-blood of an intestate, oral evidence is admissible to prove that the sole consideration for the deed from his mother, whereby he was vested with title to the tract of land in controversy, was love and affection, notwithstanding the sole recitation in the deed of a consideration is a substantial, valuable consideration.

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

*J. J. Thomas, John F. Fults, W. B. Whitney* and *F. W. Byrd,* for appellants.

*Perry, Lambe & Butler* and *John Stevens, Jr.*, for cross-appellants.

*W. S. Morlan, contra.*

ROOT, J.

This is an action in equity to settle conflicting claims to a quarter section of land in Furnas county. The case is here on appeal and cross-appeals.

Elizabeth Fisher, a widow, one of the pioneers of Furnas county, acquired title from the United States to the land in controversy. Mrs. Fisher was the second wife of her husband, and to them were born three sons and two daughters, all of whom attained maturity. Of these children Benjamin, the oldest, for many years was the head of the family. One son, Perley J. Fisher, departed this life subsequently to his mother's demise, and his heirs are parties to this action. The daughters married, and they also are parties hereto. Benjamin, subsequently to his marriage, lived separate from his mother, but in the immediate neighborhood of her home. The other son, John Thomas Fisher, remained unmarried, and departed this life intestate May 28, 1908. Elizabeth Fisher departed this life intestate September 17, 1895. There are numerous other parties to this action, all of whom are relatives of the half-blood of John Thomas Fisher or assignees of some of those relatives. For convenience sake they will be collectively referred to as "the half-bloods." All of these relatives are descendants of John Thomas Fisher's father by the first marriage, and in the veins of none of them flows the blood of Elizabeth Fisher.

There is evidence to prove and this court may take judicial notice of the fact that droughts, insect plagues and almost universal low prices for farm products prevailed in western Nebraska during many of the years covered by this inquiry. The proof also discloses that Benjamin Fisher years ago sold his homestead, and the pro-

ceeds were used in part at least for the benefit of his mother's family; the same sacrifice was made by one of the daughters; and John Thomas also brought to the common fund the proceeds of the sale of a tract of land formerly owned by him. The close and tender relations which the evidence discloses existed between this widow and all of her children continued to the close of her natural life.

In 1895, during a period of financial depression, the Fishers were in sore need of money, and, for the purpose of supplying her sons Benjamin and John Thomas with funds, Elizabeth Fisher, probably at the suggestion of Benjamin, determined to mortgage her farm; she also concluded that, for the purpose of keeping the title to the homestead in those sons, she would convey the farm to them. The attendance of a justice of the peace was procured, and, according to his testimony, he was directed by Mrs. Fisher to prepare a deed conveying the farm to these men. She said, "My time is short, and I want this land to remain with the Fisher boys," referring to Benjamin and John. Before the deed was drawn, it was mentioned that Benjamin's wife was not in condition to go to Beaver City, the county seat, to sign the mortgage, which it was proposed should be made, and thereupon it was suggested by the scrivener, or by Benjamin, that the deed might be made to the unmarried son, John Thomas, and this was done. Subsequently the mortgage was executed to secure the payment of $500. The deed was executed February 28, 1895, but seven months before Mrs. Fisher died. The proof discloses that John Thomas Fisher was an easy-going, pleasure-loving man of simple tastes, working at times on the farm and on another quarter section, the title whereto he acquired under the pre-emption laws, but devoting considerable of his time to hunting, attending baseball games, and occasionally indulging in a mild drinking bout. Benjamin farmed his land, the land in controversy, and John Thomas' pre-emption, so that Benjamin received all of the income from these tracts of land; he also paid the taxes thereon, and supplied John Thomas

with whatever money he desired. With one possible exception there seems to have been no friction between the brothers; but John Thomas, relieved of all responsibility and the necessity of earning his bread in the sweat of his face, was content that Benjamin should farm the land, pay the taxes and all expenses, receive the proceeds, and furnish his brother such sums of money as he demanded. The evidence is uncontradicted that John Thomas was well supplied with money, and that it was all furnished by his brother Benjamin. This condition existed before, as well as subsequently to, the execution of the deed by Elizabeth Fisher.

The court held that the deed executed by Mrs. Fisher was void and conveyed no title; a deed from Mrs. Bailey, one of Mrs. Fisher's daughters, to Benjamin Fisher was set aside, and the title to the land was quieted as follows: In Benjamin Fisher an undivided three-fourths, in the heirs of Perley J. Fisher, each a one-thirty-second part, collectively a one-eighth, and in Mrs. Bailey an undivided one-eighth. Benjamin's portion includes the share his sister, Mrs. Kolp, inherited, which she conveyed to him. The writer of this opinion is directed by a majority of the court to say that, while this court does not adopt all of the findings nor the reasoning of the learned district judge, we are of opinion that he attained the correct result, for the reasons following: We are inclined to the view that the heirs cannot now successfully question the validity of the deed from Mrs. Fisher to her son John Thomas. At this late date it is immaterial whether there was a consideration for the deed, or whether it was executed by reason of Benjamin's undue influence. John Thomas was in possession of this land, under a claim of right, for more than ten successive years subsequently to the execution of the deed and to Mrs. Fisher's demise, before he departed this life and before this suit was commenced. Therefore the plea of the statute of limitations is sustained. Nor do we think there is any such proof of recently acquired knowledge of the alleged duress, fraud or lack of consideration as will toll the statute.

To the contention made by the plaintiffs and by the relatives of the half-blood that the deed conveyed no estate to Benjamin, and that, since no writing was signed by Elizabeth Fisher or by John Thomas Fisher, no trust was created or declared which Benjamin may avail himself of, and therefore he has no interest in the land other than as an heir of John Thomas, we have to say: If the evidence of the justice of the peace is competent, it discloses that Elizabeth Fisher intended that her sons Benjamin and John Thomas should own the farm in equal shares, and but for the ignorance of all parties to the transaction, including the scrivener, a written instrument would have been prepared and signed to evidence that intent. However, the proof is satisfactory that, subsequently to the execution of the deed, Benjamin's possession was under a claim of right; he made lasting and valuable improvements on the farm and not only tilled the soil, but assumed authority to place his married children in possession of the land. Ordinarily such acts would reasonably be referable to a claim of right; but it is said that, because of the peculiar circumstances of this case, we should not so hold. But we find declarations of John Thomas, made at different times to within two years of his death, admitting by inference or directly his brother's interest in the land. In 1897, but two years after the deed was executed, John Thomas requested a third party to prepare a deed to convey all of the title to Benjamin, saying that "He ought to have it (the land)," and solely because the proposed scrivener desired to go home to luncheon, and the subsequent attraction of a ball game, that purpose was not consummated. John Thomas refused to sell part of the land because, as he said, it was always to remain in the Fisher family. This statement may indicate a testamentary intention, but it sheds some light on the controversy. Within two years of John Thomas' demise, in discussing the location of a ditch on the farm, he said in substance that he did not know whether Benjamin wanted the ditch constructed along

the proposed path, and that he and Benjamin owned the land together. There is some evidence of John Thomas' declarations to the contrary, and also Benjamin's declarations evincing a disclaimer of any interest in the land; but, taking all of the evidence together, we find that at all times subsequently to the execution of the deed to John Thomas, Benjamin Fisher asserted ownership to at least an undivided one-half of this land, and, in reliance upon his belief and contention that his mother intended that he should have an interest in the land, made lasting and valuable improvements thereon, and, with his brother John, held undisputed possession of the premises for more than ten years preceding the commencement of this action and subsequently to his mother's death, and during all of that time John acquiesced in that claim. A tenancy in common may be created by prescription. *Inglis v. Webb,* 117 Ala. 387. This estate in Benjamin was not created so much by a disseizin of his brother John, as by John's recognition of his mother's trust and confidence in him and his respect for his brother's rights. There was in effect an execution by him of the trust reposed in him by her, and, that trust having been fully executed and respected by him for more than ten successive years, not only should the ten year statute of limitations (code, secs. 5, 6) bar a recovery, but the case is within the principle announced in *Karr v. Washburn,* 56 Wis. 303, and *Oberlender v. Butcher,* 67 Neb. 410.

This brings us to the contention between the half-bloods and the descendants of Elizabeth Fisher; the one faction contending for an estate of inheritance because the deed from Elizabeth Fisher is one of purchase, and the other side asserting that the deed is one of gift, and, hence, by the terms of section 33, ch. 23, Comp. St. 1911, which provides that an estate of inheritance which vested in an intestate by devise or gift from some of his ancestors shall descend from him solely to such of his relatives as are of the blood of that ancestor, the line of descent is confined to the heirs of the full-blood.

We do not think that the execution of the mortgage and the use of the funds acquired thereby should control the character of Mrs. Fisher's deed. The money was secured for the benefit of Benjamin Fisher and John Thomas Fisher, and in effect they mortgaged their land to secure the payment of their debt. Rather this controversy depends upon the right of the heirs of the full blood to contradict by oral evidence the recital in the deed from Elizabeth Fisher that she was paid $2,000 therefor.

A majority of the court instructed me to say that oral evidence is admissible to prove the actual consideration for a deed, even though the effect may be to convert the instrument from one of bargain and sale into one of pure gift; such proof has always been considered competent in other actions, and a majority of the court does not think sound sense should permit an exception to be made in a case where, to do so, is to compel the court to hold contrary to the fact, and thereby render ineffectual a plain provision of the statute. Such evidence, although admissible, should not be held to prove the fact, unless it is clear and convincing and leaves no reasonable doubt in the mind concerning the consideration given for the deed.

The courts of last resort are not in harmony in cases like the one at bar. The following cases directly sustain the majority of this court: *Bradley v. Love,* 60 Tex. 472; *Rockhill v. Spraggs,* 9 Ind. 30; *Jones v. Jones,* 12 Ind. 389; *Kenney v. Phillipy,* 91 Ind. 511. See, also, *Sires v. Sires,* 43 S. Car. 266, and *Salmon v. Wilson,* 41 Cal. 595.

The writer of this opinion, while recording the views of a majority of the court, personally holds to the contrary. That is to say, that while for many purposes recitations in a deed may not, even as between the parties and their privies, be conclusive evidence of the facts, and the recitation of consideration is frequently held to be solely *prima facie* evidence of the fact, yet it seems to me that, both upon reason and the better authority, persons claiming under a deed should not, in the absence of fraud, or mutual mistake, be permitted to prove by oral evidence

that a recitation of a substantial, valuable consideration, where no other consideration is referred to in the deed, is false, and prove by the oral evidence that the sole consideration was good so as to change the quality of the estate thereby conveyed. In such cases the recitation gives quality to the estate transferred, and, to contradict it by oral evidence, violates the statute of frauds and perjuries. *Patterson v. Lamson,* 45 Ohio St. 77; *Brown v. Whaley,* 58 Ohio St. 654; *Groves v. Groves,* 65 Ohio St. 442.

Among the cases cited to sustain the majority of the court *Bradley v. Love, supra,* is directly in point, but the opinion is a mere declaration that the law is as stated and contains no convincing argument to sustain the conclusion. The later Indiana cases follow *Rockhill v. Spraggs,* 9 Ind. 30, and it was decided on the authority of *M'Crea v. Purmort,* 16 Wend. (N. Y.) 460. The New York case, however, merely involved the right of a party to a deed to prove that the consideration therefor was a quantity of iron delivered by the grantee to the grantor, rather than a money consideration, as recited in the deed. That case was correctly determined, but does not sustain the Indiana cases, nor the majority opinion in the instant case.

In *Salmon v. Wilson,* 41 Cal. 595, in addition to a recitation of a nominal valuable consideration, there was a recitation of a good consideration, and it was held that, upon a consideration of the entire instrument, the court should construe the deed to be one of gift.

In *Carty v. Connolly,* 91 Cal. 15, that court recognize the rule that, in the absence of fraud, oral evidence should not be received to contradict the recitation of consideration for the purpose of defeating the conveyance according to its terms. In the case at bar the testimony is convincing that the sole consideration for the deed was that of love and affection, and we conclude, upon a consideration of the entire record, that substantial justice has been done.

The judgment of the district court, therefore, is

AFFIRMED.

SEDGWICK, J., concurring.

The foregoing opinion was prepared by Judge ROOT while he was a member of the court, and is now adopted as a correct disposition of the case. The most serious contention in the case is determined by the second paragraph of the syllabus. The general rule is that the consideration expressed in a written instrument may be inquired into, and that it may be shown by parol testimony to be without consideration, although such consideration is recited in the instrument. The adjudicated cases are in conflict and each view is supported by many decisions. We think that the better reasoned decisions hold that the general rule obtains in cases of this kind. If there was a valuable consideration for the deed, the property goes, upon the death of the grantee, to his heirs in general. If the deed was in fact a gift from an ancestor of the grantee, the property upon the death of the grantee descends to those who are "of the blood of such ancestor." When the ancestor makes a gift to his descendant, and recites in the deed of gift that a valuable consideration was paid therefor, this recitation on his part may be for the purpose of controlling the line of descent of the property. We know, however, that in practice this recitation is often made in deeds for other and different purposes, or it may be carelessly made without any purpose whatever. If the conveyance is in fact a gift, and the ancestor desires to qualify the estate conveyed and control the line of descent, he can do so by inserting in the conveyance apt and conclusive words for that purpose. If the ancestor desires to make disposition of his property that shall take effect after his death, or to place limitations upon the title derived through him, he can accomplish these results through a gift of the property by will, and the law favors that method of making such posthumous limitations. It is not usual in practice to qualify the estate conveyed by so uncertain a method as recitations of consideration, and to adopt such methods would lead

to uncertainties in titles to real estate. We think, therefore, the better reason is in favor of the rule which we have adopted.

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THOMAS M. REED, APPELLEE, V. ELI B. FISHER ET AL., APPELLANTS.

FILED JANUARY 24, 1912. No. 16,582.

Judgment: CANCELATION OF SATISFACTION: MISTAKE. A plaintiff who, without any consideration whatever, satisfied a judgment in his favor, mistakenly believing that the debt had been paid by means of a worthless deed to land on which the judgment was a lien, may have the satisfaction canceled, where no right of any innocent party has intervened.

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

*W. J. Fisher* and *Aaron Wall,* for appellants.

*R. J. Nightingale, contra.*

ROSE, J.

This is a suit in equity in which the trial court canceled the satisfaction of a judgment against Eli B. Fisher and William J. Fisher, defendants herein, on a petition alleging that plaintiff, without consideration, through fraud and mistake, had discharged his lien. Defendants have appealed.

In a former action at law plaintiff recovered a judgment for $50 against Eli B. Fisher, who, to prevent collection thereof, had previously deeded an undivided sixth of a quarter section of land to his brother, William J. Fisher. The deed, though binding on the parties to it, was, by decree of court, canceled as to plaintiff, and the realty subjected to the payment of his judgment in a subsequent suit in equity, wherein he was plaintiff and both

of the Fishers named were defendants. Assuming that the decree had restored the title to the fraudulent grantor, plaintiff accepted from him a deed to the land and satisfied his judgment lien thereon, mistakenly believing the judgment debt had been thus paid. The result was that he did not acquire title or receive anything else of value, and lost his lien—the fruit of an action at law and a suit in equity. William J. Fisher, though he parted with nothing and lost no legal right when the satisfaction was entered, clung to the title obtained from his brother without consideration, refused to deed the land to plaintiff, kept him out of possession and prevented him from participating in the rents and profits arising from the land. What the trial court did in the present case—another suit in equity—was to strike off plaintiff's entry of satisfaction and reinstate his lien on the land described.

Defendants seek a reversal on two grounds: (1) The cancelation is an attempt to relieve plaintiff from his own mistake of law. (2) The action is barred by the statute of limitations.

1. Was the mistake one of law or fact? Was it mutual? While these questions were subjects of animated debate, the correctness of the cancelation can be tested by two propositions about which there is no dispute in the record: Plaintiff made the mistake of assuming that the judgment debt was paid when he satisfied his lien. The deed which he accepted as a consideration for the satisfaction was absolutely worthless. It is therefore perfectly clear that no title was conveyed to him and that no debt was paid. When plaintiff accepted the deed, he received nothing and neither of the judgment defendants parted with anything. In equity that is not the way debts are paid or judgments satisfied. There is no intervening right of any third party to complicate plaintiff's equities. Both parties to the fraudulent conveyance were defendants in the suit wherein it was canceled as to plaintiff and they are also defendants here. It having been conclusively shown that plaintiff discharged his judgment

lien under the circumstances narrated, without any consideration whatever, the satisfaction was properly canceled. *Bowman v. Forney,* 15 Pa. Co. Ct. Rep. 134; *Hay v. Washington & A. R. Co.,* 11 Fed. Cas. 6255*a*; *Stewart v. Armel,* 62 Ind. 593; *Russell v. Nelson,* 99 N. Y. 119; *Watson v. Reissig,* 24 Ill. 281, 76 Am. Dec. 746.

2. Whether plaintiff knew, more than four years before he commenced this suit, that he had received no consideration for satisfying his judgment is an issue in dispute with proof on both sides. The trial court found for the plaintiff, and an examination of the entire record leads to the same conclusion on appeal.

AFFIRMED.

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BERTHA M. VOTAW, APPELLANT, V. HORACE E. VOTAW, APPELLEE.

FILED JANUARY 24, 1912. No. 16,587.

Divorce: EXTREME CRUELTY: QUESTION OF FACT. False accusations of marital infidelity may constitute extreme cruelty on the part of a husband making them, but whether a wife should be granted a divorce on that ground depends upon the facts of each case.

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

*Wilcox & Halligan,* for appellant.

*J. G. Beeler* and *Hoagland & Hoagland, contra.*

ROSE, J.

Plaintiff sued her husband for a divorce on the ground of extreme cruelty. After proofs had been adduced at great length on both sides her action was dismissed, and she has appealed to this court for the relief denied below.

As husband and wife the parties lived together at North Platte for ten years. They have two children. Defend-

ant was a locomotive engineer on the Union Pacific railroad during nine years of their married life, but left the railway service, and thereafter devoted his time to the milling business at Maywood, a village located a few miles from North Platte. The family residence, however, was not changed, and defendant drove home from his mill once in a week or two. The proofs indicate that he had a phlegmatic temperament, and that his wife was affected by a nervous ailment described as cardiac neurosis.

December 1, 1908, defendant went home in the evening after dark and found company. A young woman who lived there, two young men invited by her, and plaintiff were playing cards. Plaintiff thought she heard her husband at the barn, went to greet him, and called his name, but he gave her a surly answer and soon approached her at the house in a jealous rage. The guests soon left. He falsely accused his wife of criminal intimacy with one of the young men who was there when he arrived. The children cried. The mother screamed, and finally, as a result of the false accusation and the accompanying ordeal, went into convulsions. In the meantime neighbors heard the commotion and tried to call a policeman. A woman pounded on the house outside, but, failing to quiet the storm within by that means, entered and upbraided defendant in his own home. He denies that he accused his wife of marital infidelity, but he admitted on cross-examination that the false imputation had been in his mind. If the words employed by him did not contain the accusation in direct terms, they nevertheless imputed the false charge. They were so understood by his wife, and the cruel thrust was no less painful on account of the form in which it was delivered. After his anger had subsided, he confided to his wife the secret that he had thought of going down town for a revolver, with the purpose of ending his own life and that of another. Plaintiff understood that she was included in the contemplated tragedy, but he denies that he ever had any intention of harming her. A week later he came home in the evening

and saw his wife with one of the children going to the next-door neighbor's. He imagined his child was a man, and inquired afterward of the children and of the young woman who stayed at their home who the man was. The same evening he went down town, after having refused to tell his wife why he was going. Fearing he would return with a revolver, she fled with her children to the home of a sister who lived in the neighborhood. The sister armed one of her sons with a revolver and put him on guard in a bedroom. Defendant came a little later, and from the outside called the sister by name. Not receiving any response, he broke in a door, entered the house, and inquired for his wife and children. An interview with plaintiff was arranged, and resulted in another case of neurasthenic prostration.

There are circumstances under which a false accusation of marital infidelity may constitute "extreme cruelty" within the meaning of that term as used in the statute relating to divorce, but whether a divorce should be granted on that ground depends upon the facts of each case. *Sample v. Sample,* 82 Neb. 37. The law being as thus stated, counsel for plaintiff were somewhat astonished at the trial court's refusal to grant her relief, but the explanation is to be found in other facts. Reprehensible as defendant's behavior was, its enormity and plaintiff's danger were exaggerated in her own mind by her nervous disorder. Thus magnified, her wrongs were communicated to her children and to her sister. It is perfectly apparent from the record that defendant loves his wife and children. Her own proof indicates that no suspicion of her infidelity had ever before entered his mind. His misconduct occurred in December, and he was sued in January following. There is no evidence of cruelty at any other time. When his wife was prostrated he sent for a physician and cared for her. He tried to restore former relations. He acknowledged the wrong he had done. He went to the young man of whom he had entertained the unfounded suspicion, and to others, and

admitted his fault, with the hope of arresting the scandal he had started and of enlisting their aid in his efforts to win back his wife's affections. He broke into the home of his wife's sister for the same purpose. She was reassured by his appearance and statements and felt no danger, though a few minutes earlier she had armed her own son for plaintiff's protection. Considering defendant's disposition, his attempts to make reparation and to pacify his wife were pathetic.

From the evidence it seems that, when defendant was returning from Maywood, he met on the highway a woman who told him his wife and children had been out riding, and that their companions included the young man already mentioned. When he reached home, a horse hitched to a two-seated conveyance was standing in front of his house. There was gaiety within and the young man was there. Defendant's anger and the false accusation followed. According to the greatest of dramatists, "Trifles light as air are to the jealous confirmations strong as proofs of holy writ." Though defendant had been schooled in the dangers of the engineer's cab, he lost his head as soon as jealousy crept into his bosom. The conditions disclosed will not prevent the parties from resuming their former relations. While his jealousy was no justification for his misconduct, the circumstances show that he did not deliberately make the charge, believing it to be false. He did not repeat it, but tried to make amends. These considerations no doubt appealed strongly to the trial court, and the judgment of dismissal is here adopted as correct.

AFFIRMED.

ROBERT B. SMITH, APPELLEE, V. GEORGE B. MCKAY, APPELLANT.

FILED JANUARY 24, 1912. No. 16,641.

1. Appeal: CONFLICTING EVIDENCE. The finding of a jury on conflicting evidence will not be disturbed on appeal unless manifestly wrong.

2. ———: HARMESS ERROR. Rulings which did not prejudice appellant in any way cannot be made grounds of reversal.

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

*George C. Gillan* and *H. D. Rhea,* for appellant.

*T. M. Hewitt* and *W. A. Stewart, contra.*

ROSE, J.

The petition contains two causes of action. In the first the sum of $343 is demanded for making a concrete foundation and cement floor for a building in Lexington according to the terms of an oral contract between plaintiff and defendant, and the second is a claim consisting of four items, amounting to $16.75, for labor and materials furnished in locating and repairing the foundation mentioned. Defendant in his answer admits that the oral agreement was made, but alleges that plaintiff violated it by making the foundation too narrow for the building planned. The second count is answered by a plea of payment. Defendant also filed a cross-petition in which he demanded $550 as damages for plaintiff's failure to make the foundation the specified width. The jury found in favor of plaintiff on the first count for the full amount of his claim, and on the second for $7.37. From a judgment for the sum of these amounts and interest defendant has appealed.

It is argued as a ground of reversal that the evidence is insufficient to sustain the verdict. The principal ques-

tion litigated is: Did the foundation and floor as completed conform to the stipulated dimensions? On conflicting proof, with abundant evidence to sustain the verdict, the jury determined that issue in favor of plaintiff, and thereby settled it for the purposes of review.

In relation to the claim for damages pleaded in the cross-petition, defendant complains of instructions and of rulings on evidence. If the trial court made mistakes in those particulars, the errors were harmless, because the jury found on an issue properly submitted that plaintiff did not violate the oral agreement in any way. Since it is established that plaintiff complied with the contract, defendant is not entitled to recover damages based solely on allegations that he violated it. No prejudicial error appearing, the judgment is

AFFIRMED.

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JOHN S. IMAN, APPELLEE, V. JOHN R. INKSTER ET AL., APPELLANTS.

FILED JANUARY 24, 1912. No. 16,943.

1. **Pleading**: PETITION: AIDER BY ANSWER. A petition omitting material averments is cured by an answer supplying them.

2. **Partnership**: ASSETS: GOOD WILL. The good will of a dissolved partnership is a part of the assets of the firm.

3. ———: SETTLEMENT: OMITTED ITEM: ACTION AT LAW. A partner's share of the value of a single asset not included in the settlement of the partnership affairs, as made by his partners without his knowledge, may be recovered in an action at law.

4. **Trial**: TRIAL TO JURY: PLEADINGS. The trial of an issue of fact to a jury in an action at law should not be abandoned because the pleadings as a whole contain matter relating to an accounting about which there is no dispute between the parties to the suit.

5. **Partnership**: NEGLECT OF PARTNER: FORFEITURE. A partner by merely neglecting his duties to the firm does not thereby forfeit his right to the assets of the partnership, in absence of an agreement to that effect.

6. Trial: VERDICT: IMPEACHMENT. Matters inhering in the verdict of a jury cannot afterward be attacked by affidavits of the jurors.

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

*McCoy & Olmsted,* for appellants.

*Charles Battelle* and *B. S. Baker, contra.*

ROSE, J.

This is an action at law to recover from John R. Inkster and James S. Van Zant, defendants, $15,000, the alleged share of John S. Iman, plaintiff, in the value of the good will of the Nebraska Live Stock Company, a dissolved partnership which had been composed of the three persons named. The jury rendered a verdict in favor of plaintiff for $4,123.16. To prevent the granting of a new trial, plaintiff filed a remittitur for all of that sum except $1,000, for which judgment was entered in his favor. Defendants have appealed.

The firm had been buying and selling live stock on commissions at South Omaha. From the standpoint of plaintiff, as shown by his pleadings and proofs, defendants, during his absence on firm business and for his own pleasure, dissolved the partnership without his consent, ousted and excluded him therefrom, incorporated under the same name, continued business in the same offices, made use of the same exchange and stock-yard privileges, appropriated to themselves the good will of the partnership, and sent him a statement that they had balanced the books, paid the debts and sold the tangible assets. The account rendered by defendants showed that plaintiff owed them $1,743.38, but did not include in the list of assets the good will of the partnership. At the trial plaintiff did not controvert any item in their statement, but made proof of facts tending to show defendants' liability for the single item of good will omitted from the account, its value and his own share thereof.

Defendants, according to their pleadings and proofs, take the position that any partner had a right to terminate the partnership at will; that plaintiff had violated his contract with defendants by failing to devote his entire time to the business of the firm and by buying and selling stock on his own account; that by his own wrong, in thus neglecting his duties to the firm and in violating his contract with defendants, he destroyed any good will which the partnership had enjoyed; that he left the state early in July, 1908, without the consent of defendants, dissolved the partnership and abandoned any interest he might have had in the good will of the firm; that he afterward engaged in a separate business on his own account; that by a letter written in Montana and received by them July 30, 1908, he informed them that he had abandoned and dissolved the partnership; that, upon learning of such abandonment and dissolution, defendants settled the affairs of the partnership, notified plaintiff thereof and sent him a dissolution statement, which did not include good will because it was of no value; and that plaintiff by accepting that part of the settlement beneficial to him is estopped to assert his claim for good will.

The petition is assailed as fatally defective for these reasons: Final and complete settlement of the partnership affairs is not alleged. It is not shown that the action is based on a single item growing out of such a settlement, nor that there are no other unsettled accounts or unpaid debts. If there is anything wanting in these particulars, it will be found in punctilious form in the answer of defendants. A petition omitting material averments is cured by an answer supplying them. *Haggard v. Wallen*, 6 Neb. 271; *Railway Officials & Employees Accident Ass'n v. Drummond*, 56 Neb. 235; *Beebe v. Latimer*, 59 Neb. 305; *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1.

When the pleadings are all considered, a cause of action for plaintiff's share of the good will is stated. It is settled law in this state that the good will of a dissolved partnership is a part of the assets of the firm. *Nelson v.*

*Hiatt,* 38 Neb. 478; *Sheppard v. Boggs,* 9 Neb. 257. A partner's share of the value of a single asset not included in the settlement of the partnership affairs may be recovered in an action at law. *McAuley v. Cooley,* 45 Neb. 582. The liability of defendants to plaintiff for his share of the good will of the partnership is fairly put in issue by the pleadings. At the trial plaintiff confined his proofs to that issue, and he did not contest any item in the account stated by defendants. His claim for good will was therefore presented, as a single item, under well-established principles.

Defendants further argue that there should have been no jury trial because the petition states a case between partners for an accounting. There is no merit in this point. As the case was presented by all of the pleadings, defendants had made their own accounting, and there was no controversy on that subject, except as to the omitted item of good will—the proper basis for an action at law. The trial court very properly declined to abandon the controverted issue at law for an accounting in equity already made by defendants and approved by plaintiff.

The petition was assailed by demurrer and by motion for judgment in favor of defendants *non obstante veredicto.* In that way both the pleadings and the evidence are attacked as insufficient to sustain the judgment. It is also argued in this connection that plaintiff's case is defeated by estoppel. These views, however, cannot be adopted. The letter pleaded by defendants to show that plaintiff abandoned and dissolved the partnership does not, as a matter of law, justify their interpretation. The evidence is sufficient to support a finding that he did not voluntarily dissolve the partnership, either by his letter or by other conduct, and that the good will was a valuable asset. The haste with which defendants, in the absence of plaintiff, settled the affairs of the partnership, pursued the same business in a new form under the same name in the same office with the same privileges, is convincing proof that, in their judgment, the good will had

not been destroyed by plaintiff and that it was an asset worth having. In any event the jury, on ample evidence, found that the good will was a valuable asset. If the partnership was dissolved by defendants without the consent of plaintiff, he did not abandon his right to his share of the good will or estop himself from demanding it. That asset stood on the same footing in the settlement of partnership affairs as the tangible property listed by defendants. If plaintiff failed to devote all of his time to the business of the firm and engaged in other business, as charged by defendants, he did not thereby forfeit his interest in the good will any more than in the office furniture or in other property listed in the settlement. He had nothing to do with the transferring of the assets of the firm to defendants or with the stating of the account. He had a right to acquiesce in the settlement as far as it went, and to sue for his share of the omitted asset of good will.

Complaint is also made that the jury were guilty of misconduct in disregarding the evidence and in disobeying the instructions with respect to giving defendants the benefit of plaintiff's indebtedness to them as settled by the undisputed account. Defendants attempted to show this misconduct by the affidavits of the jurors themselves. The attack so made related to matters inhering in the verdict itself, and the jurors could not impeach it in that manner. *Gran v. Houston*, 45 Neb. 813; *Johnson v. Parrotte*, 34 Neb. 26; *Welch v. State*, 60 Neb. 101. The finding of the jury on the measure of recovery, however, was not accepted by the trial court, but was reduced from $4,123.16 to $1,000—a sum fully sustained by the evidence.

The case was fairly submitted to the jury. They were not permitted to find in favor of plaintiff unless his share of the good will, if any, exceeded his indebtedness to defendants, as shown by their own account. No prejudicial error has been found in the rulings on evidence or elsewhere in the record.

AFFIRMED.

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

FILED JANUARY 24, 1912. No. 16,842.

1. Appeal: SUFFICIENCY OF EVIDENCE: ESTOPPEL BY ACTS. Where at the close of a trial in the district court, plaintiff, without any motion for a directed verdict, or objection of any kind that the evidence is insufficient to sustain a verdict in favor of defendant, requests instructions upon a material issue of fact in controversy, which are given by the court, he will not thereafter be heard to say that an adverse finding thereon is not sustained by sufficient evidence.

2. ———: ———: ———: SEVERAL ISSUES. But where no special findings are submitted to the jury, and there are two or more material questions involved, upon either of which the verdict might have been based, the fact that the defeated party is, by having requested instructions, estopped to question the sufficiency of the evidence upon one point does not estop him from questioning the sufficiency of the evidence to sustain the verdict on other points, upon which no instructions were requested by him.

3. ———: VERDICT: AMBIGUITY. The record examined, and *held* to leave the matter in doubt upon which of the material issues in controversy the verdict is based.

4. Bridges: REPAIRS: NEW STRUCTURE. Evidence examined and referred to in the opinion *held* insufficient to sustain the verdict of the jury upon point 7.

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

*Calvin H. Taylor,* for appellant.

*W. N. Jamieson* and *John F. Stout, contra.*

FAWCETT, J.

This case is before us for the fifth time. The history of the case and of the matters in controversy will be found in our former opinions reported in 63 Neb. 813, 66 Neb. 473 and 476, and 72 Neb. 93. The last trial was held at the February, 1910, term of the district court for Sarpy county. There was a trial to the court and a jury and a

verdict for defendant. Judgment on the verdict. Plaintiff appeals.

The only contention made here is that the verdict is not sustained by the evidence. In his brief counsel for plaintiff states that it is only necessary to discuss the following questions: "(1) Whether or not at time of making the repairs by plaintiff, in 1900, on the bridge in question, the same was a public wagon bridge and formed and was used as a part of the public highway. (4) The reasonable value of the repairs so made necessary to put said bridge in safe condition for public travel. (7) The issue was also raised by the pleadings as to whether or not said bridge was actually repaired, or whether it was not a new construction so as to render defendant not liable."

Under the rule announced by this court in *American Fire Ins. Co. v. Landfare,* 56 Neb. 482, *Farmers Bank v. Garrow,* 63 Neb. 64, and *Missouri P. R. Co. v. Hemingway,* 63 Neb. 610, plaintiff is not in a position to urge the insufficiency of the evidence to sustain the verdict on point 1. At the conclusion of the trial plaintiff, without any motion for a directed verdict or objection of any kind that the evidence was insufficient to warrant a verdict in favor of defendant, requested, and the court gave, instructions 3 and 4, covering the question involved in point 1. The verdict having been adverse to plaintiff, it cannot now be heard to assert that there was not sufficient evidence upon that point.

Point 4 need not be considered, for the reason that, the verdict having been for defendant, the question of the reasonable value of the repairs is immaterial for the purpose of this review.

The rule above announced, and held to be applicable to point 1, has no application to point 7, for the reason that no instructions upon that point were requested by plaintiff. As no special findings were submitted to and returned by the jury, it is impossible to say upon which of these two points the verdict of the jury was based. If upon point 7, we think the contention of plaintiff, that

the verdict was not sustained by the evidence, is sound. The evidence in this record, that the bridge was not a new bridge but was simply an old bridge repaired, is much stronger than in *Brown County v. Keya Paha County*, 88 Neb. 117, where the same contention was made as here, but where we held that plaintiff's claim was for repairs; and upon the record before us we must hold the same here. According to the testimony, there never was a day when this bridge was not used. It even shows that at the very time they were making the repairs teams were crossing. One witness testified that, "during the time we were repairing it, we let no teams go across there only at 12 o'clock, at noon, and after 6 o'clock, just one day the teams that were waiting there amounted to about 80 teams." The evidence shows that the length of the bridge was about 2,800 feet; that there were in round numbers 508 piling, 889 stringers and 127 caps used in its original construction. In making the repairs, only 11 new piling, 551 stringers and 49 caps were used. That the floor was all new, that no one section of the bridge was left standing complete and without repairs, and that the piling left in the bridge was old piling which had been there for a number of years does not change the character of the work done. It would be useless to quote the testimony at large upon this point. Viewed from any standpoint, it is entirely insufficient to sustain the contention that this was a new structure, and upon point 7 the verdict is without sufficient evidence to sustain it. Being unable, as above indicated, to determine upon what theory the jury returned their verdict, it should not, in the face of the apparent merit of plaintiff's claim, be permitted to stand. That this bridge was a part of a highway, which the public generally, in both the plaintiff and defendant counties, used and had used for nearly ten years is beyond question. That there may be some slight question as to whether the lands in the approaches to the bridge had been dedicated to public use by the owners, or legally condemned and opened as a public road, should not weigh

against the more important fact that the bridge has been used as a part of the public highway for so many years.

The question as to the right of plaintiff to a change of venue is not properly presented by this record. If it were, we might be constrained to hold that plaintiff is entitled to have the venue changed, and the case submitted to a jury free from any local interest or prejudice. The verdict of the jury indicates the propriety of such a course.

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

REVERSED.

BARNES, J., dissenting.

I am unable to concur in the opinion of the majority. It appears that the only contention on this appeal is that the verdict is not sustained by the evidence. The main question involved in the trial of this case was whether at the time the alleged repairs were made the bridge in question was a public wagon bridge which was in use as a part of a public highway. This was the primary fact necessary to be established in order to sustain a recovery. The record discloses that the bridge had not been in use for the full period of ten years at the time of the repair or reconstruction for which recovery is sought. It follows that no rights were obtained under the statute of limitations. It appears that at both ends of the bridge the title to the property abutting upon the river banks was in private parties. The evidence is not entirely clear that the lands which constituted the approaches to the bridge had been dedicated to public use by the owners, or legally condemned and opened as a public road. At the conclusion of the trial plaintiff, without any motion for a directed verdict, and without objection of any kind that the evidence was insufficient to warrant a verdict in favor of the defendant, requested the court, by proper instructions, which were given, to submit the main question, above stated, to the jury. This having been done, and the jury having returned a verdict for defendant, counsel for the appellee insists that plaintiff, by causing the sub-

mission of the main question to the jury, under the well-established rule in this state, cannot now claim that an adverse finding upon this question is not sustained by sufficient evidence. The question submitted at the request of the plaintiff was the material one, under the pleading, and if decided adversely to the plaintiff it could not recover. In *American Fire Ins. Co. v. Landfare,* 56 Neb. 482, it was held: "One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable fact in the case, cannot afterwards be heard to assert that there was no evidence received tending to prove such fact." This rule was followed in *Farmers Bank v. Garrow,* 63 Neb. 64, and *Missouri P. R. Co. v. Hemingway,* 63 Neb. 610, and is so well settled that it ought not to be disregarded at this time.

The main issue in this case having been submitted to the jury upon instructions prepared and tendered by the plaintiff, and the jury having found against it upon the evidence, such finding should conclude the plaintiff, and terminate this litigation. As stated in the majority opinion, this is the fifth time that this case has been before us. There should, at some time, be an end to litigation. Therefore, I am of opinion that the judgment of the district court should be affirmed.

ROSE, J., joins in this dissent.

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GIRARD TRUST COMPANY, TRUSTEE, APPELLEE, V. HENRY NULL ET AL.; WALTER V. HOAGLAND, APPELLANT.

FILED JANUARY 24, 1912. No. 16,998.

**Acknowledgment, Authority to Take.** A notary public is not disqualified from taking an acknowledgment of a mortgage made to a loan company, merely because it is shown that he was at the time local agent of the mortgagee, it not appearing that he was a stockholder in such company or otherwise beneficially interested

in having the mortgage made. Nor would the fact that such mortgage was executed as a renewal of a prior mortgage, in which such notary had an indirect interest, disqualify him, it not appearing that the execution of such renewal mortgage operated to his benefit in relation to his indirect interest in the original mortgage.

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

*H. P. Leavitt* and *Hoagland & Hoagland,* for appellant.

*Albert Muldoon, contra.*

FAWCETT, J.

From a decree of the district court for Lincoln county, awarding the plaintiff a foreclosure of its mortgage upon the northeast quarter of section 10, township 16, range 29, in said county, defendant Walter V. Hoagland appeals.

The record shows that Henry Null, originally one of the defendants in this suit, proved up on the land in controversy as a government homestead, and was residing there with his family, claiming it as a homestead, at the times of the execution of all of the instruments hereinafter referred to. May 1, 1887, Null mortgaged the land to the Central Nebraska Loan & Trust Company for $350. T. C. Patterson was president and a director and stockholder in that company. December 1, 1888, Patterson, as the agent for McKinley-Lanning Loan & Trust Company, which for brevity will be designated as the McKinley Company, obtained for the Nulls from that company a loan of $500 for five years at 10 per cent. per annum. To secure this loan two mortgages were executed by the Nulls and acknowledged before Mr. Patterson as notary public, the principal mortgage being for $500 with 7 per cent. interest, payable semi-annually, and the other, called a commission mortgage, being for $75, which represented the other 3 per cent. of interest for the five years.

At the time of executing these mortgages, Mr. Patterson had a contract with the McKinley Company, by the terms of which, for loans of this character, he was to receive one-half of the commission represented in the smaller mortgage, when the principal mortgage was paid. When the mortgage to the McKinley Company matured in 1893, the Nulls executed to that company the mortgage in suit, as a renewal of the former mortgage, and at the time of its execution they also executed a mortgage for $75, representing the additional 3 per cent. of interest, as was done on the former occasion, these two mortgages also being acknowledged before Mr. Patterson. Subsequently, and before maturity, the mortgage in suit was assigned by the McKinley Company to the plaintiff. On July 17, 1907, Henry Null and wife by special warranty deed conveyed the land in controversy to defendant Hoagland. The covenant in the deed is "that the said premises are free and clear of all liens and incumbrances, and we do hereby covenant to warrant and defend the said premises against the lawful claims and demands of all persons claiming by, through, or under us, and against no other claims." The undisputed evidence shows that at the time of the execution of this deed the land was worth from $1,200 to $1,600. The only testimony shown in the abstract with reference to the execution of this deed and the consideration paid by Mr. Hoagland therefor is in the testimony of Mrs. Null. She testified that they lived on the land, rented it about two years, and sold it to Mr. Hoagland. "I do not remember what he paid. He paid me some money, but not much, because we sold it to him with the mortgage on it. I did not get much, I think about $225. I think in cash. Q. And you sold it because there was a mortgage on the land and that it was not paid, and that he would have to fight it? A. Yes, sir. Q. And he got to help you? A. Yes, sir. Q. You mean that he was to fight the mortgage? A. Yes, sir; we talked it all over."

The brief of defendant contains five specific assignments of error. We will consider these in their order.

1. That there is not sufficient evidence in the record to show that plaintiff is the owner of the mortgage in controversy and entitled to maintain this suit: Under this head the rulings of the court, in the admission of certain exhibits, are assailed, and the argument advanced that no sufficient foundation was laid for their admission. The record is so clearly against defendant upon this point that nothing would be gained by reviewing it.

2. That the mortgage contract sued upon was usurious: This contention must fail for the reason that the evidence is entirely insufficient to sustain it.

3. That plaintiff's action is barred by the statute of limitations: Upon this point it is sufficient to say that the facts upon which defendant's argument is based do not appear in the record.

4. That the land covered by the mortgage was the homestead of the Nulls at the time of the execution of the mortgage, and that the mortgage was void because Mr. Patterson, who took the alleged acknowledgment, was incompetent to take the same: The rule of law that one who has an actual pecuniary interest in a mortgage is incompetent to take the acknowledgment of the mortgagors thereto is well settled, as contended for by defendant. The question here is, did Mr. Patterson have such an interest in the mortgage in suit? That he had such an interest in the mortgage executed to the McKinley Company in 1888 is probably true. But at the time that mortgage was executed there was executed simultaneously therewith and as a part of the same transaction the commission mortgage for $75, one-half of which, under his contract with the McKinley Company, belonged to Mr. Patterson. If the evidence showed that he had a like interest in the commission mortgage given five years later and simultaneously with the mortgage in suit, defendant's contention would have to be sustained. The undisputed testimony of Mr. Patterson upon that point is that his contract with the McKinley Company, for compensation on loans, applied only to original loans and did not extend to re-

newals thereof; that he had no interest whatever in the mortgage in suit, or in the commission mortgage executed in connection therewith; that his contract with the McKinley Company was in writing; that he did not have the contract, but could state substantially the contents of it; that "the contract was to the effect that I would get compensation for my services of one-half the commission notes, I had no interest whatever in the loan, or any in the principal, but in the commission notes I was to get one-half, when the loan and principal notes were canceled, then I was entitled to one-half. These commission notes represented 3 per cent. of the 10 per cent. interest on the loan; that contract applied to original loans, but not renewals. Nothing was said in the original contract with reference to renewals. In correspondence afterwards, with McKinley-Lanning people, attention was called to that, and it was understood that I had no interest in renewals. I guaranteed the original loan, and to that extent, but had no recompense out of it. I guaranteed to the extent of my share of the commission. I was not entitled to anything unless the original loans were paid and the commission notes paid, then I was entitled to one-half of the commission. When I made renewals I took 3 per cent. mortgages just the same as I did before. My contract ceased when I made the original loan. Q. Was there anything in your written contract that provided when it should cease? A. Nothing in my original contract provided anything about renewals. I was to have my interest in the commission notes upon the original loan. When I took renewals I had no interest in the loan whatever. If the proceeds of the loan went to pay the original loan, of course, in that way I would get a benefit out of it. I would get a benefit in the payment of my commission. What I have testified to is substantially my relation with the McKinley-Lanning Loan & Trust Company, during the time I was transacting their business, as agent for them here." On cross-examination he testified: "In the principal loan and mortgage to McKinley-Lanning

Loan & Trust Company, I had no interest whatever. I had a contingent interest in the $75 note and mortgage, and the agreement as to any interest in these loans applied wholly to the original mortgage. Referring to exhibits 2 and 3, the note and mortgage to the McKinley-Lanning Loan and Trust Company, dated December 1, 1893 (the mortgage in suit), I had no interest whatever. Q. Did you receive personally any part or portion of the loan of $500 or any of the interest accruing thereon, either commission or the original loan? A. I received personally no part or portion of the original loan of $500 only what was necessary to pay expenses, such as taxes, etc., and nothing for services or otherwise that I rendered for and on behalf of the McKinley-Lanning Loan & Trust Company. I received nothing except reimbursements for actual expenses." There is nothing in the record even tending to contradict this testimony by Mr. Patterson. There is no evidence to show that the commission mortgage taken in 1888, in which Mr. Patterson had a half-interest, was paid by or through the mortgage in suit. In the light of this testimony, we think the district court was right in holding that Mr. Patterson had no interest in the renewal commission mortgage. If he had no interest in that, it is clear that he had none in the principal mortgage—the mortgage in suit. This contention of defendant must therefore fail.

5. That the district court erred in finding that, because defendant bought the property in controversy, of the value of $1,200 to $1,600, for $225, "with the mortgage on it," the mortgage was a part of the consideration for the land, and therefore defendant "cannot be heard as to either of the defenses by him made," is, under our holding upon point 4, immaterial.

Upon a consideration of the whole case, we conclude that the judgment of the district court was right, and it is

AFFIRMED.

DAVID A. RUSSELL, APPELLEE, V. ELECTRIC GARAGE COMPANY, APPELLANT.

FILED JANUARY 24, 1912. No. 17,094.

1. Appeal: HARMLESS ERRORS. Record examined, and *held* to show no reversible errors of law.
2. Negligence: SUFFICIENCY OF EVIDENCE. The evidence examined and set out in the opinion, *held* sufficient to sustain the verdict of the jury and the judgment of the trial court.

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

*Francis A. Brogan* and *O. C. Redick,* for appellant.

*Smyth, Smith & Schall, contra.*

FAWCETT, J.

Action for personal injuries alleged to have been received through the negligence of defendant in causing a collision of defendant's electric automobile with a hack driven by plaintiff. Verdict and judgment for plaintiff. Defendant appeals. We do not find any reversible errors of law in the record. The only debatable question is one of fact—the sufficiency of the evidence of negligence on the part of defendant.

At the close of plaintiff's case, defendant moved for a directed verdict, which motion was overruled. It is unnecessary to pass upon this ruling of the trial court, for the reason that defendant waived the error, if any, in such ruling by proceeding with the trial and introducing evidence upon the issues joined by the pleadings. At the close of all of the evidence, defendant again requested the trial court to direct the jury to return a verdict in its favor, for the reason that plaintiff had failed to show any negligence on its part which caused the accident and the resulting injuries to the plaintiff. The motion was, in our judgment, properly overruled. As the case then stood, it was clearly one for a jury.

The evidence is quite voluminous. So much so that it would unwarrantably extend this opinion to attempt to set it out at length. Summed up, it shows that plaintiff was driving along an important public street in the city of Omaha at about the hour of midnight. It was raining and the street somewhat slippery. The vehicles were traveling in the same direction, east, and at substantially the same rate of speed. At the point where they were traveling there was a slight down-grade, but there is no evidence to show that the street was not perfectly level north and south between the curbs. The driver of the electric car was entirely shut in, his only means of keeping an outlook ahead being through a glass window badly blurred by the falling rain. This window could have been opened so as to have afforded him an unobstructed view ahead. When he finally saw the hack about 25 feet ahead of him, the only effort he made to avoid a collision was by applying the brakes. When he applied them the car began to "skid." Observing then that his brakes were not having the desired effect, we think it was plainly his duty to have used his steering lever and turned out so as to avoid the collision. That the mechanism of his car was all in working order, and that there was ample room to have passed the hack on either side, is admitted. The driver says he was helpless. That, under the evidence, is an unwarranted conclusion. If he had testified that, when he found his brakes were not going to prevent a collision, he tried to turn out, but was unable to do so, that claim might have been made with some show of reason. We do not think it is a sufficient exercise of diligence by the driver of an automobile, when he sees he is about to collide with a vehicle of any kind, to use one of the methods at hand for avoiding a collision, and, when he sees that is not going to have the desired effect, sit, either helpless or careless, and fail to use other means at hand. It is charged that he was driving his car at a high rate of speed; and we think the evidence would justify the jury in so finding. If he was not driving much faster

than seven miles an hour, and the hack ahead of him was also traveling at from six to seven miles an hour, it is incredible that the car could strike the hack with such force as to cause Mrs. Rosewater, in her room some distance away, to arouse her husband, Doctor Rosewater, and say to him, "There must have been somebody hurt; there was a crash in front of the house," and advise that he get up and go out. Moreover, the street could not have been very dark. It is undisputed that an arc light was burning at the street intersection a block away, and one light at Thirty-fifth street, which point they were nearing at the time of the collision. Without pursuing the matter further, we think it would be an invasion of the province of the jury to hold that a verdict should have been directed for defendant, in the face of this evidence. The trial court very properly declined to be a party to such invasion, and its action meets with our approval.

Objection is made to the rulings of the court upon objections interposed by defendant to certain questions propounded to Doctor Rosewater and Doctor Mick. These objections were not entirely without merit, as the particular questions objected to and the answers thereto were somewhat speculative, and therefore obnoxious to the rule announced in *Carlile v. Bentley,* 81 Neb. 715; but a careful examination of the testimony of all of the physicians, testifying on both sides, satisfies us that these rulings of the trial court could not have prejudiced defendant.

It is strenuously urged that the recovery is excessive. The jury returned a verdict for $4,950. Upon consideration of the motion for a new trial, the district court ruled that a new trial would be granted unless plaintiff remitted $950 from the verdict. Such a remittitur was then filed and judgment was entered for $4,000. We have carefully examined the evidence upon this branch of the case and are of the opinion that the verdict is still too large. A careful consideration of this question has impressed us with the conviction that $3,000 will fully compensate plaintiff for his injury shown by the proofs.

Upon consideration of the whole case, we think the defendant had a fair trial; that no prejudicial error is shown by the record, and that the evidence is sufficient to sustain a judgment for $3,000, but that as to the excess above that sum the judgment is excessive. The judgment of the district court is therefore reversed and the cause remanded for further proceedings, unless plaintiff within 30 days from the filing of this opinion shall file a further remittitur for $1,000, in which event the judgment of the district court will stand affirmed.

AFFIRMED.

SEDGWICK, J., dissents.

BARNES, J., dissenting.

I am unable to concur in the conclusion announced by the majority of my associates. The grounds alleged in plaintiff's petition on which a recovery was sought were, in substance, that the defendant, acting through one of its agents and employees, carelessly and negligently ran its automobile with great force and at an excessive rate of speed against a hack which the plaintiff was driving upon one of the streets of the city of Omaha, and thus caused the injuries of which he complained. Defendant's answer was a general denial, followed by a plea of contributory negligence.

To maintain his action the plaintiff testified, in substance, as follows: My name is David A. Russell. I am the plaintiff, and have resided in Omaha for over 25 years. I am going on 48 years of age. For a good many years I have been a hack-driver. On October 9, I was in the employ of Louis Boone, driving a hack on West Farnam street, in the neighborhood of Thirty-fifth street. It was a one-horse vehicle. It was the night of the Ak-Sar-Ben ball. I conveyed Mr. Black to the ball in the evening, about 8 o'clock; took him home between 12 and 1 o'clock. At the time of the accident I was going east. After leaving Mr. Black at his home, as I came east it was raining, although not a very bad night, just an ordinary rain. It

would have been dark if there were not lights on the street. It was light where the accident took place. There were lights along there. I could see a block or more ahead of me at the time. I sat on the outside of the hack, and the seat was about five feet from the ground. The seat was high up and inclined toward the front. It was called a jockey seat. In sitting, the body is out in front and you are braced. At the time of the accident I was driving about six or seven miles an hour, jogging along at a very slow rate. I was braced in my seat at the time, not expecting anything. As I was approaching Thirty-fifth street on the south side of Farnam something struck me. I was riding along, not thinking of anything, and something struck me. I felt the crash and something going. I could not tell what happened. I could not tell whether the hack fell over or what happened. I did not know anything for quite a while. When I recovered consciousness I was in Doctor Rosewater's residence across the street. (Then followed a description of plaintiff's injuries and sufferings.)

On cross-examination the plaintiff testified, in substance, as follows: I have been driving hacks for about 33 years; was raised on a farm; worked at times at landscape gardening, where I used a spade and shovel. During the last summer I drove a light wagon for the Expressmen Delivery Company; handled some trunks and small boxes; most of the time I was alone. I worked for the company not quite four months. The wagon had a high seat, and I would have to climb up there. The night of the accident I was alone. All that I know of my own knowledge is that something struck my hack. What it was I do not know, except as I learned from others. I did not see the thing that struck me either before or after the accident. On his redirect examination the plaintiff testified: The blow against my hack was a heavy one. On recross-examination he said: I did not notice the condition of my horse at the moment of the accident. I was knocked clean off, could not see anything.

The plaintiff also produced Doctor Charles Rosewater as a witness, who testified that he was a physician and surgeon; had been practicing his profession for 30 years; was a graduate of the University of Heidelberg, Germany. He said, I know the plaintiff; met him at my house at the corner of Thirty-fifth and Farnam streets on the 9th of October; when I first saw him he was on the street just being helped up by two parties. This is the way I came to go out: I had just retired; was dozing; my wife aroused me, and said, there must have been somebody hurt; there was a crash in front of the house; and I had better get up and go out. I got up, dressed quickly, went out and found Mr. Russell being assisted to his feet. My wife was in her room at the time she heard the crash.

The foregoing is the substance of all of the evidence produced by the plaintiff in any way bearing upon the accident, or the manner in which it occurred. At the close of the plaintiff's testimony the defendant requested the trial court to direct the jury to return a verdict in its favor. The motion was overruled, and an exception was noted.

As I view the record, it is quite probable that the defendant's motion should have been sustained, for it would seem that the plaintiff failed to establish any negligence on the part of the defendant which could be considered the proximate cause of the plaintiff's injury. The mere fact that there was a collision and an injury would hardly be sufficient proof of negligence to support a verdict for the plaintiff. It appears, however, that the defendant was not content to stand upon the motion, and after it was overruled introduced evidence to support the issues on its part, and to that end produced as a witness one George Hartleib, who testified, in substance, as follows:

I live in Council Bluffs; work in an automobile shop at Griswold, Iowa. In October, 1909, was employed by the Electric Garage Company; had been working for the company about three months at that time. My work was to deliver automobiles and bring them in. I would wait

at the garage until people who owned the electrics called up, and I would go to the house and bring the electric back. I operated it on the way back. I had been running an automobile for about three months prior to October 9, 1909. During the time I worked for the garage company I learned to operate automobiles. It took me three nights to learn. I knew of the T. L. Davis car. It was a Baker Electric. I had operated it about two or three months before the accident. When it was brought to the garage it was for purpose of charging it. Yes; I got word to bring the car in on October 9. I went out for it to Jackson and Thirty-seventh streets, Mr. Davis' residence. Jackson is three blocks south of Farnam. I got the car and started with it to the garage about a quarter of twelve. When I started with it there were two lights in front, burning. The car was a coupe, entirely inclosed with the top closed in and the sides. The top covered the entire framework of the car, except the wheels. I got inside of the car, closed the door and operated it from the inside; went north on Thirty-seventh street to Farnam, then east on Farnam. It was very dark and rainy. From the inside of the car and from the glass in front, covered with water, I could not see more than about 25 feet ahead of me. As I went east on Farnam street I was moving at about seven miles an hour. I had no means of knowing how fast I was going, but was able to estimate. The car was operated in this wise: There were two foot brakes and the controller; move the controller forward and the car would start; to stop the car you would throw the controller back in neutral, and apply your brakes. There were two foot brakes. There is a steering rod and handle which is different from the controller. By moving the rod forward the car moves one way, and by drawing it back the car moves the other way. The different means of operating the car were in working order on the night of the accident, and the car responded to the different means. I did not increase my speed as I went east. My machine was coasting, no power on. The

controller was on neutral. It was a very slight down grade; the means of stopping the car with the controller, as I had to, was by pushing on the brakes. I did not see the hack until I was about 25 feet from it. I could not tell what it was—just a dark object. I could tell the size of it, but could not tell whether it was moving. The hack was close to the car track on the south side. I was traveling along the south side near the car tracks, practically behind the hack. As soon as I discovered the dark object I put on the brakes and the car started skidding. The car started to turn south. I was helpless, and could do nothing. The car kept on moving; before it struck the hack it turned about one-fourth of the way around. It then struck the hack. The front end of the car struck it. I had the brakes on and was trying to stop the car. When the car struck the hack it stopped. Nothing happened to the hack; it seemed to stop. I put my reverse on and backed out to the curb, got out just in time to see the hack upset. As I stepped out of the car the hack overturned. I think it turned towards the north. When I got out I found the hack turned over, the horse down on his haunches. I saw the head and shoulders of the driver; he was between the horse and the hack. I took hold of the driver and pulled him out from under the hack, took him to the sidewalk, and put him in the care of a gentleman who happened to pass by there. I went out to unharness the horse and tie him to a telephone pole. In the meantime Doctor Rosewater came out and helped the driver to his office, with the assistance of the motorman. After the hack was picked up and the horse tied, we dragged the hack to the side of the street. After attending to the injured man in the Doctor's house, I left and drove my car back to the garage. I found a slight dent in the front hood of my car. I am not now in the employ of the garage company. I was not able to stop the car after I saw the hack in front of me. I saw no lights on the hack.

On cross-examination the witness further testified, in

substance: I am 20 years of age; was 18 at the time of the accident. I learned to operate the car in three nights. I did not look for any lights on the hack. The hack, when I first saw it, was running close to the south rail of the street-car track. There was ample room between the hack and the curb for me to pass. There was ample room on the north side of the hack to pass. Yes; I said that I could not see more than 25 feet ahead of the car through a glass covered with rain. I sat there in the car looking through the glass covered with rain, running down Farnam street. I do not know what horse-power my car was. (It is shown by the record, however, that it was 3½ horse-power electric car.)

One George Redick testified for the defendant, in substance, as follows: I am president of the garage company. Mr. Barkalow is manager. I passed Thirty-fifth and Farnam streets soon after the accident. I was riding in an open automobile. The night was very dark, and I did not see the hack as I went by. I was acquainted with the location of the street lights. At the time of the accident there was one side-light on the southeast corner of Thirty-sixth and Farnam; that is two blocks from Doctor Rosewater's house. There was one light at Thirty-fifth and Farnam, another side-light on the south side of the street at Thirty-second. The nearest arc light to Thirty-fifth is at Thirty-fourth street. The pavement was very slippery; they had been hauling dirt on the street, and the rain on the street made the street slippery. I afterwards went to the scene of the accident.

Denise Barkalow, while on the witness stand for the defendant, describes skidding as follows: By skidding I mean that under certain conditions, due to the momentum of the car and the weight, and the fact that the rear wheels will give less resistance, the car has a tendency to slide. It might turn several times. A car will skid even when the ground is not slippery, if it is going at a very great rate of speed and you apply the brakes instantly. Applying the brakes makes the possibility of skidding

much greater. A car never skids when going at a moderate rate of speed, unless the brakes are applied.

It further appears from the testimony that the car which struck the hack was a Baker Electric. The front was glass, which could be lowered about a foot, and the glass on the side doors could be dropped down within about six inches of the level of the wood or framework. If the windows were dropped down it would leave an open space about a foot and a half; the glass in front could be dropped not quite a foot.

The foregoing is the substance of all of the evidence relating to the manner in which the accident in question occurred. At the close of all of the evidence the defendant again requested the trial court to direct the jury to return a verdict in its favor, for the reason that the plaintiff had failed to show any negligence on its part which caused the accident and the resulting injuries to the plaintiff. The motion was overruled, and an exception was taken.

The majority opinion states, in substance, that the driver of the electric car, by operating it when within its glass-inclosed top, where, owing to the darkness of the night and the rain upon the glass in front of him, he was unable to see more than 25 feet, was guilty of actionable negligence. I am not impressed with the soundness of this statement. It appears that the automobile in question was what is known as a "Baker Electric," 3½ horsepower Runabout; the kind of car ordinarily used by women and children, not capable of being run at a dangerous rate of speed, and its operation is not attended by much, if any, danger to any one. It can ordinarily be brought to a full stop within the distance of three or four feet. Cars of this kind are constructed so that they can only be operated while the driver is within the glass-inclosed top. They are in general use in cities, and are as much entitled to the use of the streets as any other vehicle commonly used as a means of travel. The driver

of such a car should not be required to open the windows of his cab, so as to admit rain or snow to drift in, and thus expose the occupants to the elements. By so doing, the very purpose of the inclosed construction of the car would be rendered useless. The driver of such a car has the right to use it in the ordinary manner, and may presume that if he can distinguish an object at the distance of 25 feet he will be able to stop and avoid an impending collision.

It further appears that the driver started to take his car to the defendant's garage at a time when travel on the streets of Omaha was over and practically abandoned for the night, and it should not be presumed that it was negligence for him to attempt to operate the car in the usual manner. He had no knowledge of the slippery condition of the pavement at the place where the accident occurred, and if we regard his testimony, which we must, for it is not disputed by any one, it is entirely clear that when he saw the plaintiff's hack, some 25 feet in advance of him, he applied the brakes, and did everything in his power to stop his car. It is equally clear that he would have succeeded in avoiding the collision if the application of the brakes and the slippery condition of the pavement had not caused the car to skid, and thus deprive him of of all control over its further movements.

It is suggested in the majority opinion that the driver of the car, at the time of the accident, must have been propelling it at an excessive rate of speed. This suggestion is based on the apparent force of the collision and the extent of the injuries to the hack. It appears, however, that where the accident occurred the street was not level, but descended in the same direction in which the vehicles were proceeding. Therefore, when the car skidded, as described by the witnesses, owing to its great weight and the loss of all control over its movements, it would naturally increase its speed until colliding with some object which would serve to stop its further progress.

This would sufficiently account for the force of the collision in a manner entirely consistent with the evidence of the driver that he was, up to the time his car commenced to skid, traveling at a moderate rate of speed.

From a careful review of the evidence, I am of opinion that the accident was one of those which could not have been avoided by the exercise of ordinary forethought and prudence, and the defendant's motion for a directed verdict should have been sustained.

Finally, it seems clear to me that the judgment of the district court is so grossly excessive as to require its reversal at our hands. It appears from the record that the defendant paid all of the expenses incurred by the plaintiff in order to recover from the injuries which he sustained; that in a short time plaintiff was able to, and did, obtain employment as the driver of an express wagon; that he followed that occupation for about 4 months, and then resumed his old occupation as a hack-driver. It was not shown that, after the time of his recovery to the day of trial, he had been compelled to lose a day's employment, or that he suffered any decrease of wages by reason of his injuries. It therefore follows that the amount of the judgment is so excessive that in justice and equity it ought not to be allowed to stand.

For the foregoing reasons, I am of opinion that the judgment of the district court should be reversed.

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HENRY J. LEE, APPELLEE, V. GILLEN & BONEY ET AL., APPELLANTS.

FILED JANUARY 24, 1912. No. 16,579.

Fraudulent Conveyances: "BULK SALES LAW," PROPERTY SUBJECT TO. Section 6048, Ann. St. 1909, commonly called the "Bulk Sales Law," relates only to merchandise kept for sale "in the ordinary course of trade and in the regular and usual prosecution of"

business, and does not apply to fixtures or a manufacturer's stock of raw materials used by himself, and not kept or offered for sale in the ordinary course of trade.

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

*C. E. Abbott,* for appellants.

*Courtright & Sidner, contra.*

SEDGWICK, J.

One Kost Teckos was conducting a confectionery and fruit store in Fremont, and manufactured and sold ice cream and confections, and sold drinks from his soda fountain. He was indebted to this plaintiff, and executed a chattel mortgage in which the property mortgaged was described as follows: "One electric motor bought of J. P. Brown, all of the shafting, belting and appurtenances in connection therewith; one ice cream machine, new; * * * sixty freezer cans, new; * * * three kettles, new; * * * five dozen pans for candies; * * * all of the stock of sugars in sacks, chocolate in bars, preserves and stock of supplies in and about my store on Sixth street in Fremont, Neb.; one candy stove, new." He continued the business and the mortgage was not filed, but some time later the mortgagee took possession of the mortgaged property. The defendants contend that the evidence does not sufficiently show that the plaintiff took possession under his mortgage before the levy of the attachment, but we think that the evidence clearly shows that he did. Afterwards, on the same day, the defendants attached a part of the mortgaged property as the property of Teckos and caused the same to be sold to satisfy their claim. The plaintiff brought this action for a conversion of the mortgaged property, and afterwards such proceedings were had that the plaintiff recovered a judgment in the district court for Dodge county; the amount now in controversy is $90.40 and costs. The defendants have appealed.

Several minor questions are presented and discussed in the briefs, but the case is not of sufficient importance to require us to discuss them here in detail, since we do not find that any substantial errors occurred requiring a reversal of the judgment.

The principal defense was that the chattel mortgage was void because in violation of section 6048, Ann. St. 1909, commonly known as the "Bulk Sales Law." That section provides: "The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller," unless certain conditions are complied with. It will be seen that this statute relates only to "a stock of merchandise," and does not apply to fixtures or a manufacturer's stock of raw material. The supreme court of Massachusetts has so construed a statute similarly worded, and we are satisfied that the construction is correct. *Gallus v. Elmer*, 193 Mass. 106. The question whether giving a chattel mortgage on a stock of merchandise is a disposition of the property within the meaning of the section is presented in the briefs and somewhat discussed; but, as this mortgage did not cover the articles of merchandise that were kept for sale, this important and perhaps difficult question is not involved.

The judgment of the district court is

AFFIRMED.

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EDWARD SHANK, APPELLEE, V. C. H. LEE ET AL., APPELLANTS.

FILED JANUARY 24, 1912. No. 17,324.

1. Intoxicating Liquors: LICENSE: PETITION: FREEHOLDER. A resident of the village in which the application for saloon license is made, who purchased and paid for property in the village, which

he has occupied as a home for three years prior to the application, is a freeholder, although he received no deed of the property until the time, or shortly before, he signed the petition.

2. ———: ———: CHARACTER OF APPLICANT: EVIDENCE. If several witnesses testify in a general way that the applicant is a man of good moral character, and there is no evidence to the contrary, the finding upon that point in favor of the applicant based upon such evidence will not be reversed upon appeal.

3. ———: ———: VIOLATION OF STATUTE: EVIDENCE. Evidence examined, and found insufficient to show that the applicant had violated the statute regulating the sale of intoxicating liquors within the year prior to his application for license.

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

*Martin & Bockes,* for appellants.

*D. F. Davis, Mills, Mills & Beebe* and *Reeder & Lightner, contra.*

SEDGWICK, J.

Edward Shank applied to the trustees of the village of Silver Creek, in Merrick county, for a saloon license. A remonstrance was filed, and upon hearing the board granted the license. Upon appeal to the district court the action of the village board was affirmed, and the remonstrators have appealed to this court.

The abstract does not show, so far as we have noticed, the number of signers upon the applicant's petition, but it states that the remonstrance alleged that H. N. Wilson, Percy Reed, B. B. Bond, and Lewis Cotton, signers upon the petition, "each was not a *bona fide* resident freeholder of the village of Silver Creek, but had been wrongfully and fraudulently made to appear as a freeholder for the purpose of signing the petition of the applicant"; and the remonstrance also alleged that the applicant had violated the provision of the Slocumb law within the past year, and denied that the applicant was a man of respectable standing and character. The abstract also shows that the re-

monstrators admitted upon the hearing that Percy Reed, B. B. Bond and Lewis Cotton were qualified as signers of the petition. This would leave only one signer, H. N. Wilson, in question. The evidence upon the qualifications of Mr. Wilson, as stated in the abstract, is that Mr. Bell was examined as a witness and identified a deed from himself and wife to Mr. Wilson; that Wilson bought the property of the witness about three years before, but for some special reason took the title in Mr. Bell's name; that Wilson paid the consideration for the property, and had paid the taxes and insurance thereon, and was "now living in the property", and that the witness has no interest in the title to the property. Upon this evidence Wilson was clearly a qualified petitioner. The abstract is quite unsatisfactory and does not comply with the rules; it contains an index of the record, but the abstract itself is not indexed, as required by rule 16 (89 Neb. vii).

The remonstrants contend in their brief that other petitioners were also disqualified. We have examined the evidence contained in the abstract as to the qualifications of the other petitioners, and cannot find from that evidence that the findings of the village board and the district court are not sufficiently sustained by the evidence.

The applicant was called as a witness by the remonstrants, and testified that for some three years prior to his application he had been engaged in conducting a livery stable and a restaurant at Osceola, and that while in the restaurant business he had a government revenue license and sold some malt beer; that he quit the restaurant business July 1, 1910, and had not sold malt beer within the year last past. The statute provides that, if the applicant has violated the provision of the liquor law within the year last past, the village board shall refuse the license. There is no evidence, as shown by the abstract, that this applicant had violated the law within the year prior to his application, and that allegation of the remonstrants was not sustained by the evidence.

Several witnesses, as shown by the abstract, testified that they were well acquainted with the applicant, and that he was a man of good character and standing in the community where he had lived for several years last past. There was no other evidence on that point.

Upon this evidence, we think that the action of the village board is not so clearly wrong as to require a reversal, and the judgment of the district court is

AFFIRMED.

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MARY ANN MAUZY ET AL., APPELLANTS, V. CLAUS HINRICHS ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,389.

OPINION on motion for rehearing of case reported in 89 Neb. 280. *Rehearing denied.*

PER CURIAM.

The facts in this case are quite fully set forth in the opinion, 89 Neb. 280. Upon further consideration, that portion of the opinion which may seem in anywise to be in conflict with the doctrine in the cases of *Hovorka v. Havlik*, 68 Neb. 14, and *Cutler v. Meeker*, 71 Neb. 732, that where a state deed to school lands has been mistakenly issued by the state authorities to a person other than the proper owner of the certificate of purchase, the grantee in such a deed takes the legal title to the same as trustee for the true owner and the title inures to him, must be modified. It was not our intention in any manner to change the rules of law laid down in the opinions in those cases. After a renewed consideration of all the facts, we are all of opinion that there is no equity in the plaintiff's bill.

The former judgment is adhered to, and the motion for rehearing is

DENIED.

NATHAN RAY FORSHA, APPELLEE, V. NEBRASKA MOLINE PLOW COMPANY, APPELLANT.

FILED FEBRUARY 10, 1912. No. 16,411.

OPINION on motion for rehearing of case reported in 89 Neb. 770. *Rehearing denied.*

PER CURIAM.

Upon consideration of the motion for a rehearing, and in view of the rule announced in *Chicago, St. P., M. & O. R. Co. v. McManigal,* 73 Neb. 585, we are of opinion that no judgment should have been rendered on the verdict in this case.

It is therefore considered that the judgment against the plaintiff and in favor of defendant Murdock & Son, and the judgment in favor of the plaintiff and against the Nebraska Moline Plow Company, should be reversed and the cause remanded to the district court for a new trial, with leave to the plaintiff to proceed against both of the defendants.

The motion for a rehearing is

OVERRULED.

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HERMAN B. PRICE, APPELLEE, V. GEORGE R. FOUKE, APPELLANT.

FILED FEBRUARY 10, 1912. No. 16,592.

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

*G. W. Berge,* for appellant.

*Claude S. Wilson, contra.*

PER CURIAM.

Plaintiff commenced this action in justice court. A jury trial was had on the 14th day of September, 1909, which resulted in a verdict and judgment in favor of plaintiff. On the 24th day of September, defendant filed his appeal bond, and on the 16th day of the following October the transcript on appeal was filed in the district court, which was 32 days after the rendition of the judgment. The statute (code, sec. 1008) requires the appeal to be taken within 30 days next following the rendition of the judgment. Plaintiff filed his motion to dismiss the appeal, for the reason that it was not filed within the 30 days prescribed by the statute. The motion to dismiss was resisted on the ground that the transcript had been duly demanded by defendant, that it had not been furnished until after the expiration of the 30 days, and that the failure to procure it was chargeable to the justice of the peace and through no fault or want of diligence on the part of defendant or his attorney. Affidavits were filed in support of, and opposition to, the motion. Application was later made for an order requiring the witnesses to appear in court for oral examination. The order was made, and the witnesses appeared and gave their testimony in open court. The motion to dismiss the appeal was sustained and the appeal dismissed. Defendant appeals.

It is shown in the bill of exceptions that the transcript was called for on several occasions during the 30 days, and was completed and ready for delivery on the 12th day of October, two days before the expiration of the time within which it might be filed in the district court. The evidence was conflicting in many respects, but particularly as to whether the transcript was demanded or called for after its completion. Upon this question there was a sharp and direct conflict. If defendant's attorney is not mistaken, he asked for the transcript on the 14th day of October, the last of the 30 days allowed for filing.

If the justice of the peace is not mistaken, his attention was not called to the matter nor the transcript called for at any time after it had been prepared. Both parties testified candidly, no doubt, but the conflict remains. The witnesses were all before the court, and we cannot reverse the decision on the weight of the evidence. A finding by the trial court upon conflicting evidence, in a law action, will not be disturbed on appeal unless manifestly wrong.

The judgment dismissing the appeal is therefore

AFFIRMED.

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OLEY OLESON, APPELLANT, V. ULYSSES OLESON ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,610.

1. **Statute of Frauds:** ORIGINAL UNDERTAKING. An agreement that, in consideration of the relinquishment of the possession of property held under a pledge, the person to whom the surrender of possession is made will pay the debt of the relinquisher, for the security of which the pledge is held, is not void under the statute of frauds. It is an original undertaking founded upon a new consideration.

2. **Trial:** QUESTIONS FOR JURY. All material questions of fact are for the consideration of the trier of fact; if in a trial by jury, the jury must determine them.

3. ———: DIRECTING VERDICT. A trial court is not justified in withdrawing a case from a jury and directing a verdict, if there is competent evidence from which the alleged facts may be reasonably inferred.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

*Allen & Dowling,* for appellant.

*Mapes & Hazen, contra.*

REESE, C. J.

Plaintiff filed his petition in the district court alleging, in substance, that, prior to the date of the transactions between himself and defendants, his son Ulysses Oleson purchased from the Northwest Thresher Company a certain threshing machine and outfit, consisting of a threshing machine or separator, one 16-horse power traction engine with tender, a wind stacker and a steel tank; that plaintiff became surety upon the notes executed for the purchase price thereof, and that defendant Ulysses Oleson pledged and delivered to the plaintiff the possession of said threshing outfit, to be held by him as security to indemnify him against having to pay the notes referred to; that, while the said machinery was in his possession, the said defendants Ulysses Oleson and Ellsworth A. Bullock entered into an agreement whereby the said Ulysses was to exchange the said "Northwest" machinery to defendant Bullock for a new, larger and more expensive threshing outfit, which Bullock had for sale, he being engaged in the business of selling such machinery; that, while the said "Northwest" outfit was in the possession of plaintiff, the defendants Bullock and Ulysses Oleson came to plaintiff's home for the purpose of removing the "Northwest" machinery, but that plaintiff refused to surrender the same until he was released from liability on the notes (then amounting to $1,740) given for that outfit; that defendants Ulysses Oleson and Bullock agreed that, if plaintiff would release his lien and possession of said "Northwest" outfit, they would indemnify him against the payment of the notes, which he had given, and pay the same; that, relying on said agreement and promise, he relinquished his lien and surrendered the property, which was then removed to the place of business of defendant Bullock, retained and sold by him, and defendant Bullock thereafter exchanged the thresher he had for sale to the said Ulysses; that defendants did not comply with their promise and agreement, but failed

and refused to take up the notes, and plaintiff was required to pay them, whereby he had been damaged to the extent of the money paid, with interest thereon, amounting to the sum of $2,088, for which he asked judgment. Defendant Ulysses Oleson made default, and, failing to plead to the petition, default and judgment were entered against him. Defendant Bullock answered, denying each and every allegation of the petition. A jury was impaneled, and the trial proceeded until the close of plaintiff's evidence, when defendant Bullock moved the court to instruct the jury to return a verdict in his favor. The motion was sustained, the jury so instructed, a verdict returned as directed, and on which judgment was rendered. Plaintiff appeals.

The motion for a peremptory instruction was based upon six grounds: (1) The petition does not state facts sufficient to constitute a cause of action. (2) The evidence fails to establish a lien or pledge of the property claimed to have been taken by defendant, or that the property was in possession or control of plaintiff at the time it was delivered to defendant. (3) That the contract alleged to have been made by defendant is void under the statute of frauds. (4, 5) The evidence failed to show any authority on the part of Clyde Bullock to make the alleged agreement on behalf of defendant. (6) The evidence is not sufficient to sustain a verdict in favor of plaintiff.

As to the first clause or ground of the motion, the substance of the petition is herein above set out, and we all agree that the objection is not well taken. The contention of defendant Bullock is that, if the contract was made as alleged, it was void under the statute of frauds. If the contract was entered into, it was founded upon a new consideration, was an original undertaking, and not void as an obligation to answer for the debt or default of another. It was not that defendant Bullock would pay the debt of Ulysses, but that, in consideration of the surrender of the property by plaintiff, he would pay and in-

demnify plaintiff against a debt which the latter owed and was obligated to pay.

The sole remaining question is as to the sufficiency of the evidence to require the submission of the case to the jury. As to the fact that such a contract was made between plaintiff and Clyde Bullock, the son of defendant Bullock, there is no conflict in the evidence. Plaintiff testified unequivocally that such a contract was made. Defendant offered no testimony. If the property had been delivered to plaintiff by Ulysses as a pledge or security against the payment of the debt by plaintiff, and plaintiff was in possession of the same at the time the alleged contract was made, this would establish the pledge and security. If there was any competent evidence of the fact, it became a question for the decision of the jury. It is not for this court to decide whether there is convincing evidence of the fact, but whether there was any competent evidence submitted tending to prove the facts alleged. Upon this question the testimony of plaintiff is not entirely harmonious. He seems not at all times to have fully understood the purport of the questions propounded. In one of his answers he says: "I was to have possession of the machine until it was paid for, and he (Ulysses) could run it, and when he paid for it I would give up all these notes." That there was some kind of an agreement between Ulysses and plaintiff was probably sufficiently established, but just what it was may not be so clear. The fact of plaintiff's possession, at the time the contract with Clyde Bullock is alleged to have been made, seems to have been then conceded by both Clyde and Ulysses Oleson. If plaintiff had possession under an agreement of the kind alleged, that would be sufficient. As the record now stands, there was sufficient evidence that the contract of indemnity and the assumption of the debt were made. Clyde Bullock was called as a witness by plaintiff, and was examined at some length, and cross-examined by defendant, but he was not interrogated by either party upon the subject of that agreement. It is

shown by the evidence that defendant Bullock sold a "Gaar-Scott" machine to Ulysses, and agreed to accept the "Northwest" machine in exchange and as part payment for the new one, and therefore the delivery to him of the "Northwest" outfit was necessary in order to the completion of the sale.

This brings us to the question of the authority of Clyde Bullock to bind defendant Bullock by the contract of indemnity, which, for the purpose of this appeal, we must assume was made. The evidence is clear that Clyde was the agent, as a salesman, for his father in the sale of threshing machines. He participated, at least, in making the contract by which the new machine was sold to Ulysses and in which the old one was to be taken in exchange. The arrangement for exchange was agreed to by defendant. As testified to by defendant when called as a witness by plaintiff, his business was buying and selling threshing machines and supplies, and repairing and rebuilding old machines. It is apparent that his son, Clyde, had general authority as a salesman. The contract for the sale of the new machine was entered into March 9, 1907, the order taken by "Clyde J. Bullock, Salesman." When the time came for the exchange, Clyde was sent to the home of plaintiff to obtain the old machine and give his aid in transporting it to the railroad station, in order that it might be shipped to defendant at Norfolk. When he arrived at plaintiff's home, he was informed of plaintiff's possession and what was insisted upon as plantiff's rights, coupled with a refusal to allow the machine to be removed until he was relieved of all liability on the notes and contract which he had signed. The surrender and relinquishment of that possession was essential to the completion of the sale of the new machine to Ulysses. As the evidence now stands, Clyde, evidently intending to represent his father, entered into the agreement that the unpaid notes, representing a part of the purchase price of the old machine, should be taken up and plaintiff's liability thereon terminated. The machine was shipped to defendant, re-

ceived by him, sold (in part at least), the notes were not taken up, and plaintiff paid them. The agency of Clyde is sufficiently shown to have existed in all matters connected with this sale and exchange, and in all matters relating to the sales of machinery, except the single one of his undertaking to protect plaintiff as against the notes referred to, and it is claimed that in that instance he was sent only to assist in the removal of the machine to the station. We do not find in the evidence any suggestion that he gave plaintiff any notice of such a special limitation upon his authority or powers. This evidence was sufficient to have justified the submission to the jury of the questions of the contract of pledge, the possession of plaintiff thereunder, and of the agency of Clyde in making the contract of indemnity.

The measure of plaintiff's damages, in case he is finally successful, is but slightly referred to in the briefs. The theory of the suit by plaintiff is that he should recover all he was required to pay in satisfaction of the notes, with interest thereon. The defendant makes no contention on the measure of damages, but denies all liability. If the contract binding defendant is finally established, it becomes an important question as to whether plaintiff is entitled to recover the full amount paid by him and for which he held a lien on the machine, or whether he should recover only the value of the property which he released. So far as now appears from the evidence, the value of the machine did not equal the amount for which he was held upon the notes. The pleadings might support a judgment for either amount, and it is the opinion of this court, in case of plaintiff's recovery, that he should receive at least the equal of what he has lost by the surrender of the property, which would be its value at the time he relinquished his right.

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

REVERSED.

## WILLIAM ROCKWELL V. STATE OF NEBRASKA.

FILED FEBRUARY 10, 1912. No. 17,398.

Larceny: SUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and *held* to be insufficient to sustain the verdict.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

*R. C. James* and *C. Gillespie,* for plaintiff in error.

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

BARNES, J.

The plaintiff in error, hereinafter called the defendant, was charged in the district court for Richardson county with the crime of larceny from the person, as defined by section 113*a* of the criminal code. He was convicted and sentenced to serve a term of not less than one nor more than seven years in the state penitentiary, and has brought the case here by a petition in error.

One of his principal assignments of error is that the verdict and judgment are not sustained by the evidence.

The defendant was charged with stealing a pocket-book containing $45 from the person of one John Mosiman on the 11th day of August, 1911, which was the day that Ringling Brothers' circus showed in Falls City. It appears that Mosiman, who was an old and confiding German, was upon the street that day, and had his purse in his pocket; that he stopped upon the main street at a place where what was called a "Baby-Rack" was in operation, and he testified, in substance, that he stood there looking at the Baby-Rack; that there were some other persons around there; that the defendant ran against him, and that about the same time he saw another man close to him, whom he did not afterwards see or recognize;

that he put his hand in his pocket, and found that his purse was gone. He thereupon immediately grabbed hold of the defendant, and accused him of stealing his purse, and at the same time made an outcry for help; that the defendant said to him, in substance, "What's the matter, old man?" and then broke away and ran up the street. It appears that several other persons saw the defendant running, and at all times after he broke away from the prosecuting witness he was observed by some one. The defendant was caught within two blocks of the place where it is claimed the robbery occurred, and was immediately searched, but no pocket-book or money, except a little small change amounting to perhaps 50 cents, was found upon his person. Nothing more was seen or heard of the person that Mosiman called "the other man." The prosecuting witness also testified that he was conscious of having his pocket-book in his pocket within from three to five minutes of the time he missed it, and seized hold of the defendant.

The foregoing is the substance of the transaction as described by the prosecuting witness. Several other witnesses testified that they saw the defendant when he broke away from Mosiman and ran up the street. No one saw him drop a purse, or dispose of anything in the way of dropping it or throwing it away. The officers who searched the defendant all testified that nothing was found upon his person which would indicate that he had taken Mosiman's money. It therefore becomes apparent that the defendant could not have committed the offense charged unless he did so with the aid of a confederate. There is no competent testimony in the record that he was seen with any other person who could have assisted him as an accomplice.

The defendant, testifying in his own behalf, stated that he came from Cairo, Illinois, to Falls City, in order to obtain work; that he arrived there on the Burlington train from St. Joseph at about 1:30 o'clock of the morning of the day the robbery was committed; that he knew

no one, and had no knowledge that any other person was with or near him when he was seized by the prosecuting witness; that he had no companion, and the reason he ran, when accused of the theft by the prosecuting witness, was because he was a stranger in the place and did not want to be arrested. He strenuously denied that he had taken Mosiman's money, or that he knew anything about the matter whatever.

The foregoing is the substance of all of the testimony, and the matter is left in such a doubtful state that we are of opinion that the evidence does not establish the defendant's guilt. Having reached the foregoing conclusion, the other assignments of error will not be considered.

For the reason that the evidence is insufficient to sustain the verdict of the jury, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

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MYRTLE M. HEINKE, ADMINISTRATRIX, APPELLEE, V. HENRY HELM, APPELLANT.

FILED FEBRUARY 10, 1912. No. 16,595.

1. **Replevin**: ESTRAYS: REFUSAL TO ARBITRATE One who takes up an animal as an estray under the provisions of chapter 27, Comp. St. 1911, cannot prevent the owner from recovering his property by refusing to accept a sum of money sufficient to pay for the expense incurred and the cost of keeping and caring for the animal or to submit his claim therefor to arbitration.

2. ———: ———: ———. In case of such refusal, the owner, after depositing a sum of money in court sufficient to cover the expense and cost of keeping and caring for the animal, may recover his property by an action in replevin.

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

*A. P. Moran,* for appellant.

*D. W. Livingston, George H. Heinke* and *Pitzer & Hayward, contra.*

BARNES, J.

Action in replevin to recover the possession of an animal taken up by the defendant as an estray. Upon appeal to the district court for Otoe county, the case by agreement was tried to the court, without the intervention of a jury. There was a finding and judgment for the plaintiff and the defendant has appealed.

It appears that on the 18th day of February, 1908, the defendant took up a heifer belonging to the plaintiff as an estray; that he proceeded in all respects according to the provisions of chapter 27, Comp. St. 1911, entitled "Estrays," up to and including the publication of notice; that when the notice was published, and the plaintiff ascertained where he could find the animal in question, which was during the first part of April, 1908, he saw the defendant, and offered to pay him $18 to reimburse him for his expenses and the cost of keeping the animal up to that time. This offer was refused, and the defendant in turn demanded the sum of $25 before he would yield possession to the plaintiff. Thereafter plaintiff brought this action to recover his property, and at the same time deposited with the justice of the peace, before whom the action was commenced, the sum of $12.50 to pay the defendant for his expenses and the cost of the care for the animal. On the trial the plaintiff had judgment, and the defendant appealed to the district court, where the plaintiff again had the judgment, from which this appeal is prosecuted.

The finding of the district court was, in substance, that the defendant had refused to submit the question of his expenses and cost of keeping and caring for the animal in question to arbitration, and had also refused to accept a

reasonable sum of money from the plaintiff to satisfy his claim therefor; that, plaintiff having deposited a sufficient sum of money to satisfy such claim in court for the defendant's use, he was entitled to, and could maintain replevin for, the possession of his property.

The record contains sufficient competent evidence to support the judgment, and it is therefore

AFFIRMED.

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## WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLANT, V. CHEYENNE COUNTY ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,992.

1. **Counties:** NEW COUNTIES: CONTRACTS: POWER TO ABROGATE. Cheyenne county by taxation created and collected a fund with which to build a bridge across the North Platte river as a part of one of its highways, and to that end entered into a valid written contract with a bridge company. Before the bridge was built the county was divided, and Morrill county was created and organized out of that part of the territory formerly in Cheyenne county in which the bridge was to be constructed. Thereafter Cheyenne county attempted to repudiate the bridge contract. *Held*, That the county board of Cheyenne county could not abrogate the contract without the consent of Morrill county.

2. ———: ———: CONTRACT FOR BRIDGE: LIABILITY. In such case the bridge company had the right to construct the bridge, and Cheyenne county was liable to pay the contract price therefor out of the fund which had been created for that purpose, and the bridge company was entitled to a judgment against the county for that amount.

3. ———: ———: BRIDGE FUND: APPLICATION OF FUND. It appearing that in the division of property between the counties as provided by section 16, art. I, ch. 18, Comp. St. 1911, Morrill county was entitled to receive one-third of the bridge fund in the treasury of Cheyenne county. *Held*, That Cheyenne county could apply that fund to part payment and satisfaction of the judgment, and that such payment would satisfy the claim of Morrill county for its part of the bridge fund.

4. **Appeal:** CONSOLIDATION OF ACTIONS: REVERSIBLE ERROR. Where two actions are consolidated and submitted to the district court to

**determine all of the rights, duties and equities of all of the parties to both actions, it is the duty of the court to dispose of all of such matters, and a failure to perform that duty may constitute reversible error.**

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

*Wilcox & Halligan, Switzler & Goss* and *Charles O. Whedon,* for appellant.

*Hoagland & Hoagland, J. L. McIntosh, F. E. Williams, Leroy Martin, W. P. Miles, Joseph M. Swenson* and *R. W. Devoe, contra.*

BARNES, J.

APPEAL from a judgment of the district court for Cheyenne county dismissing the action of the appellant, the Western Bridge and Construction Company.

It appears that the commissioners of Cheyenne county, in response to a petition filed for that purpose, determined to construct a bridge across the North Platte river at or near the town of Irving, in that county; that a bridge tax had been levied and collected, and there was available to the county the sum of $11,524.43 for that purpose; that on the 12th day of September, 1908, the board published a notice inviting bids for the construction of the bridge, according to certain plans and specifications, which had theretofore been adopted; that at that time there was on file a petition for an election to divide the county. In due time the election was called, and notice thereof was published and given as provided by law; that on the 10th day of October the board opened the bids, and awarded the contract to build the bridge to the plaintiff, hereinafter called the Bridge Company, as the lowest and best bidder, and to that end entered into a written agreement, by the terms of which the plaintiff was required to give a bond to the county in the sum of $2,000 for the performance of the contract according to its terms; that the Bridge Com-

pany thereafter gave the required bond, which in due time was approved by the county board; that at the election, which was held on the 3d day of the following November, the proposition for county division was adopted, and in due time county officers were elected to take charge of the affairs of the new county. The governor thereupon issued his proclamation, and on the 4th day of January, 1909, the organization of the new county was completed, and part of the territory formerly embraced in Cheyenne county became the new county of Morrill. Thereafter, and on the 11th day of February, 1909, the county board of Cheyenne county caused the clerk of that county to send a letter to the Bridge Company notifying it that the county had repudiated the contract above mentioned, for the reason that after the date of the said contract Cheyenne county was divided and Morrill county was created out of a part of its territory; that the river intended to be bridged was in Morrill county, and indicated its willingness to bear any reasonable expense that the Bridge Company had incurred by reason of the contract.

Cheyenne county thereafter took no further action in the premises, and on the 9th day of March, 1909, the two boards of commissioners made a settlement of all of the property rights, debts, liabilities and obligations of their respective counties, on the basis of one-third to Morrill county and two-thirds to Cheyenne county, with the exception of the matter relating to the bridge contract above mentioned. In that settlement it appears to have been stipulated that, whereas Cheyenne county had entered into a valid contract with the Bridge Company to build the bridge in question, and the county boards were unable to agree as to the respective rights and liabilties of the two counties growing out of said contract, the proposed construction of the said bridge and the division of the bridge fund then in the treasury of Cheyenne county, the matters in difference should be settled by the judgment of the district court for Cheyenne county, and an action was duly brought for that purpose.

It further appears that the Bridge Company built the bridge in all respects in compliance with the terms of its contract, and the bridge thus constructed is wholly within Morrill county; that on the 9th of November, 1909, it filed its claim with the board of county commissioners of Cheyenne county for the sum of $9,359,29, which was the cost of the construction of the bridge according to the terms of the contract. Thereafter the county board wholly rejected the said claim, and thereupon the Bridge Company appealed to the district court for that county; that there were then two cases pending in said court—one between the Bridge Company and the defendant Cheyenne county, and one between Cheyenne county and Morrill county—growing out of and connected with matters relating to the same transaction. It further appears that, in response to a motion made by Cheyenne county, the two cases were consolidated, and the district court was requested to adjudicate the rights of the parties and determine all of the matters in controversy according to the rights, duties and liabilities of the respective litigants. The record discloses that afterwards, and on the 22d day of August, 1910, that court rendered a judgment in favor of Cheyenne county and against the Bridge Company, dismissing its action, and refusing to grant it any relief in the premises, and directed the county of Cheyenne to pay to Morrill county one-third of the bridge fund in the treasury of Cheyenne county at the time Morrill county was organized. From that judgment the Bridge Company and Morrill county have both appealed.

The contention of the Bridge Company is that the district court erred in finding that Cheyenne county had repudiated the contract in question, and in dismissing its action without granting it any relief in the premises whatsoever. It is also contended by Morrill county that the county board of Cheyenne county had no right or power, after the organization of Morrill county, to take any action which in any manner would destroy the rights acquired by that county growing out of the bridge contract

entered into while it was a part of Cheyenne county. We are of opinion that this contention is well founded. When the contract in question was signed, the commissioners of Cheyenne county acted for all of the territory included therein and the inhabitants of that part of such territory as afterwards became Morrill county. They had paid a part of the taxes which had created the bridge fund then in the county treasury of Cheyenne county, with the understanding that they were to have the benefits which would naturally flow from the construction and use of the bridge in question. When the commissioners of Cheyenne county attempted to repudiate the contract, they had no power or jurisdiction to act for Morrill county or any of its inhabitants. Therefore they could take no action which would affect the rights of that county. It seems clear that Morrill county had a beneficial interest in the contract, and it was beyond the power of the commissioners of another county to repudiate or put an end to it without the consent of that county. *Bremer County v. Walstead*, 130 Ia. 161; *State v. Commissioners of Kiowa County* 41 Kan. 630; *Commissioners of Marion County v. Commissioners of Harvey County*, 26 Kan. 181. These authorities, while not precisely in point, sustain the foregoing proposition. It therefore follows that the attempted repudiation by Cheyenne county was wholly ineffectual, and the Bridge Company had the right to carry out the contract and build the bridge according to its terms. This also carried with it the right to maintain an action against Cheyenne county to recover the cost of the bridge out of the fund which had been raised and was in the treasury of Cheyenne county for that purpose. In view of the situation, it would seem that the district court should have rendered a judgment against Cheyenne county and in favor of the Bridge Company for the amount of its claim, less the amount of the freight bills, which by the terms of the contract, and by leave of the state railway commission, the Union Pacific Railroad Company had agreed to receipt in full as a donation to aid the people of that

county in constructing the bridge, which was considered a necessary work of public improvement, and was, in a way, a benefit to the railroad company.

The district court should also have directed and decreed that Cheyenne county was entitled to and should be required to apply one-third of the bridge fund in its treasury at the time of the organization of Morrill county to the satisfaction of so much of the judgment against it, and that such payment should be a complete satisfaction of Morrill county's claim against Cheyenne county on account of the interest it had in said bridge fund.

It is further contended by Morrill county that the district court erred in failing and refusing to determine all of the rights, duties and liabilities between it and Cheyenne county, and render judgment thereon in accordance with justice and equity. We think this contention is well founded. By the terms of the submission of the two causes for adjudication, it was the duty of the court to determine all of the matters in controversy in the manner above indicated.

For the foregoing reasons, the judgment of the district court is reversed, and the cause is remanded for further proceedings in harmony with the views expressed in this opinion.

REVERSED.

HAMER, J., dissenting.

As I understand the case, the new county was cut off from the old county of Cheyenne before any work had been done on the bridge. This condition gave Cheyenne county the power to rescind the contract because it was executory. It was probably the duty of the board of county commissioners of Cheyenne county to rescind the contract. At least that is what the board attempted to do. I think that the board did what was right. I doubt the authority of the county board to build a bridge in another county than that in which the members of the board reside. I do not think that Cheyenne county should be held

liable on the contract for the building of the bridge. Whether the tax levied for the building of the bridge should create a specific fund to be applied in satisfaction and payment of the contract price is another question. There should be no future liability declared aganst Cheyenne county. The Cheyenne county board should not be compelled to build and pay for a bridge in any other county than Cheyenne, and, when the counties were divided and the new county was cut off from Cheyenne, the jurisdiction of the Cheyenne county board ceased.

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THOMAS M. LOGAN, APPELLANT, V. REGNAR F. AABEL ET AL., APPELLLEES.

FILED FEBRUARY 10, 1912. No. 16,593.

**Trusts: CONSTRUCTIVE TRUSTS: RELIEF IN EQUITY.** Where one person obtains property of another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge.

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

*John Everson,* for appellant.

*Adams & Adams, contra.*

LETTON, J.

The district court sustained demurrers to the petition, and from a judgment of dismissal plaintiff appeals. In substance the petition alleges Regnar M. Aabel and Regnar F. Aabel, Jr., are father and son; that while Aabel, Jr., was employed by plaintiff he was in charge and full control of a stock of merchandise belonging to plaintiff, as manager; that while so employed he fraudulently appropriated to his own use plaintiff's goods and merchandise of about

the value of $4,500; that he fraudulently appropriated to his own use and benefit money taken in for the sale of merchandise to the amount of about $3,000, and also wrongfully sold goods and merchandise at a price much less than the true value thereof, contrary to the knowledge and consent of plaintiff, to plaintiff's damage in the sum of $8,000; that with the moneys so wrongfully obtained he purchased an undivided one-half interest in 160 acres of land in Harlan county, the other half interest standing of record in the name of his father, Regnar M. Aabel; that after plaintiff discovered the peculations the son executed and placed of record a deed to his interest in the land to his father; that the father is now endeavoring to sell and dispose of the land, though knowing the facts, and knowing that the same was purchased by the son with the proceeds of the property wrongfully taken from the plaintiff. It is also alleged that both defendants are wholly insolvent, that the interest of Aabel, Jr., in the land is of the value of about $1,250, which is all the property of which he is possessed, and that the father is about to sell the land and convert the proceeds to his own use, and will do so unless restrained by an order of the court. The prayer is for judgment against Aabel, Jr., for the value of the property taken; that Aabel, Sr., be charged as a trustee *ex maleficio* to hold the title to the land for the plaintiff's use, and that he be restrained from selling and conveying the land and converting the proceeds.

The petition, while in some respects inartistically drawn, seems sufficient to state a cause of action.

The defendant Aabel, Jr., is charged with having, while in a position of trust and confidence, converted the goods and money of the plaintiff to his own use and invested the proceeds in land, while the other defendant is charged with having full knowledge of the fraudulent origin of the property and with receiving it with the intent to carry out the fraudulent purpose. These facts make the case one with which a court of equity is alone fitted to deal in such a manner as to do justice. There is an allegation that the

plaintiff sold merchandise for less than it was worth and a general allegation of damages, but these we think must be regarded as surplusage, since it is clear that the purpose of the action is to reach the property into which it is alleged the money of the plaintiff has been converted.

Where one person obtains the property of another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge. *Tecumseh Nat. Bank v. Russell,* 50 Neb. 277; *Nebraska Nat. Bank v. Johnson,* 51 Neb. 546; *Lamb v. Rooney,* 72 Neb. 322. Another court has aptly said: "The true owner of property has the right to have his property restored to him, not as a debt due and owing, but because it is his property wrongfully withheld. As between the *cestuis que trustent* and the trustee and all persons claiming under the trustee, except purchasers for value and without notice, all the property belonging to the trust, however much it may have been changed in its form or its nature or character, and all the fruits of such property, whether in its original or altered state, continues to be subject to and affected by the trust. * * * It was formerly held that these rules came to an end the moment the means of ascertaining the identity of the trust property failed. * * * In the case of trust moneys commingled by the trustee with his own moneys, it was held that money has no earmarks, and when so commingled the whole became an indistinguishable mass and the means of ascertainment failed. But equity, adapting itself to the exigencies of such conditions, finally determined that the whole mass of money with which the trust funds were commingled should be treated as a trust." *Windstanley v. Second Nat. Bank,* 13 Ind. App. 544.

We think the demurrers should have been overruled. The judgment of the district court must, therefore, be reversed and the cause remanded.

REVERSED.

# IRA V. REASONER ET AL., APPELLEES, V. JOHN W. YATES ET AL., APPELLANTS.

FILED FEBRUARY 10, 1912. No. 16,608.

1. **Brokers: SALE OF LAND: LIABILITY FOR COMMISSIONS.** If a vendor of lands enters into a contract of sale of the same with a competent purchaser produced by a land broker or agent, the subsequent inability of the vendor to convey a good title, by reason of which the contract is not performed, does not release him from the obligation to pay the agent's commission.

2. ———: ———: ———. The fact that the contract is canceled afterwards by mutual consent of the vendor and the vendee cannot affect the right of the agent to recover the agreed compensation for procuring a purchaser, where the vendee has at all times been in such a position that performance could have been enforced.

3. ———: ———: ———: SUBAGENTS. So, also, with reference to the liability of a general agent for commission to persons whom he may employ as subagents. In such transactions the original agent stands in the same relation to the subagent as the vendor does to him, and, when the subagent has produced a purchaser with the requisite qualifications, the liability of his principal to pay the agreed commission exists, irrespective of whether the owner of the land refuses to ratify the sale or is unable to make a good and satisfactory title.

4. ———: ———: ———. In an action by an agent against an owner, if the only reason that a sale has not been completed is that the vendor cannot furnish a good and perfect title, it is not essential to recovery that the owner had represented to him that his title is good. Neither is it so in a case of subagency.

5. **Evidence: SECONDARY EVIDENCE: ADMISSIBILITY.** A carbon copy of a letter was properly received in evidence, when it was proved that the original had been duly mailed to the address of defendants at their usual place of business, that notice had been served upon them to produce the original for inspection, that it had not been produced, and that it was stated at the trial that they had made diligent search and were unable to find the same.

6. **Brokers: SALE OF LAND: APPLICABILITY OF STATUTE: SUBAGENTS.** The provisions of section 10856, Ann. St. 1911, providing that contracts for the sale of lands, "between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing," are not applicable to a contract made

between an agent of the owner employed to sell the lands and a subagent whereby the agent agrees to pay the subagent a specific commission if he procure a purchaser for the land.

7. ———: ———: EVIDENCE. Evidence examined, and *held* to justify the giving of certain instructions and to sustain the verdict of the jury.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

*Heasty, Barnes & Rain* and *McKesson & Turner*, for appellants.

*C. A. Robbins* and *E. A. Wunder, contra.*

LETTON, J.

This action was brought to recover commissions claimed to have been earned by the plaintiffs as subagents for the defendants in the sale of certain lands situated in Colorado. Plaintiffs were land agents, whose place of business was in Lincoln, Nebraska. Defendants were in the same business in Colorado Springs, Colorado. There are six causes of action set forth in the petition. The first alleges that the plaintiffs by an oral agreement with defendants undertook to procure persons who would purchase certain lands in the San Luis valley through and from the defendants as agents of the owners, and defendants undertook and agreed to pay to plaintiffs 10 per cent. of the purchase price of each piece of the land sold to such purchasers. The plaintiffs advertised the lands extensively, and procured a purchaser ready, willing and able to purchase, whereby the agreed commission became due and payable. The first six causes of action are identical, except as to the name of the purchaser, the date and amount of the sale, and the amount of commission. The seventh cause of action is of like nature, except that it alleges a part payment of the commission and a balance due. The answer is a general denial to the first six causes of action, and a settlement as to the seventh. The settle-

ment is denied by the reply. A verdict was returned for the plaintiffs. The court required a remittitur of a part of the recovery, overruled the motion for a new trial, and rendered judgment.

Defendants first contend that the recovery is excessive for the reason that two of the purchasers failed to complete the purchase on account of the owners of the land failing to furnish satisfactory title thereto, and also in this connection complain of the giving of instructions Nos. 1 and 13, given at request of plaintiffs. These instructions in substance told the jury that the plaintiffs were entitled to their commission after a contract of sale was made and the purchasers were able, ready and willing to comply with the terms of sale. Defendants argue that the evidence shows that "the prospective purchaser was able, ready and willing to buy, provided he should receive a good title, but the good title was not forthcoming so he was not willing to purchase," and, hence, the contract was never fulfilled.

The evidence shows that one of the purchasers to whom the law laid down in these two instructions is applicable was able, ready and willing to carry out the contract from the time it was made in 1907 until the time of the trial in 1909, but was prevented from doing so by the inability of defendants to convey a good title, and that the other purchaser had also been ready to fulfil until the contract was finally canceled by his consent and that of the defendants for the same reason. It is also shown that the plaintiffs had no hand in this cancelation, and did not waive their right to a commission on the sale. It is settled law in this state that, where the vendor of lands enters into a contract of sale of the same with a competent purchaser produced by a land broker or agent, the subsequent inability of the vendor to convey a good title, by reason of which the contract is not performed, does not release him from the obligation to pay the agent's commission. *Potvin v. Curran & Chase,* 13 Neb. 302; *Jones v. Stevens,* 36 Neb. 849; *Lunney v. Healey,* 56 Neb. 313. This is the general

rule. *Monk v. Parker,* 180 Mass. 246; *Smith v. Schiele,* 93 Cal. 144; *Davis v. Lawrence & Co.,* 52 Kan. 383; *Phelps v. Prusch,* 83 Cal. 626; *Bruce v. Wolfe,* 102 Mo. App. 384.

The fact that the contract is canceled afterwards by mutual consent of the vendor and the vendee can in no-wise affect the right of the agent to recover the agreed compensation for procuring a purchaser, where the vendee has at all times been in such a position that performance could have been enforced. *Millett v. Barth,* 18 Colo. 112; *Swigart v. Hawley,* 140 Ill. 186; note to *Breckenridge v. Claridge & Payne,* 43 L. R. A. 593 (91 Tex. 527). The same reasoning applies with reference to the liability of a general agent for the sale of lands to persons whom he may employ as subagents. In such transactions the original agent stands in the same relation to the subagent, so far as liability to pay the agreed compensation upon the furnishing of a competent purchaser, as the vendor does to him, and, when the subagent has produced a purchaser with the requisite qualifications, the liability of his principal to pay the agreed commission exists, irrespective of whether the owner of the land refuses to ratify the sale or is unable to make a good and satisfactory title. *Barthell v. Peter,* 88 Wis. 316; *Oliver v. Moravetz,* 97 Wis. 332; *Smith v. Schiele, supra.*

It is also argued that the plaintiffs' testimony that one of the defendants guaranteed the title to the land to be perfect cannot be of any benefit, for the reason that this alleged guarantee or warranty was not in writing, and hence is void under the statute of frauds. The contention that the statute of frauds is involved we think is unsound. The liability of the defendants does not depend upon whether the vendors were competent to convey good and perfect title. The defendants represented to the plaintiffs that they had the right to sell the lands for the owners. Even if no express representations had been made by them that the owners were competent to convey a good and perfect title the plaintiffs were justified in relying upon the implication that the persons for whom the defendants

were acting were possessed of a marketable title to the real estate. In an action by an agent against an owner, if the only reason that a sale has not been completed is that the vendor cannot furnish a good and perfect title, it is not essential to recovery by the agent that the owner had represented to him that his title is good. Neither is it so in a case of subagency. *Gorman v. Hargis,* 6 Okla. 360, 50 Pac. 92.

The giving of instruction No. 2 is complained of. This instruction in substance told the jury that if plaintiffs rendered to defendants a written account or statement of the commission due on the sale to Wheeler, and the defendants acknowledged its receipt, but made no objection, such acknowledgment is evidence of the correctness of the statement. Perhaps it would have been better to have amplified this instruction so as to explain more fully to the jury its applicability to the evidence. It applied particularly to the evidence furnished by a letter written by the plaintiffs to the defendants, and a reply to the same. These letters showed a claim was made for 10 per cent. commission on the Wheeler sale, and that no specific objection was made by the defendants to the amount. Defendants' answer to this letter speaks of a dispute between plaintiffs and one McCullough, and states that as soon as plaintiffs and McCullough come to some understanding they were ready to make a settlement concerning commissions.

It seems that McCullough had made an arrangement whereby plaintiffs were to pay him a commission of 3 per cent. on sales to purchasers procured by him, and that he had made a claim direct to defendants that commissions be paid to him, instead of to the plaintiffs. When considered in connection with all the other testimony, we cannot see how the defendants were prejudiced by this instruction being given.

It is next urged that the court erred in admitting in evidence plaintiffs' exhibit 6. This is a carbon copy of a letter, which the evidence shows was written by the plain-

tiffs to defendants, duly stamped and addressed to defendants at their usual place of business at Colorado Springs. Notice was served upon the defendants to produce the original letter for inspection. It was not produced but it was stated at the trial that they had made a diligent search and were unable to find the same. Since the original was not accessible, and proper diligence had been exercised to procure the same, secondary evidence of the contents of the letter was admissible. *Birdsall v. Carter,* 5 Neb. 517.

Instructions Nos. 3 and 4 are correct statements of the law as applied to the facts in this case. We believe, in the light of the prior correspondence and the subsequent acts of the parties, that M. T. Yates had authority to act in the matter of commissions.

The assignments of error with respect to the giving of instruction No. 14 and the admission in evidence of the case of *Long v. Herr,* 10 Colo. 380, will be considered together, since the point involved is whether it is necessary to the validity of the contract relied upon that it should be in writing. Defendants contend that, under the provisions of section 10856, Ann. St. 1911, the contract is void. This section provides: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." We are of opinion that this section has no application to the facts in this case. The contract here does not fall within its terms. It was not made between the owner of lands and an agent. The contract was between an agent and a subagent. The statute was designed to protect the owner of lands, and we cannot extend its terms by construction or interpretation so as to embrace another class of persons. Before its passage oral contracts whereby one person employed another to procure a

purchaser for his land upon commission were valid, irrespective of whether the employing person was the owner of the premises or not. The law has been changed by the statute so far as landowners are concerned but it remains unaltered as to all other persons. *Sadler v. Young*, 78 N. J. Law, 594. Instruction No. 14, therefore, is not objectionable for the reason that the contract was not in writing, nor was the introduction in evidence of the report of the Colorado case prejudicial, even if erroneously admitted, which point we find it unnecessary to determine.

Finally, it is argued that the verdict is unsupported by the evidence, and must have been the result of passion and prejudice on the part of the jury. The evidence satisfies us that the jury were warranted in believing that the sales were made under the contract proved. We cannot say the verdict is not sustained by the evidence.

The judgment of the district court is

AFFIRMED.

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ELZINA MATHEWS, APPELLANT, V. FRANK E. GILLETT ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,612.

Taxation: FORECLOSURE OF TAX LIEN: JURISDICTION. In the district court, a county's foreclosure of a tax lien on land without an antecedent administrative sale is not, on account of that omission, void for want of jurisdiction.

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

*Martin Langdon*, for appellant.

*A. W. Scattergood, contra.*

ROSE, J.

The action is ejectment, commenced October 12, 1908, for 200 acres of land in Brown county. Defendants answered that they acquired title through a tax-foreclosure sale made by the sheriff January 28, 1902, at the suit of Brown county, and confirmed by the district court February 6, 1902. Plaintiff replied that the sheriff's sale was void for want of jurisdiction, there having been no antecedent administrative sale by the county treasurer to Brown county. The present action was dismissed, and plaintiff has appealed.

To obtain a reversal, plaintiff relies on a former holding that the foreclosure of a tax lien is erroneous, unless based on a tax-deed or tax-sale certificate. *Logan County v. Carnahan,* 66 Neb. 685, 693. That rule does not apply to the present suit, which is a collateral attack on such a foreclosure. It is established by repeated decisions that the foreclosure of a tax lien on land without an antecedent administrative sale is not, on account of that omission, void for want of jurisdiction. *Jones v. Fisher,* 88 Neb. 627; *Hardwick v. Snedeker,* 88 Neb. 515; *Cass v. Nitsch,* 81 Neb. 228; *Wagener v. Whitmore,* 79 Neb. 558; *Selby v. Pueppka,* 73 Neb. 179; *Russell v. McCarthy,* 70 Neb. 514.

Complaint is made because the trial court admitted in evidence the record of the tax-foreclosure suit. The principal objection thereto was the unfounded one that the court in which the judgment of foreclosure was rendered had no jurisdiction. Objections were also made on other grounds but were properly overruled. There is no error in the record, and the judgment is

AFFIRMED.

R. H. ALLEN, APPELLANT, V. DANIEL MEETZ, APPELLEE.

FILED FEBRUARY 10, 1912. No. 16,599.

1. Instructions examined and referred to in the opinion, *held* without prejudicial error.
2. Evidence examined, and found sufficient to sustain the verdict and judgment.

Appeal from the district court for Pierce county: JOHN F. BOYD, JUDGE. *Affirmed.*

*Douglas Cones,* for appellant.

*Mapes & Hazen, contra.*

FAWCETT, J.

Action in the district court for Pierce county, upon two promissory notes given as the consideration for the purchase of a threshing machine, consisting of a separator and loader. Petition in the usual form. The answer admits the execution and delivery of the notes; alleges failure of the consideration therefor, in that the machine was defective, would not do the work for which it was designed and purchased, even after several opportunities were given plaintiff to remedy the defects; that defendant placed the machine under a shelter at his residence, and notified plaintiff that it was there, subject to his order, and that subsequently plaintiff took possession of the machine. Defendant also sets up a counterclaim, consisting of a number of items aggregating over $800. The reply is in substance a general denial, with an allegation that plaintiff furnished an expert who adjusted and put the machinery in working order, and that defendant on October 9, 1903, and again three days later, acknowledged in writing that said machinery was operating in a satisfactory manner. There was a trial to a jury, with a verdict in favor of defendant and against the plaintiff on

plaintiff's causes of action, and in favor of defendant upon his counterclaim, for one cent. Plaintiff appeals.

Objection is made to instructions 2 and 5, given by the court on its own motion. In each of these instructions the court is simply stating the issues, No. 5 being directed to the reply. The only objection urged to No. 5 is that it omits the allegation in the reply in relation to the written acknowledgments of October 9 and 12. We think the instruction states all that was material. The two written statements omitted were introduced in evidence, and, under other instructions properly given, plaintiff had the full benefit of both; hence, he was not in any manner prejudiced by the failure of the court to refer thereto in instruction No. 5.

We have examined the evidence, and find that it is ample to sustain the verdict of the jury.

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

AFFIRMED.

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STATE, EX REL. OVID M. KELLOGG, APPELLEE, V. CHARLES C. BARR, APPELLANT.

FILED FEBRUARY 10, 1912. No. 17,376.

1. **Pleading: SUFFICIENCY: WAIVER OF OBJECTIONS.** If an objection is made to the sufficiency of a pleading because of the omission of an allegation of some material fact, and the fact so omitted is clearly proved without objection, and the objection to the pleading is not brought to the attention of the trial court in the motion for a new trial, the objection is waived.

2. **Quo Warranto: PARTIES.** If the officials refuse to prosecute an action of *quo warranto* to try the right to a public office, the action may be brought by one who claims the right to the office as against the incumbent, and, if he verifies the information and allows it to be filed and the action begun without objection on his part, he is the real party in interest, and it is not necessary to join others who support and assist him.

3. Elections: CONTEST: ADMISSIBILITY OF EVIDENCE. In a trial to determine the result of an election, if the ballots and other records of the election are sufficiently identified, they should not be excluded from the evidence because of the negligence of the officers in caring for the same.

4. Trial: ORDER OF PROOF: DISCRETION OF COURT: REVIEW. The order of proof in the trial of a cause is largely in the discretion of the trial court, and this court will not interefere, unless an abuse of discretion is clearly shown.

5. Evidence: IDENTIFICATION OF RECORDS: PRESUMPTIONS. It will not be presumed that documents received in evidence were not sufficiently identified, unless that fact appears from the record as contained in the abstract.

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

*Perry, Lambe & Butler, R. D. Druliner* and *Ratcliffe & Ratcliffe,* for appellant.

*P. W. Scott* and *A. T. Cowings, contra.*

SEDGWICK, J.

At an election held in the village of Benkelman in April, 1911, the relator and the respondent were both candidates for election to the office of trustee of the village. The votes were canvassed, and it was declared that each of these parties received the same number of votes, and the respondent, whose term then expired, insisting that there was no election, continued to hold the office. The relator brought this action in the district court for Dundy county to obtain the office. The district court found in his favor, and the respondent has appealed.

The statute provides that a trustee of the village must be 21 years of age, a citizen of the United States, or have declared his intention to become such, "who shall have been an inhabitant and taxpayer of the village at the time of his election and resided therein for three months next preceding." Comp. St. 1911, ch. 14, art. I, sec. 42.

The information alleged that the relator, at the time of the election, "was eligible to be elected to and hold the office of trustee in and for the village." It did not allege that the relator was a taxpayer in said village, but alleged all other qualifications required by the statute.

The first contention is that the information was insufficient in not alleging that the relator was a taxpayer; that the allegation above quoted was a mere conclusion of law and was insufficient. It is of course necessary to plead facts and not conclusions, and it would no doubt be better practice to allege the specific qualifications required by statute. It is not necessary to determine whether this defect would render the information demurrable, since the evidence shows, and, so far as appears from the abstract, without objection, that the relator had resided in the village for several months, and had been assessed for taxes soon after the election, and this assessment is required to be made upon property owned on the first day of April, which was prior to the election. This is conclusive that he was a taxpayer in the village at the time the election was held. The supposed defect in the petition was not brought to the attention of the court in the motion for new trial. The error, if any, was waived.

It is contended, and strenuously argued in the brief, that the plaintiff "was not the real party in interest" in this litigation, and that the county attorney had not refused or neglected to begin and prosecute the action. The county attorney was requested to bring the action at a date earlier than it was begun, but refused to so do. The fact that the information had been signed by the relator before this request was made, upon the understanding that the county attorney was not interested and would not prosecute the action, is immaterial.

The respondent alleged in his answer, and offered to prove on the trial, that there was a contest pending in the village as to whether saloons should be licensed for the ensuing year, and that parties interested in that contest desired the relator to become a member of the village

board, and encouraged the prosecution of this action, employed counsel and assisted in expenses and that relator declared himself indifferent in regard to the office. The trial court held that these facts were immaterial, and we think properly. The relator signed and verified the information and has a direct legal interest in the action. It is to be presumed that those who voted for the relator would desire him to qualify and hold the office, but this does not constitute such a direct legal interest as to make them necessary parties to the litigation.

It is contended that the ballots offered in evidence had not been properly preserved by the officials. They were not promptly delivered to the clerk after the votes had been canvassed, and the clerk left them in the vault of a bank in care of the bank officials. The respondent is right in supposing that great care should be used by public officials in preserving the ballots and other records of a public election, but there is no evidence that the relator was in any way connected with any supposed negligence of the officials; and, if the ballots and other records are fully identified, he ought not to be deprived of his right to be heard in court on account of the neglect of those officials whose duty it was to take greater care. The court was clearly right in overruling this objection.

It is insisted that the court erred in allowing a recount of the ballots before any showing was made that such recount would change the result. This objection relates to the order of proof, which is largely in the discretion of the trial court. The whole evidence shows that a recount would and ought to change the result, and we cannot see that the court abused its discretion in the order of proof.

It is also urged that the ballots and the envelopes which contained them were not sufficiently identified. One of the canvassing board was called as a witness, and testified that the ballots were placed in envelopes, and identified the envelopes and testified that some of the writing on the envelopes was in his handwriting. The abstract does not show what the indorsements on these envelopes were, but

it does show that the ballot which was in dispute was indorsed by two persons, one of whom was a judge of election, but the abstract does not show whether the other person was or was not a judge of election. The appellant prepared an abstract, which omitted important matters bearing upon the point which he seeks to present here. The appellee prepared and filed a supplementary abstract, which is not criticised by the appellant. We do not find from these abstracts that any error was committed requiring a reversal of the judgment. The costs of both abstracts should be taxed against the appellant.

The judgment of the district court is

AFFIRMED.

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E. S. JOSEPHINE TAYLOR, APPELLANT, V. W. E. HARVEY ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,841.

1. **Mortgages**: FORECLOSURE: CONVEYANCES AS ONE TRANSACTION. A deed from T. to H. and from H. to S., and a mortgage from H. to the husband of T. for a part of the consideration for the deed, with an assignment to T. by her husband, the deed from H. to S. being expressly subject to the said mortgage, all executed at the same time, will be presumed to constitute one transaction, the purpose being to convey the land to S. by T. and take a mortgage lien upon the land for a part of the purchase price, there being no other explanation of the transaction, and no evidence to the contrary.

2. ———: ———: CROSS-DEMANDS. Section 106 of the code requires that, when cross-demands exist at the same time, they must be held to compensate each other so far as they are equal; and this principle will be applied by courts of equity when conditions require it in order to do equity between the parties.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Affirmed.*

*L. L. Raymond, James E. Philpott* and *R. C. Hunter,* for appellant.

*William Morrow, contra.*

SEDGWICK, J.

On the 14th day of September, 1908, this plaintiff conveyed to the defendant W. E. Harvey a tract of land in question, and as part of the purchase price Mr. Harvey and his wife executed and delivered to plaintiff's husband, A. O. Taylor, a mortgage on the same land, and at the same time the plaintiff's husband assigned and delivered the mortgage to the plaintiff, and the defendant Harvey conveyed the land to the defendant corporation subject to the said mortgage. These instruments, all being executed on the same day, are presumed to be executed as a part of the same transaction, nothing appearing in the abstract to the contrary. The deed from the plaintiff to Mr. Harvey contained the usual covenant against incumbrances, and at the time it was executed and delivered the land was subject to a lien for irrigation taxes. The mortgage contained a stipulation that the mortgagor would pay all taxes thereafter assessed against the land, and that in event he failed to do so the whole sum secured by the mortgage should at once become due and payable. The mortgage by its terms would become due in March, 1916. The taxes of 1908 became a lien upon the land and became due and payable, and the plaintiff began this action to foreclose the mortgage, and declared the whole amount due on account of the default of the defendants in paying the general taxes that had become due. The irrigation taxes, which constituted an incumbrance upon the land when the plaintiff deeded the same, were much more than the general taxes that accrued thereafter for which the mortgagor was liable, and the trial court offset the general taxes against the irrigation taxes, and rendered a judgment in favor of the defendants and against the

plaintiff for the difference, and dismissed the plaintiff's action for a foreclosure of her mortgage. The plaintiff has appealed.

The plaintiff contends in the brief that the existence of the irrigation taxes against the land at the time she conveyed the same, with covenants against incumbrances, constituted a breach of that covenant at the time the deed was made, and that this became a claim against the plaintiff in favor of the defendant Harvey, and that, as Harvey has conveyed the land to the defendant corporation, defendant cannot now avail itself of the plaintiff's breach of the covenant against incumbrances as a defense in this action. The deeds and the mortgage and the assignment of the mortgage, as before stated, were made at the same time, and presumably as a part of the same transaction, for the purpose of transferring the land to the irrigation company, with a mortgage lien to the plaintiff for the unpaid purchase price. The plaintiff in her reply asks the court to treat these respective claims as arising out of the same transaction, and as properly compensating each other, in the following allegation: "Plaintiff offers to allow to be deducted from the amount found due plaintiff here any sum which may be adjudged by the court as legally due from her as taxes on the said premises or any part thereof, or to pay the same into court as by the order of the court made therein, upon the payment of the amount due her on said note and mortgage." The plaintiff's husband manifestly had no interest in the transaction, except such incidental interests as arise from marital relations, and all of the parties interested were before the court in an equitable proceeding in which the court was asked by the plaintiff to adjust the matters existing between them. This the court did, and we think, in any view of the legal questions that are discussed in the briefs, this action of the court was right. When this action was begun both of these claims for taxes existed at the same time, and should in equity be held to compensate each other, as provided in section 106 of the code. Under these circumstances the

defendant cannot be said to be in default for not having paid the general taxes; the plaintiff's action was prematurely brought, and for that reason properly dismissed. This dismissal will not bar another action upon default in the conditions of the mortgage.

The judgment of the district court is

AFFIRMED.

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J. K. ARMSBY COMPANY, APPELLANT, V. RAYMOND BROTHERS-CLARKE COMPANY, APPELLEE.

FILED FEBRUARY 29, 1912. No. 16,563.

OPINION on motion for rehearing of case reported, *ante*, p. 553. *Rehearing denied.*

PER CURIAM.

Complaint is made in a motion and brief for rehearing that in reversing a law action this court is without jurisdiction to direct the district court to render judgment in favor of either party. It is further stated that defendant desires to amend its answer in the court below. The first point must be decided adversely to defendant's contention under the authority of section 594 of the code, which provides: "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment." This provision of the code has been followed in *Story v. Robertson*, 5 Neb. (Unof.) 404; *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530; *Robertson v. Brooks*, 65 Neb. 799; *American Surety Co. v. Musselman, ante*, p. 58.

The statement that defendant desires to amend its answer in the court below should not be considered now. No reason is assigned why the amendment was not made

prior to the first trial. The request comes too late after protracted litigation. *Gadsden v. Thrush*, 72 Neb. 1.

The motion for rehearing is

OVERRULED

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CLYDE C. MOSSLANDER, APPELLEE, V. GEORGE C. ARMSTRONG, APPELLANT.

FILED FEBRUARY 29, 1912. No. 16,597.

1. **Physicians and Surgeons: MALPRACTICE: ADMISSION OF EVIDENCE: HARMLESS ERROR.** In an action against a physician and surgeon for damages arising from the alleged unskilful treatment of plaintiff in an effort to cure an injury resulting from an accident, a witness, who was a nurse, was permitted to testify that from a conversation she had previously had with the defendant, which she detailed, she did not think his standard of "technique" was equal to the standard of other physicians in the locality in which he resided and practiced his profession. *Held*, That the admission of the evidence over defendant's objection was erroneous, but that in view of the instructions of the court, and the testimony of other physicians as to defendant's reputation and standing as an educated and competent physician and surgeon, the error was without prejudice.

2. **Trial: INSTRUCTIONS.** In considering an instruction stating the averments of a pleading, effect will be given to the whole thereof, and not to a technical error in the failure to use apt language, if it sufficiently contains the substance of such pleading and is not liable to be misunderstood by the jury.

3. **Pleading: SUFFICIENCY OF REPLY.** "The reply should show specifically what allegations of the answer are denied, but if a reply denies 'each and every allegation of new matter' and is not assailed by motion, it will be held good after verdict." *Western Mattress Co. v. Potter*, 1 Neb. (Unof.) 627.

4. **Physicians and Surgeons: MALPRACTICE: INSTRUCTIONS.** Plaintiff asked and the court gave an instruction to the effect that defendant had no right to make any other or different incision in plaintiff's foot than he had obtained permission or plaintiff had requested him to make. Defendant asked and the court gave an instruction that "consent to an operation will be pre-

sumed from voluntary submission to it, and the burden is on the plaintiff to prove the contrary." *Held*, That the two instructions, when taken together, correctly state the law.

5. Instructions given and refused are examined, and no prejudicial error is found therein.

6. Damages. The damages awarded by the jury are examined and found not so excessive as to require the intervention of the court.

7. Appeal: AFFIRMANCE: COSTS. The verdict awarded $2,000 as damages, and to which was separately added $169.13 as interest, making a total of $2,169.13, for which judgment was rendered. After the appeal was taken by defendant, and all briefs filed, plaintiff filed a remittitur of $169.13, the interest allowed, and asked that the judgment be modified and affirmed for $2,000. *Held*, That the judgment would be so modified and affirmed, but that all the costs made after the rendition of the judgment by the district court, including the costs of the supreme court, should be taxed to plaintiff.

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

*W. S. Morlan*, for appellant.

*Perry, Lambe & Butler, contra.*

REESE, C. J.

This is an action by the plaintiff against the defendant, a physician and surgeon, for damages alleged to have been sustained by reason of the negligent and unskilful treatment of plaintiff as the patient of defendant in and about the treatment of plaintiff, who had been injured by stepping upon a sewing needle, which had punctured his foot, and the point of the needle was supposed to have remained within the punctured wound in the ball of the foot near or about the joint of the great toe. No serious question arises with reference to the pleadings. The facts alleged, and so far as undisputed, are that late in the evening, or early morning, on or about the 7th day of August, 1908, plaintiff stepped upon an ordinary sewing needle on or in

the carpet in his bedroom and by which the needle was driven into his foot, puncturing it. At the time of the accident plaintiff searched the floor for the needle, and found that it had been broken into probably three pieces, two of which, constituting the major portion of the needle, were found, the remainder, consisting of the point, was not found. The next morning he called at defendant's office, when defendant made an incision into the foot in search for the needle-point, but none was found. The foot became infected. Two other incisions were made in the effort to arrest and cure the blood poisoning, but seemed not to be successful, when other physicians were called, and it was found necessary to amputate the great toe, which was done, and soon thereafter plaintiff was removed to a hospital, where a recovery followed. The chief contention upon the trial arose over the question of the care and skill, or want thereof, in the use, or failure to use, proper antiseptics in the surgical treatment of plaintiff's foot by defendant; it being alleged and claimed by plaintiff that, by reason of the failure of defendant to guard against infection, the blood poisoning was promoted and the amputation rendered necessary. The testimony as to the course pursued by defendant in the treatment of plaintiff's foot is sharply conflicting on almost every feature of the case. The result of the trial was a verdict in favor of plaintiff, upon which judgment was rendered. Defendant appeals.

The errors assigned in this court are: First. "Errors of law occurring on the trial and duly excepted to by the defendant." The second to the eleventh, inclusive, consist of alleged errors in giving certain instructions to the jury and in refusing to give instructions asked by defendant—the instructions being separately referred to in the assignments; twelfth and thirteenth, that the damages are excessive.

Under the first assignment, the only question discussed in defendant's brief is as to alleged errors of the court in admitting immaterial and irrelevant testimony. The tes-

timony objected to is too long to be here copied. It is the testimony of a nurse, who attended plaintiff at the hospital to which he was removed, and who had waited upon him to some extent at his home before his removal, and which may be epitomized to be: That she was familiar with the standard of technique used in the hospital where she was employed and among physicians and surgeons in that vicinity; that the standard was that before a surgical operation is performed, and during the time, "the instruments are thoroughly sterilized and the dressings are thoroughly sterilized, and the patient is prepared for several days prior to a major operation;" that she was acquainted with defendant, and had had occasion to learn from him what his opinion of that standard was; that some three weeks prior to plaintiff's accident she had a conversation with defendant, in which they discussed surgery in general, and he gave his idea of asepsis; that he stated that certain well-known and leading surgeons in Illinois and Minnesota played to the galleries, and that he could "go out into the country and take a bar of White Russian soap and prepare a patient for an operation in ten minutes and get the same results that those surgeons could in their weeks of preparation;" that defendant's opinion of technique was not up to the other physicians in the community where he resided and practiced, but was below them. The definition and description of "technique" was not objectionable, the witness showing some knowledge upon the subject, and it could result in no possible prejudice to defendant, for all the physicians who testified upon that matter fully agreed with her, but with more elaboration. There was no difference upon that subject. Her comparison of defendant's views and his standard of technique with other physicians was objectionable, and the objection should have been sustained. We know of no rule of law or evidence which sanctions such a procedure. In addition to the evidence of defendant's high standing in his profession, the court, upon the request of plaintiff, instructed the jury that the question of defend-

ant's liability did not depend upon the skill he possessed, but upon whether he applied that reasonable degree of skill and diligence ordinarily possessed and used by other physicians in that and similar localities. This eliminated the question of his knowledge of technique. The statute (code, sec. 145) provides that courts "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." The question then arises: Did the error have that effect, or could it? From a reading of the bill of exceptions, it must be conceded that the learning and ability of defendant as a physician and surgeon was fully and completely established and shown by the testimony of all the men of the profession who testified upon that subject. They were interrogated by defendant's counsel directly and explicitly thereon, and, indeed, there was no contrary contention. It is to be observed that the nurse testified only as to defendant's "standard of technique," and not as to his knowledge, ability or standing generally in his profession. While the admission of the evidence was erroneous, we are unable to see that any prejudice resulted, or could result, therefrom.

There is also some objection to the admitted testimony of plaintiff and one of the physicians who was called as a witness by him. Upon a careful consideration of the rulings complained of, we are unable to see any reversible error, and will not notice the subject further.

The next contention is that there was manifest error in the instructions given to the jury. The transcript contains 36 instructions given. That the jury were thoroughly instructed cannot well be doubted in so far as volume is concerned. The practice of overloading juries with a great number of instructions has been freely condemned by this court. As we said in *City of Beatrice v. Leary*, 45 Neb. 149: "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." But "a judgment will not be reversed on account of the number of instructions given to the jury by the trial court, unless it clearly appears that the party complaining is prejudiced thereby." *Omaha Street R. Co. v. Boesen,* 68 Neb. 437. No objection is made on this ground, but we deem it proper to refer to it.

The brief of appellant consists of 28 pages of carefully prepared criticisms upon instructions given and the action of the court in refusing to give a portion of those requested by defendant. Many of the points presented are quite technical and not entitled to consideration. Where not contradictory, instructions should be considered as a whole.

The first instruction given by the court upon its own motion is of considerable length and will not be copied. It consists of a statement of the averments of the petition. The opening sentence is that the action is brought "to recover the sum of $5,000 as damages, on account of the failure of the defendant to properly treat and care for an injured foot of the defendant." (The word "defendant" is conceded to be a clerical or inadvertent error.) The objection to the instruction is that it fails to use the word "alleged" or one of similar import, but practically informs the jury that there was a failure to properly treat plaintiff's foot and the suit is brought on that "account." It is true that the instruction would have been more skilfully drawn had it contained a statement of what the *allegations* of the petition were, instead of telling the jury what the suit was *for*. The language above quoted is followed by a statement of what the plaintiff "alleges in his petition," and the statement properly covers those allegations. We can detect nothing which by any reasonable interpretation could, in view of other instructions, have any tendency to mislead the jury as to what the issues were. The second and third instructions in a condensed form fully state the contents of the answer that it admitted that he was a physician and surgeon, denied all other allegations of the petition, and alleged that whatever damages plain-

tiff sustained, if any, were by reason of his own contributory negligence.

The third instruction told the jury that the reply denied "each and every allegation of new matter" in the answer. Objection is made to the words "new matter." These words are copied from the reply. The attack should have been made upon the reply, instead of upon the instruction, which followed its language. In *Western Mattress Co. v. Potter*, 1 Neb. (Unof.) 627, we held that, "if a reply denies 'each and every allegation of new matter' and is not assailed by motion, it will be held good after verdict." It is also the well-settled law of this state that if a cause is tried upon the theory that the averments of an answer are denied, even if no reply is filed, objection cannot afterward be successfully made to the pleadings in that regard.

In instruction numbered 4½, informing the jury of the material allegations of the petition which must be established by plaintiff, the fourth subdivision thereof was that, "on account" of the negligence, etc., the plaintiff suffered the injuries complained of. In other words, the jury must find that the injury was suffered on account of the negligence. The same meaning would have been conveyed had the language been "by reason of." The contention is without merit.

The petition alleges that the treatment of plaintiff's foot by defendant was careless, negligent, and unskilful. There was evidence which tended to prove that an incision made in plaintiff's foot, so soon after he had stepped upon and punctured his foot with the needle, was not skilful nor necessary treatment. Plaintiff testified that he was not asked for, nor did he give, his permission to the making of that incision. The court instructed the jury that defendant "had no right to make any other or different incision in the foot of the plaintiff than defendant had obtained permission or plaintiff had requested him to make." The defendant asked and the court gave instruction numbered 14 of those requested by him, in which it is said: "Consent to an operation will be presumed from

voluntary submission to it, and the burden is on plaintiff to prove the contrary." These two instructions, when taken together, stated the law correctly. That consent is a necessary prerequisite to an operation where no emergency exists rendering it impracticable to confer with the patient, see 30 Cyc. 1576; *Mohr v. Williams,* 95 Minn. 261; 1 Kinkead, Commentaries on Torts, sec. 375. But that consent will be presumed in the absence of fraud or misrepresentation, see *M'Clallen v. Adams,* 19 Pick. (Mass.) 333. It is true, as insisted by defendant's counsel, that instructions must be based upon the pleadings. The petition alleged the careless, negligent and unskilful treatment, and testimony was introduced to show that the operation was a part of the unskilful treatment. Even though the operation might not have been necessary, yet, had plaintiff requested or consented to the operation, such consent or request would be a defense, in so far as that part of the case was concerned.

Complaint is made that the court refused to submit defendant's theory of the case to the jury by proper instructions. This contention is not sustained by the record. There were 11 instructions given upon defendant's request. These, with the instructions given by the court upon its own motion, sufficiently submitted all material phases of the case. The first instruction asked by defendant and refused does not contain a correct statement of the law. It is to the effect that if plaintiff's foot was infected at the time he first called upon defendant for treatment, and that such infection produced the injury complained of, the verdict must be in favor of defendant. This left the question of unskilful treatment subsequent to the beginning of the treatment entirely out of the case. The proof is clear that infection can often be successfully treated. There was no error in the refusal to give the instruction. The second instruction, also refused as asked, but modified and given, was in part a repetition of the first. The remainder thereof was sufficiently covered by its modification by the court and other instruc-

tions given. Other instructions are criticised with the technical nicety of a purist. We are unable to find anything therein which can fairly be said to be prejudicial to defendant.

It is insisted that the damages awarded are excessive. The verdict and judgment were for the sum of $2,000, plus interest to be hereafter noted. A resume of the evidence can hardly be said to be necessary here. If defendant was negligent (and of that the jury were the judges), and if plaintiff was guilty of no contributory negligence (and of which the jury were the judges under the evidence), and his sufferings and present and past conditions are attributable to the negligence of defendant (and of which the jury were the judges), the verdict, while probably somewhat liberal, cannot be said to be so far in excess of compensation as to require the interference of the court.

By the verdict the jury found in favor of plaintiff and assessed "the amount of his recovery at the sum of $2,000, and interest thereon at the rate of 7 per cent. per annum from the 12th day of August, 1908, a total of $2,169.13," for which amount judgment was rendered. It is conceded by plaintiff that he was not entitled to interest on the damages assessed, and he filed a remittitur of the interest allowed by the jury, and consents that the judgment be modified and affirmed for $2,000 as of date of its rendition, to wit, October 30, 1909. The judgment will therefore be so modified. The remittitur was filed in this court after the appeal had been taken and all briefs filed. Therefore the costs made after the rendition of the judgment by the district court and the costs in this court will be taxed to plaintiff.

The judgment of the district court for and to the amount of $2,000 is affirmed, and the costs taxed to plaintiff as above.

AFFIRMED.

SEDGWICK, J., dissenting.

1. It appears from the opinion that the nurse, when

upon the witness-stand, testified to her opinion as to the quality of the defendant's technique. She testified that it was in her judgment not as good as other physicians' in that neighborhood whom she mentioned. By technique she meant the proper and necessary preparation, the cleansing of the wound and of the instruments, etc. If he did not attend to this properly he was negligent and would be liable for the consequences. The measure of the care required from him would be that which was recognized as necessary by the profession in that locality, so that when this witness stated her conclusion upon that point she appears to have stated the precise thing that the jury were called upon to determine. Generally, we have held such evidence to be prejudicial.

2. The third paragraph of the syllabus does not meet any contention of the parties. It is not insisted in the brief that the reply was insufficient. The point made in the brief is that the instruction of the court did not plainly state the issue. The court told the jury that the defendant denied the allegations of "new matter" in the answer, but did not tell the jury what those allegations of new matter were, and so did not tell the jury what the plaintiff denied in the reply. This is the point made in the brief and is not determined in the opinion. This objection seems to be well taken.

3. Again, the discussion in the fourth paragraph does not meet the point raised by the defendant. He does not insist that these two instructions, taken together, do not correctly state the law. He admits that they do, but what he says is that they state the law upon an issue that was not in the case at all, and that, under the circumstances, this statement was very misleading to the jury. This is the reason he criticises this instruction; that is, he objects to the court putting before the jury the issue as to whether the plaintiff consented that the defendant should make an incision in the foot. And the objection seems to have merit.

4. The fifth paragraph approves of the instructions in

bulk without mentioning them. The defendant asked the court to instruct the jury as follows: "The court instructs the jury, if you find from the evidence that plaintiff's foot was infected at the time he first came to defendant for treatment, that such infection produced the injury of which plaintiff complains, and that ordinary care, skill and diligence on the part of the defendant would not have prevented such injury, then it is immaterial whether defendant used ordinary care, skill and diligence, and your verdict must be for the defendant." The court modified the instruction by adding to it the following: "That is, if he used ordinary skill, care and diligence, considering that infection already existed, in caring for the same." This modification made the instruction unintelligible. The instruction, as offered, stated that it was immaterial whether the defendant used ordinary care, skill and diligence under the conditions recited in the instruction, and this modification tells the jury that this is so if he did use ordinary care, skill and diligence, considering that infection already existed. The instruction, as offered, was technically correct. I suppose it must be true that if the foot was so infected at the time that the defendant was first called that ordinary care, skill and diligence on the part of the defendant would not have prevented the injury complained of, the plaintiff could not recover. The court might have given another instruction, plainly stating the idea involved in the offered instruction, and so framed it that there would be no danger of misleading the jury. I think that this instruction, as modified, was erroneous.

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GUSTAVUS A. LONGNECKER, APPELLANT, V. EDWIN LONGNECKER, APPELLEE.

FILED FEBRUARY 29, 1912. No. 16,618.

1. **Appeal: DISMISSAL OF ACTION: PLEADING AND PROOF.** In a suit aided by attachment proceedings for the recovery of money

loaned or advanced under an alleged oral agreement of repayment, if the plaintiff's undisputed evidence is insufficient to sustain a judgment in his favor, and clearly shows that his action should have been one for an accounting between partners, it is not reversible error for the court to sustain a demurrer to the evidence and dismiss the action.

2. ———: AFFIRMANCE. Where the judgment of the district court is proper upon the undisputed facts shown by the record, it will be affirmed, without considering whether the reasons given by the trial judge for his conclusion were competent and adequate to support the same. *Bowhay v. Richards*, 81 Neb. 764.

3. ———: QUESTIONS REVIEWABLE. On appeal in such a case, this court will not consider errors alleged to have been committed in matters of practice or procedure.

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

*Burkett, Wilson & Brown,* for appellant.

*A. J. Sawyer* and *Joseph Wurzburg, contra.*

BARNES, J.

Action, aided by attachment proceedings, to recover money alleged to have been loaned or advanced by the plaintiff to the defendant to carry on certain partnership mining operations, under an alleged oral agreement that the defendant would reimburse the plaintiff therefor. The defendant had the judgment, and the plaintiff has appealed.

It appears that on the 1st day of April, 1873, in Cumberland county, Pennsylvania, the plaintiff and the defendant, who are brothers, entered into a written agreement by which it was provided, in substance, that the defendant, who was an officer in the United States navy, should provide the plaintiff, a young mining engineer, with the necessary funds for prospecting and opening mines, and that, after the sale of any iron ore or other minerals, the plaintiff, from the time of such sale, should bear an equal proportion of the expense; that plaintiff was to do

the leasing, prospecting, developing and practical running of the business, the defendant to be what is known as a silent partner of the firm. It was further provided that all leases, contracts, sales and books of the firm should be kept by and in the name of the plaintiff, and that either partner should have access to the books of the firm at such time as he might feel disposed to examine the same, and that all transactions of the firm should be duly recorded in and after the manner of bookkeeping, as it is generally known in commercial enterprises. No time was fixed for the termination of the partnership. The record discloses that the defendant furnished the money to carry on that part of the business known as the prospecting and opening of mines until about the 1st of September, 1878, and thereafter declined to advance any more money for that purpose, or to further continue the business. The plaintiff alleged in his petition that the defendant, after refusing money to carry on the partnership business, orally agreed that the plaintiff should go forward with the development, equipment and prospecting for new mines with whatever moneys the plaintiff should put in and advance for that purpose, and that the defendant would reimburse the plaintiff therefor within a reasonable time, together with interest thereon; that, pursuant to said contract and understanding, the plaintiff proceeded to lease, develop and equip mining properties, and expended therein on behalf of the defendant large sums of money, relying upon such mutual understanding that the defendant would reimburse the plaintiff for moneys so expended by the plaintiff on his behalf; that from the 12th day of January, 1879, to the 1st day of April, 1906, he expended in said enterprises the sum of $31,400.87; that he was entitled to interest on the sum so invested; and prayed judgment against the defendant for the sum of $29,767.48, together with interest thereon from the 1st day of September, 1907.

For answer to the plaintiff's petition, the defendant entered a plea to the jurisdiction of the court; alleged that

the plaintiff's action was in truth and in fact a suit in equity for an accounting between partners; that no accounting or settlement had ever been had between them; and alleged that the plaintiff's right of action was barred by the statute of limitations, in that it did not accrue to the plaintiff within four years next preceding the commencement of the action. Defendant admitted the making of the written contract; alleged that he had furnished money thereunder to the plaintiff, amounting to $5,300, and upwards; admitted that plaintiff opened some mines in York county, Pennsylvania; alleged that plaintiff took complete charge of the business and had the books and records under his control, and from about the year 1888 refused to give the defendant any information concerning the said partnership business, although often requested so to do, and declared to defendant that he, the defendant, had no interest in such partnership business. Defendant denied the making of the alleged oral agreement, and averred that there was no understanding or agreement of any kind between the parties, except the written partnership agreement set out in the plaintiff's petition. Defendant also alleged that he was informed and believed that plaintiff had sold 140,000 tons of ore and appropriated the proceeds to his own use, and refused to render any account therefor, though often requested so to do; that the defendant had not conversed with or seen the plaintiff since about the year 1890, when the partnership was by both parties considered and treated as abandoned and at an end because of the defendant's exclusion therefrom by the plaintiff; that in 1890 defendant began, in the court of common pleas of Cumberland county, Pennsylvania, a court of competent jurisdiction, and in which state both parties then resided and still reside, a suit in equity against the plaintiff for an accounting of their partnership business; that said suit was still pending and undetermined; and that, though the defendant had entered an appearance therein, he had never filed any answer or submitted any statement or account of the

partnership business; and that said suit is a bar to this action; that in July, 1899, plaintiff, without consulting the defendant, and without his knowledge, entered into a partnership in the same business with one John M. Myers, and prosecuted said business without the consent or knowledge of the defendant, in Hastings county, Ontario, and never gave the defendant any information in relation thereto. The answer also contained other matters which need not be stated in order to dispose of the questions presented by the record. The reply, in substance, was a general denial of the matters alleged in the defendant's answer.

Upon the trial in the district court for Lancaster county the plaintiff testified in his own behalf in relation to the alleged oral contract, as follows: "'Well,' I says, 'maybe in the matter of equipping this mine, if the panic strikes me next year, I may be in debt, maybe $8,000 or $10,000.' He says, 'I don't think that will occur. You go ahead and equip it,' and he says, 'If it should unfortunately terminate in that manner I will make it good. I will see you don't get stuck,' or words to that effect." On cross-examination plaintiff restated the agreement, in substance, as follows: While there were numerous conversations covering a long period of years, I am safe in saying on that very subject that I raised yesterday, and fixed the date as 1878, that was discussed from the time I discovered the ore at Dillsburg in 1876, how we would go about to proceed to equip and furnish this operation with necessary machinery and mine the ore. He positively assured me that in case of failure, panic or otherwise, he would stand by me and see that the money was returned in case of loss and the creditors paid, as his salary was sufficient; and other items which I might state, and go into details and make it very lengthy, if you want me to; that was about the substance of the conversation. Plaintiff also admitted on cross-examination that in 1878 he mined and sold ore, but insisted that such sales were in small quantities. He also admitted that he had refused to make

any statement to the defendant as to the condition of the partnership affairs, and had also refused to allow him to examine the books, giving as his reasons that the defendant was not entitled to know anything about the business until he reimbursed the plaintiff for the several amounts which he claimed to have advanced to him under the alleged oral agreement. The plaintiff further testified that he abandoned their Dillsburg mine, went to Canada and formed a partnership with one Myers to work certain mines or purchase a large quantity of ore in that country without the knowledge or consent of the defendant; that he put into and lost $5,000 by that venture, and he now seeks to charge the defendant with one-half of that loss. He also stated that he had formed a partnership with one Miller, in which he lost heavily; that he had for many years engaged in farming, and had worked during the time covered by his alleged losses and expenditures for other mining companies and corporations from time to time on a salary; that he had at all times refused to render to the defendant any account of the alleged partnership business; that at one time he had borrowed about $600 of the defendant on a direct promise to repay it, but had never fulfilled his promise. Finally, as a part of the plaintiff's cross-examination, a letter written by him to the defendant was put into the record, which is dated July 30, 1887, in which he stated, among other things, that he had shipped and sold 14 car-loads of iron ore in four days, and in which he also said: "In regard to your money business, I propose to pay you all I owe just as soon as I get it."

At the close of the plaintiff's evidence the defendant demurred to its sufficiency, and also asked leave to amend his plea of the statute of limitations, so as to set forth therein the statutes of the state of Pennsylvania. Leave to make the amendment was granted, over the plaintiff's objections, and the statute of limitations of that state was read and transcribed by the reporter and was copied into the record. The court thereupon sustained the demurrer

to the plaintiff's evidence, and dismissed the action for the following, among other reasons: That plaintiff had failed to show any right to be reimbursed for his alleged advancements to the partnership; that his action should have been one for an accounting between partners, and that the present action was barred by the statute of limitations. In response to a question by plaintiff's counsel, the court stated that the action was dismissed for want of jurisdiction, and, in answer to a question of counsel for defendant, the court also declared that his entry would be just simply for a dismissal, without stating the grounds. The brief of counsel for the plaintiff contains several assignments of error which go to questions of procedure, and which are ably argued at great length, but it may be said if the judgment complained of is right, and is the only one which ought to have been rendered, then the errors complained of need not be considered.

In *Bowhay v. Richards,* 81 Neb. 764, it was said: "Where the judgment of the district court is proper upon the undisputed facts shown by the record, it will be affirmed, without considering whether the reasons given by the trial judge for his conclusion were competent and adequate to support the same."

From a careful reading of the whole record, we are satisfied that the judgment of the district court sustaining the defendant's demurrer to the plaintiff's evidence was correct, and its correctness is not challenged by the plaintiff either upon principle or precedent. It follows that the action was properly dismissed.

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

AFFIRMED.

JOHN T. HILL, APPELLANT, V. JOHN FEENY, APPELLEE.

FILED FEBRUARY 29, 1912. No. 16,744.

1. Judgment: REVIVOR: PLEA OF PAYMENT: BURDEN OF PROOF. In a proceeding to revive a dormant judgment, where the judgment debtor pleads payment, a presumption of payment arises, and the burden is upon the judgment creditor to rebut that presumption. *Platte County Bank v. Clark*, 81 Neb. 255; *Wittstruck v. Temple*, 58 Neb. 16.

2. Evidence examined, and *held* insufficient to overcome the presumption of payment.

APPEAL from the district court for Adams county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

*J. E. Willits,* for appellant.

*John C. Stevens, contra.*

BARNES, J.

Proceeding to revive a dormant judgment. The defendant contested the revivor on two grounds: First, that the plaintiff was not the real party in interest or the owner of the judgment; second, by an answer of payment. The defendant prevailed, and the plaintiff has appealed.

It appears that in the year 1890 the Blue Ridge Marble Company, doing business at Nelson, in the state of Georgia, obtained a judgment in the county court of Adams county against John Feeny and Charles Feeny, partners as John Feeny & Son, for $414. At the time the judgment was obtained the plaintiff in the action was represented by the law firm of Dilworth, Smith & Dilworth, who appear to have had no other connection therewith; that in 1891 an execution was issued upon the judgment, which was returned by the officer as wholly unsatisfied; that shortly subsequent to that time the collection of the judgment appears to have been entrusted to an attorney named John A. Castro; that from the year 1891

to the time when the proceeding to revive the judgment was commenced no execution was ever issued thereon, and it appears that no attempt was made by any one to collect it from the present defendant Charles Feeny, who is the surviving member of the firm of John Feeny & Son. It further appears that John Feeny died about 14 years before the commencement of this proceeding. The elder Mr. Dilworth, of the firm of Dilworth, Smith & Dilworth, is dead, and the testimony of the younger Dilworth was not taken in this proceeding. Smith, however, testified that he had nothing to do with the claim since about 1893. It also appears that an application was made by the original plaintiff to revive the judgment, and a motion for security for costs was interposed for the reason that the plaintiff was a nonresident of this state; that, thereupon, the proceeding was dismissed, the judgment was assigned to the appellant herein, and the present proceeding was instituted.

To support his alleged ownership, the appellant testified that he purchased the judgment and took an assignment thereof executed by Mr. Willits, as attorney for the marble company; that in payment for the judgment he gave his note for $200, due in one year without security; that at the time of the trial the note was long past due, and had not been paid, and that payment of the note had never been demanded of him. He further testified that when he purchased the judgment he made no examination of the record to see whether there was any such judgment in existence, and that he would rather there would not have been a judgment.

To support the issue of nonpayment, the president of the marble company testified, over the objections of the defendant, that there were no entries in the books of the company showing payment of the judgment; and testimony to the same effect was given by a Mr. Bane, the present treasurer of the company. The appellant testified that he was still the owner of the judgment; that he knows Charles Feeny, the surviving defendant therein, and that

Feeny had never paid him anything on the judgment. On the other hand, the defendant testified that at one time he was a member of the firm of John Feeny & Son; that his father died 14 years ago; that his father was the active manager of the business; that he remembers the time when the execution was issued on the judgment, and that John A. Castro was then acting for the marble company; that a compromise was effected, and the judgment was then paid and satisfied, and he contributed the sum of $80 for that purpose; that from the time of that settlement until the present proceeding was commenced he never heard anything about the judgment, and no demand had been made upon him for its payment.

Some testimony was introduced tending to show that in 1890 the firm of John Feeny & Son executed a chattel mortgage upon their property, and it is contended that they were therefore insolvent, and that fact is tendered as an excuse for the failure of the marble company to keep the judgment revived, or make any attempt to obtain payment thereof.

Upon this evidence, the district court for Adams county found generally for the defendant, upon the issues joined, and dismissed the proceeding.

It is contended by the appellant that the testimony was sufficient to rebut the presumption of payment which necessarily arises from the facts above stated. On the other hand, defendant has directed our attention to *Platte County Bank v. Clark*, 81 Neb. 255. There the facts were quite similar to those in the case at bar, and it was held: "In a proceeding to revive a dormant judgment, where the judgment debtor pleads payment, a presumption of payment arises, and the burden is upon the judgment creditor to rebut that inference." In the opinion in that case it was said: "Not an admission, express or implied on the part of the appellants, that the debt is unpaid is shown; not an excuse or reason is given for this long delay in attempting to collect the judgment. In the meantime the original judgment creditor has gone out of

business, one of the mesne assignees has removed from the state, one is dead, and the present owner does not testify because of her mental condition. Finally, one of the judgment debtors has become incompetent. There being no individual, or collection of persons, having actual knowledge of the fact, to appear and testify that the debt has not been paid, it seems to us the presumption of payment can only be rebutted by proof of some intervening fact transpiring within a reasonable time, such as a payment of part of the claim, an admission on the part of those to be charged that the debt is unpaid, proof that the debtors have been insolvent and unable to pay, or by proof of some other fact or circumstance, the legitimate tendency of which is to make it more probable than otherwise that the judgment has not in fact been paid. * * * We do not consider that the legitimate tendency of the evidence presented is sufficient to overcome the presumption of payment." If, as was there held, the evidence was insufficient to overcome the presumption of payment, it would seem clear that in the case at bar the district court was justified in arriving at the conclusion that the evidence was insufficient to establish nonpayment and entitle the plaintiff to an order of revivor.

It may also be said that it may be assumed that the general finding of the district court embraced a finding that the plaintiff was not the real party in interest, and was not the owner of the judgment sought to be revived. It follows that upon this record we would not be justified in setting aside the findings and reversing the judgment of the trial court.

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

AFFIRMED.

LETTON, J., not sitting.

JOSEPH W. GRAY ET AL., APPELLEES, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 29, 1912. No. 16,566.

1. Trial: INSTRUCTIONS: ABANDONMENT OF ISSUE. Where at the trial no attempt is made to prove some of the allegations of the petition and plaintiffs abandon one of the grounds upon which they base their right to recover, the issues made by the pleadings as to such matters should be eliminated from the charge to the jury.

2. Waters: OBSTRUCTION OF WATERCOURSE: LIABILITY FOR DAMAGES. Where, about 20 years before the damages complained of, the channel of a natural stream was extended by a ditch, which had been properly established and suitably constructed by the county authorities under the drainage laws, so that the stream flowed under a railroad trestle bridge, and has so continued to flow, and the trestle bridge as originally built was large enough to allow ample opportunity for flood-waters to escape when they overflowed the banks of the ditch, the duty of the railway company with respect to keeping and maintaining a sufficient opening to permit the waters of the stream to pass became the same as it would be if the extended creek channel had been the natural channel, and if any damages were caused by the careless and negligent obstruction of a proper passageway the railway company would be liable for such damages.

3. ———: ———: ———. If, however, in such case, the filling up of a proper and sufficient waterway for the flood-waters was not occasioned by obstructions negligently permitted to remain in and about the trestle, but was caused by a gradual deposit of silt brought down through the extended channel of the creek, and by which gradual deposit the elevation of a portion of the land above the trestle not upon the defendant's right of way was raised to such an extent as to prevent the flood-waters reaching the trestle at the time of the damages complained of, then the defendant cannot be held liable for such damages.

4. Drains: OBSTRUCTIONS: DUTY OF COUNTY. It is the duty of county authorities, under chapter 89, Comp. St. 1907, to keep the channel of a county ditch free from obstructions.

5. Limitation of Actions: ACCRUAL OF CAUSE OF ACTION. Where crops are destroyed by the negligence of a railway company in permitting a waterway which it was its duty to keep open

to become obstructed, the cause of action for such damages accrues at the time the crops are destroyed.

6. Pleading: AMENDMENT OF REPLY. Where the answer alleged that at the time the crops were planted the plaintiffs knew of the conditions, and that in all probability they would be destroyed by flood-waters, it is not error to permit an amendment to the reply setting forth that before the crops were planted the defendant company through its agent promised to clear the waterway so as to drain the plaintiffs' lands, and to admit in evidence proof tending to establish such promise.

7. Evidence: COMPETENCY. The purport of certain letters, set forth in the opinion, *held* to afford no evidence of ratification of such a promise.

8. Trial: QUESTION FOR JURY: OBSTRUCTION OF WATERCOURSE. Where the main point of contention is whether the damming of the flood-waters was caused by the defendant negligently permitting the trestle to become obstructed, or whether the filling in of the trestle was owing to natural causes, and the evidence is conflicting, this question of fact should be submitted to a jury for its determination.

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

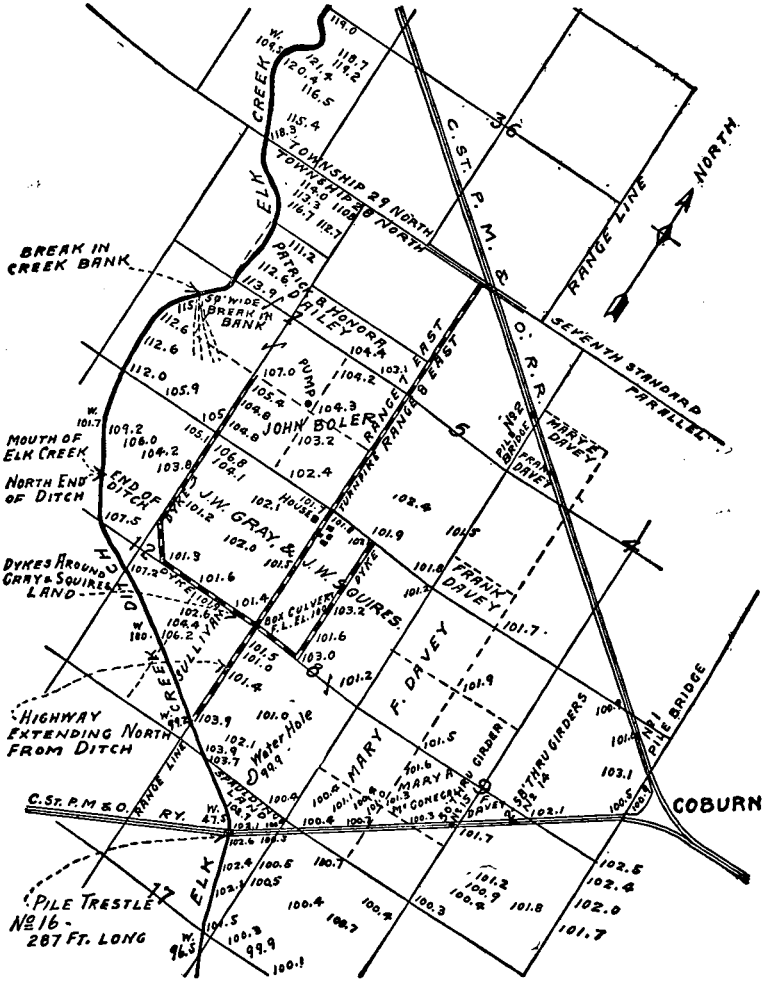
*C. C. Wright, B. T. White, B. H. Dunham* and *Herman Aye,* for appellant.

*R. E. Evans* and *Shull, Farnsworth & Sammis, contra.*

LETTON, J.

This is an action to recover for flood damages to crops in the years 1907 and 1908. The petition, much condensed, alleges that the defendant's railway crosses a running stream, known as "Elk Creek," near plaintiffs' land; that prior to 1885 Elk Creek in that vicinity spread out forming a marsh, and finally draining into the Missouri river; that the drainage of the flood-waters was through and over the marsh; that in 1885 the railway was constructed across the marsh and a trestle about 160 rods long built for the passage of the flood-waters of Elk

Creek, and that the natural flow of these waters was under this trestle; that in 1886 a drainage district was organized and a ditch constructed from Elk Creek through the marsh




and under the trestle for the purpose of draining the ordinary waters of the marsh, but not for the purpose of draining the flood-waters; that afterwards the defendant filled the trestle, leaving about 284 feet, and by so doing negligently failed to leave sufficient openings in the em-

bankment to carry off the flood-waters; that the piling and the trestle were not placed at right angles with the flood-waters, but in a diagonal direction with reference thereto; that a large amount of weeds and debris accumulated around the trestle and dammed the waters, and thereby caused a deposit of debris and sediment which gradually filled the opening under the trestle. It is further alleged that after the ditch was made it became the natural channel of Elk Creek, and that for more than ten years before the matters complained of the flood-waters flowed through the trestle; that the defendant fastened to the trestle two or more strands of barbed wire, by which flood matter coming down the stream choked the channel, filled it with sediment and caused the water to back up and flood the plaintiffs' lands; that there was for many years a space of more than 6 feet between the ground and the stringers of the trestle, but that defendant negligently allowed the space to be filled up to within about 15 inches of the bottom of the stringers; that defendant, in 1906 and 1907, dug a ditch on the northwest side of the trestle in its right of way, and threw the dirt from the excavation out and under the trestle, raising the accumulation of dirt about 18 inches; that before these wrongful acts the flood-waters sometimes overflowed plaintiffs' land, but passed off within a few hours; but that by the filling of the trestle the usual flow of the flood-waters has been cut off, and in case of unusual floods the waters are dammed and held on plaintiffs' land, whereby their crops have been destroyed.

The answer denies negligence and that defendant shortened the trestle; alleges that plaintiffs' land was a swamp when the railroad was built, without watercourse or drain; alleges that Dakota county constructed the drainage ditch, and it was the duty of the county to maintain it and keep it clear; that the injuries received were due to the construction and maintenance of the ditch and to dikes built by plaintiffs around their land which changed the flow of water over the same. It is also alleged that the situation was well known to the plaintiffs before the

crops were planted. The reply alleged that the trestle was originally constructed a half mile in length and was afterwards filled in. During the trial an amendment to the reply was permitted, pleading that in 1906 the defendant agreed, through its agent, C. P. Hill, with the plaintiffs that it would replace a portion of the wooden trestle with a steel span about 60 feet long, and drain the plaintiffs' land, and that the plaintiffs relied upon this agreement in planting their crops in 1907 and 1908.

The evidence consists of about 1,200 pages of typewriting, besides maps, profiles and other exhibits. The court gave 48 instructions. There are 145 assignments of error. It is impossible to do more than mention a few of these, or to give more than a general statement of the evidence.

The line of defendant's railway crosses what is known as "Big Marsh" in Dakota county, which is situated on what is commonly called the "Missouri river bottoms." Elk Creek, which is a stream about 40 miles long, flows in a southeasterly direction through the higher lands to the north and west, and when the railway was built discharged its waters upon the surface of the bottom lands at a point near the southwest corner of plaintiffs' lands. The Elk Creek ditch, which was dug in 1886, began where the creek debouched upon the bottom lands, and after its excavation the waters which formerly were discharged on the surface of the lower lands, thus creating the swamp, were kept within its banks and carried southward under the trestle into a creek. The ditch bottom being lower than the adjoining land, the surface waters drained into it, and for a number of years after it was in operation it successfully drained the land of plaintiffs and others lying in the swamp. At the trial it was admitted by the plaintiffs that the trestle was originally 270 feet long, and that in 1907 it was 283 feet in length, so that it was slightly longer at the time the damage occurred than it was when originally constructed. By this admission the charge of negligence in shortening the trestle was disposed of. These further facts seem established: That in 1885 there

was no defined channel under the trestle, but merely a portion of the swamp, the waters slowly draining southward, and that at that time plaintiffs' lands were marshy and unfit for cultivation, the same as most other land in the vicinity; that plaintiffs suffered loss of crops substantially as alleged; that their lands for a long time after the construction of the railway embankment and ditch, when flooded, drained to the south and east and through and under the trestle, and that the trestle gradually became nearly filled with earth and silt, except where the ditch passed under.

The main point in controversy, and that upon which the decision as to the rights or liabilities of the respective parties must eventually in great measure rest, is whether or not the sediment which caused the partial filling of the trestle was deposited as the natural consequence of the slackening of the current of Elk Creek when it flowed from the higher lands into the ditch and the deposit under a well-known natural law of the matter held in suspension during its more rapid flow, or whether such filling was caused by the negligence of defendant.

An examination of the maps and plats in evidence and the testimony of the engineers shows that the same phenomena have occurred with reference to the banks of the ditch as are apparent on the banks of natural streams under similar conditions. Where a stream which is heavily loaded with silt overflows its banks, the solid material held in suspension, when the rapidity of the current is slackened, tends to settle and be deposited. As a natural result it is almost invariable in Nebraska that the land near the channel on each side of a stream flowing through an alluvial plain is slightly higher in elevation than that which lies farther from the stream. We are probably entitled to take judicial notice of this fact, but, whether we are or not, the testimony found in this record establishes it. The accompanying plat shows that at a point upon the half section line west of plaintiffs' lands where it intersects the ditch the elevation is 107.5,

gradually lowering to the eastward to about 101.3 on plaintiffs' lands, and that all along the line of the ditch to some distance south of the trestle the banks of the ditch are higher and gradually slope away to the nearly level surface lying to the eastward. At a distance of about 600 feet below the trestle the elevation is 102.4 at the ditch bank and 100.5 to the east of it, and 1,200 feet below it is 101.5 at the bank and 100.3 at a point to the east a short distance.

The defendant contends that the waters were surface waters, as to which it owed no duty to plaintiffs; that silt was deposited all along the course of the ditch above and below the trestle by natural causes; that the resulting elevation of lands belonging to private parties lying between the right of way and the plaintiffs' lands prevented the waters reaching the trestle, and consequently that the keeping open of the trestle would have had no effect.

At the trial the plaintiffs seem to have abandoned the theory that the original construction of the railroad embankment and trestle was negligent, and the contention that the trestle has been shortened; in fact, it is said in their brief: "It is not claimed by the plaintiffs that their damages resulted primarily by reason of the construction of a permanent railroad grade to the north and east of the trestle in question. It is probably true that the trestle itself, when free from obstruction, was amply sufficient to provide an outlet for all waters that might come down from above, and the chief complaint of plaintiffs is with relation to the filling in of said trestle and of the right of way immediately adjacent thereto. The point that we make and insist upon is that the obstructions to the flow of the flood-waters from plaintiffs' land existed upon the right of way of the defendant company, and that they arose by reason of the defendant's negligence in permitting the filling up of the trestle with dirt and debris, and that the maintenance of the ditch by the county, whether proper or improper, did not cause the water to be dammed up and held on plaintiff's land with-

out opportunity to flow therefrom in the natural and ordinary way and direction. Also, the defendant was not relieved of the duty of preventing the obstruction to the flow of the water over and across its right of way, even though the county did not properly maintain the ditch, or even though the obstructions formed at or near the ditch at the point where it crossed the right of way."

The court evidently did not take the same view of the issues as the plaintiffs assert in this court. It gave to the jury, in defining the issues, the allegations of the petition at great length, including the charge of negligence in shortening the trestle, which had been eliminated, and further instructed them that "the gist of this action is the charge of negligence and the want of proper care on the part of the defendant in the construction of its trestle bridge across Elk Creek and the openings in the embankment east thereof across what is called 'Big Marsh,'" and that, to entitle plaintiffs to recover, "it must further appear from the evidence that such overflow was directly and naturally caused by the negligent and improper construction of the defendant's trestle bridge and embankment."

Instructions Nos. 7, 9 and 10, which are assigned as erroneous, were based upon this theory of the case. By instruction No. 7 the jury were told that "it was the duty of defendant to so construct the trestle bridge over Elk Creek and to provide openings in the embankment east thereof as to permit the passage in the channel of the creek of such quantities of water as might reasonably be expected or anticipated in ordinary years." The ninth instruction embodies the same idea in greater detail. By the tenth instruction the jury were told that if the defendant constructed such a trestle and embankment, as stated and defined in the preceding instructions, then it would not be guilty of negligence and would not be liable, and that, "on the other hand, if the jury from the evidence believe that the defendant failed to exercise and employ such reasonable and proper care and skill, as stated and

defined in said last preceding instruction, in the construction of said trestle bridge and embankment, and that the overflow on the plaintiffs' land was the direct and natural result of such failure, and that the plaintiffs suffered damages in consequence thereof, then the defendant would be liable in this case for only such damages as were caused by its negligence in backing up said flood-waters and holding the same on crops of plaintiffs." This portion of the charge must have tended to divert the attention of the jury from the questions that were really involved in the case. The facts hereinbefore stated show that they were not applicable to the evidence, and that the jury were thus permitted to base a verdict against the defendant upon facts suggested and implied by the instructions, but not proved by any evidence. These instructions also seem to be inconsistent with others given. That this is the case is not seriously disputed by plaintiffs' counsel, but, say they, the inconsistency was produced by the court giving other instructions stating the law more favorably to the defendant than the facts warranted.

In such a case as this it is a difficult matter for a trial court to state clearly the real issues. Many of the allegations of the petition were not sustained by the evidence, and it was unnecessarily lengthy and involved, so that the task for the court was needlessly harder than it would have been if the pleadings had truly reflected the real issues. In such a case the trial court would be justified in taking all the time necessary, even to the suspending of the trial, to give an opportunity to prepare instructions clearly presenting the true and actual issues to the jury. We believe the instructions given, predicated on the contention that the original construction of the railroad and trestle was negligent, and permitting the jury to consider and return a verdict on such an issue, were prejudicially erroneous to the defendant, as outside of the true issues, confusing and misleading in their tendency. This is more especially so in such a case as this where the question of

liability rests upon such a narrow margin. There was no negligence in the construction of the railroad or trestle in 1879, and the evidence shows that for more than 20 years after the trestle was constructed overflows of Elk Creek and of the ditch were infrequent, that flood-waters were rapidly discharged from the lands of the plaintiffs and others, and that it was only after the bed and banks of the ditch had been raised by the deposit of silt, and after a period or cycle of dry years had given place to a series of years in which rainfall was more abundant, that trouble ensued. It was after a heavy flood in 1906, which brought down much sediment by erosion from the higher lands, that the injuries complained of occurred.

Since there must be a new trial for the giving of the instructions referred to and other errors, we deem it wise to indicate our view upon some of the matters of law in dispute. By instructions given at the request of defendant, the jury were told in substance that the undisputed evidence shows that the county constructed the Elk Creek ditch and changed the course of the waters and increased the volume of the same at the place where the ditch flows under the railroad, and that it is not the duty of the defendant to maintain the ditch, but the duty of the county to maintain the ditch and keep the same free from obstructions across the right of way; "that the defendant company cannot be held liable in this case on account of obstructions in the channel of the Elk Creek ditch, for the reason that there is no duty in the law on the defendant to keep said ditch free from obstructions, and the defendant company could only be made liable in case it wilfully placed obstructions in the channel of said ditch in such a manner as to obstruct the free flow of the water therein and cause the water to overflow its banks." By other instructions the jury were told "that the defendant is not liable on account of any fill under its trestle which was caused by the natural overflow of the Elk Creek ditch;" and, further, that, "if such flood waters caused a deposit of silt and sediment under the railway trestle in question

by the natural operation of said stream, and during the years past caused said trestle to be filled on account of such deposit to such an extent as to destroy the drainage of plaintiffs' land, then the defendant company cannot be held liable therefor in this action."

Do these latter instructions state the law correctly? Was the defendant under any duty, after the ditch was dug and these flood-waters concentrated at and above the trestle, to keep the trestle free from obstructions? If the ditch had been a natural watercourse it would have been its duty to keep and maintain a passageway for the waters which might reasonably be anticipated to flow therein, both while in the channel and while in flood. When Elk Creek was in fact extended under the trestle, did the same duty attach? This was a county ditch, established under the drainage statutes, and, if any additional duties or obligations were imposed upon the defendant by its construction, they were presumably taken into account in estimating benefits or damages when the proceedings to establish the ditch were had. The new channel had been in use for nearly 20 years in 1906. While we believe it to be the duty of the county to keep the channel of the ditch clear, we are also of the opinion that the change in the channel imposed the liability on the defendant to keep its trestle unobstructed to the same extent as if it were a natural stream at that point. Of course, this does not mean that defendant must clear away a general deposit of sediment above the trestle, unless the deposit is caused by a negligent failure to maintain a proper passageway thereunder for the loaded waters; for, if the deposit would have taken place even if the lands had been in their natural state unencumbered by the railway and trestle, the defendant is clearly not responsible for the silting, and not liable for any damages caused thereby. A number of the instructions given at the request of the defendant are inconsistent with this view of the law, and should not be given on a new trial.

As to the measure of damages: If the deposit was oc-

casioned by the negligence of the defendant in allowing the trestle to be obstructed, and could have been prevented by keeping it open to the extent its duty required, then we think that each failure to allow the flood-waters to pass constituted a nuisance, and each recurring damage to the crops thereby furnished a new cause of action. *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237; *Chicago, R. I. & P. R. Co. v. Andreesen,* 62 Neb. 456; *Chicago, B. & Q. R. Co. v. Mitchell,* 74 Neb. 563; *Morse v. Chicago, B. & Q. R. Co.,* 81 Neb. 745; *Reed v. Chicago, B. & Q. R. Co.,* 86 Neb. 54. Unless the filling of the Spalding land lying between the outlet and plaintiffs' lands was occasioned by obstructions negligently permitted to remain at the trestle, defendant is not liable either for damages to the crop or damages to the land; but, if the Spalding land was filled as a result of negligent obstructions to the waterway, then we think the rule stated in the foregoing cases applies.

Defendant also complains that the plaintiffs were permitted to amend their reply so as to allege an agreement by one Hill, defendant's claim agent, made in 1906, after the flood of that year, that the defendant would promptly replace a portion of the trestle with a steel span about 60 feet long, and would ditch and otherwise prepare the land north of the trestle so as to properly drain the plaintiffs' lands, and that in planting the crops in 1907 and 1908 they relied upon this agreement. This amendment was intended as a defense to the allegations of the answer that when these crops were planted the plaintiffs knew the condition of affairs and took the risk. The testimony of Mr. Gray substantially corresponds with this allegation, although the promise is denied by Mr. Hill. We believe the testimony as to the promise to open the waterway and ditches so as to drain the land was connected with the subject with which Hill was authorized to deal, and was properly admissible as excusing the plaintiffs for planting the crops as conditions then existed, and, of course, in proving this the whole statement was narrated. It was

really immaterial whether a new steel span was to be put in or not; the controversy is as to whether there was a promise to open the waterway so as to justify the planting of crops.

In this connection certain correspondence was received over defendant's objection, ostensibly for the purpose of showing a ratification by the defendant of the alleged promise by its agent Hill to erect a new steel span. Exhibit 35 is a letter from Gray to the claim agent describing the flood, making a claim for damages and giving his idea of the cause. It makes no reference to any agreement for a new bridge. Exhibits 36, 37 and 38 merely acknowledge the receipt of the letters by Gray. Exhibit 40 promises an investigation, and says: "If we find that any of this damage is due to lack of waterway, the necessary steps will be taken to remedy the trouble." The remaining letters throw no further light upon the agreement and ratification than do those mentioned. We cannot see that they afford evidence of ratification of the alleged promise made by Hill, and think they should not have been admitted in evidence.

Defendant insists that the evidence of the engineers produced by it as witnesses and also the elevations shown on the various plats introduced by both plaintiffs and defendant conclusively established that obstructions of the trestle were not the proximate cause of the injuries, and that the court should have directed a verdict in its favor. We find, however, testimony on behalf of plaintiffs to the contrary by the witness Johnson, who also is an engineer, and by other witnesses. While we might have taken a different idea had we tried the question, we believe there is sufficient evidence to warrant the submission of the real issues to a jury. If a new trial is had, the issues should be narrowed and clearly presented both in the pleadings and instructions. We feel it our duty to repeat what has frequently been said by this court, that instructions should reflect the real issues, and that if the evidence clearly fails to sustain an issue, or if either party virtually abandons

one or more of the contentions on which he relies, that issue, or that contention, should not be submitted, even though it is made in the pleadings; that the charge should be as brief, clear and connected as may be and at the same time fully and fairly submit the true issues involved, without undue repetition, since it is difficult enough at the best for one unused to the technical phraseology of the law to clearly grasp the meaning of stiff and formal written instructions.

What has been said with reference to the main question being whether or not obstructions to the flow of water through the trestle negligently made caused the damage is not intended to mean that other questions involved which we have not mentioned may not properly be issues in the case. It is impossible, with due regard to the right of other litigants, to extend this opinion so far as to cover every point involved.

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

REVERSED.

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## IDA L. HAAS, APPELLANT, V. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, APPELLEE.

FILED FEBRUARY 29, 1912. No. 17,227.

1. **Process: SUMMONS: AMENDMENT.** A petition was filed against "Mutual Life Insurance Company of New York"; the summons and return thereto named the party defendant in like manner. The proper name of defendant is "The Mutual Life Insurance Company of New York." The summons was served upon the managing agent of defendant. Defendant made a special appearance objecting to the jurisdiction. Before the objections were submitted the plaintiff filed motions to amend the petition, summons, and return by correcting the name of defendant. These motions were sustained. The plea to the jurisdiction was then overruled. The summons was served before the bar of the statute of limitations had fallen; the amendment was made thereafter. *Held*, That it was not erroneous to allow the amendment to be made, and that it related back to the date of the service of the summons upon the proper person.

2. **Judgment:** RES JUDICATA. A general demurrer to a petition was sustained in the circuit court of the United States and the plaintiff given leave to amend; an amended petition was then filed containing additional allegations; a general demurrer was filed to this petition, but while the demurrer was pending, and before submission, the action was dismissed at the plaintiff's request. The petition in this case is substantially identical with the latter petition in the federal court. *Held*, That the ruling upon the demurrer to the first petition and the judgment of voluntary dismissal do not establish the defense of former adjudication.

3. **Insurance:** CONTRACT: PLACE OF CONTRACT: LAWS GOVERNING. Where a resident of Nebraska, who then owned a paid-up policy of insurance in the defendant company, made an application at his home in this state for a new policy to an agent of the defendant who was authorized to transact business for it in this state, and submitted to a medical examination, and delivered to the agent here his paid-up policy with a paper authorizing and directing the company to apply from the surrender value of the former policy the amount of the first two premiums, and pay the remainder to him in cash, and afterwards, without any communication between the applicant and the home office, the agent in this state delivered the new policy and a check for the balance due on the surrender value, the contract was completed in Nebraska, and is to be governed by the laws of this state, and not by those of the state of New York where the home office of the defendant is.

4. ———: ———: ABANDONMENT OF CONTRACT: QUESTION FOR JURY. Whether or not the insurance contract was abandoned is a question of fact for the jury to determine.

5. ———: CONSTRUCTION OF POLICY: FORFEITURE. When the insured died, the insurer had in its possession an accumulated reserve on his policy sufficient to pay the premiums upon the policies for more than three years and until after his death. There being no forfeiture clause in the policy, *held* that the insurance was in force at the time of his death, unless the policies were abandoned.

6. ———: ———: INCONTESTABILITY. The incontestable clause of the policies sued upon does not apply to the defense of lapse or forfeiture by nonpayment of premiums, or to the defense of abandonment of the contract.

7. ———: ———: RIGHTS OF INSURED. There being no forfeiture clause in the policy, its provisions allowing options to the insured of taking a paid-up policy, etc., on default of payment of premium on the day fixed, did not bind the insured to exercise the options,

and he had the right to rely upon the main and not upon the ancillary or subordinate stipulations, if it seemed best to him so to do.

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

*Charles S. Elgutter* and *Joel W. West,* for appellant.

*Montgomery, Hall & Young* and *Frederick L. Allen, contra.*

LETTON, J.

On a previous appeal, opinion reported in 84 Neb. 682, it was determined that a general demurrer to the petition had been erroneously sustained by the district court, and its judgment was reversed and the cause remanded for further proceedings.

The point determined on the former appeal was in substance that, if a policy of life insurance contains no provision for a forfeiture by reason of the failure of the insured to pay subsequent premiums *ad diem,* a failure to pay such premiums on the day named will not of itself forfeit such policy.

On being remanded, issues were made up in the district court, the cause tried, a verdict directed for the defendant, and from a judgment of dismissal plaintiff appeals.

Omitting some unimportant matters, the answer pleads the statute of limitations, former adjudication, and abandonment of the contract by the insured in his lifetime, and further alleges, as the fifth defense, that the policies sued upon are New York contracts and are governed by the laws of that state; that the defendant gave notice to the insured as provided by the statutes of that state of the falling due of the several premiums, and that the notices so given stated that, "unless the payment so due shall be paid to this company by or before the said day, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up

policy as provided by statute." It is then alleged that the premiums were not paid, and that under the laws of New York such failure to pay the premiums caused the policies and each of them to lapse and to become of no effect, except as otherwise provided in the policies; that Haas knew of such result and accepted the policies accordingly. It was further alleged, referring to the clauses in the policy referring to paid-up policy, options, etc., that under sections 88 and 90, laws of New York, 1892, a failure to pay any premium after the third premium would cause the policies to lapse, except for the purpose of obtaining substitute contracts, and that by the laws of New York the rights of delinquent policy holders are limited to those mentioned in section 88. It is also alleged that Haas never requested either a paid-up policy or other optional contract, and that none was issued to him, and that by reason of these laws and the failure of Haas to pay the premium or exercise his options the policies lapsed and became void long before the death of the insured.

The reply consists of general denials; a plea as to the allegations that the contract was a New York contract, that this is no defense on account of failure to give notice as the New York statutes require; and in substance that the contracts were made in Nebraska and are Nebraska contracts.

After the evidence of both parties had been adduced, the district court instructed the jury that the plaintiff was not entitled to recover "on the ground that the policies were forfeited for nonpayment of premiums and notice of forfeiture duly given during the lifetime of Andrew Haas." A number of errors are assigned in the motion for a new trial and in the briefs, but we think it unnecessary to consider them in the order of assignment.

The third defense pleaded is that the action is barred by the statute of limitations. The original petition was filed on the 23d day of April, 1907, against "Mutual Life Insurance Company of New York." The true name of the defendant is *"The* Mutual Life Insurance Company of

New York." The summons and return showed service upon the proper agent of the defendant under the wrong name. Defendant made a special appearance objecting to the jurisdiction, and on June 13, 1907, and before the objections were submitted, the plaintiff filed motions to amend the petition, summons, and return by correcting the name of defendant. These motions were sustained, and the plea to the jurisdiction was overruled. The insured died on the 1st day of May, 1902, so that if the original summons which was served on April 27, 1907, was sufficient to bring it into court, the action was begun within the five-year limitation. Section 144 of the code provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of a party, or a mistake in any other respect." The omission of the article "the" in defendant's name cannot be regarded as fatal when the summons was served on the proper person. The defendant was apprised of the action, and, the summons being served before the bar of the statute fell, the amendment related back and the action was begun in time. Amendatory statutes would be of little use if they could not be applied under such circumstances.

As to the fourth defense: An action was begun on these policies in the circuit court of the United States for this district. A demurrer to an amended petition was filed and sustained. By leave of court a second amended petition was filed, which is identical with the petition in this case. A general demurrer was filed to this petition, but before it was submitted or considered by the court the action was dismissed by the plaintiff. Defendant contends that the second amended petition differed in no essential respect from the first, to which the demurrer was sustained, and, hence, that the order of the court sustaining this demurrer and providing "the plaintiff is granted ten days in which to file amended petition, other-

wise judgment will be entered dismissing said action at the cost of the plaintiff," and the dismissal, was a final adjudication. We cannot take this view. When the second amended petition was filed, if it had been identical in substance with the first, it should have been stricken from the files at defendant's instance. Two additional paragraphs had been added, however, which defendant now insists did not change the legal effect. The federal court and the defendant itself evidently took the second amended petition as *prima facie* evidencing a change in the material facts alleged, or the case would not have been dismissed with an issue of law pending. To hold as defendant urges would require this court to pass upon the question whether that court was right in treating the second petition as being different from the first, and in allowing the case to be dismissed at the plaintiff's request with that question undetermined. This we are not inclined to do.

The fifth defense is based upon the proposition that the policies issued are New York contracts, and that under their provisions and the laws of that state they were forfeited during the lifetime of the insured. The facts relied upon to establish this defense are as follows: At the time applications were made for the two policies Haas was the owner of two paid-up policies for $1,500 each issued by the defendant. One of these policies at this time had a cash surrender value of $522.18. On July 9, 1896, one H. S. Winston, an agent of the defendant, who was a neighbor and friend of the insured, procured from Haas in Omaha an application for a new policy for the sum of $5,500, under an agreement that he should surrender the paid-up policy, that from the cash surrender value two premiums on the new policy should be paid, and the remainder of the surrender value paid in cash. At the same time Mr. and Mrs. Haas executed and delivered to the agent a paper entitled "Conversion Receipt," which acknowledged the receipt from the defendant of $522.18 by them, in full payment of the value of policy No. 677,819

now surrendered to the company for the purpose of converting the policy into another for $5,500, and providing that two of the yearly premiums were to be paid out of the surrender consideration, the remainder, if any, to be paid in cash. This paper was not dated when it was signed, though a blank space was provided for that purpose, but after the application had been approved the date of August 18, 1896, was inserted in the blank space at the company's office in New York. The application, conversion receipt, and old policy were delivered to the agent in Omaha, and Haas took the medical examination there.

The evidence shows that the defendant had appointed a general agent for Iowa and Nebraska, Mr. R. J. Fleming of Des Moines, and that the defendant's business for these states was conducted by himself and brother under the firm name of "Fleming Brothers, Managers." This firm maintained offices in Des Moines and in Omaha, and "Fleming Brothers, Managers" had the general control and management of the business of the defendant in the states named. Soliciting agents were also appointed by the defendant, who were under the direction of Fleming Brothers. Both Fleming Brothers and the soliciting agent, Winston, were authorized to transact business for the defendant company in Nebraska by the state auditor, under the provisions of section 6513, Ann. St. 1911. Winston acted under the immediate direction of Fleming Brothers, Managers. The application and other papers were sent to the home office in New York by the agents, where it was accepted and the new policy No. 775,291 made out. A statement of account was made up and a check drawn for $141.48, which amount, together with the two premiums agreed to be paid, made up the surrender value of the old policy. The policy and check were then sent by mail to Fleming Brothers, Managers, for delivery. The papers were given by them to Winston, the agent, in Omaha. The check, after being indorsed, was cashed by Haas at an Omaha bank, and the policy was found among Haas' papers in

his office in South Omaha after his death. Haas was not in the state of New York in 1896. The second policy was obtained in like manner, except that it was at a later date in the same year. The policies bear stamped on the back: "Any change in address notify Fleming Bros., Managers, Des Moines, Iowa."

Was this contract entered into in New York or in Nebraska? No communication was ever had by mail or otherwise, so far as the evidence shows, between Haas and the defendant at its home office in New York. The agent Winston took the application, received the old policy and the conversion receipt in Omaha, and, after the papers were given to him by Fleming Brothers, there delivered the new policy and the check to Mr. Haas. The defendant places much stress upon a clause in the application that the statements therein made "are offered to the company as a consideration of the contract which I hereby agree to accept, and which shall not take effect until the first premium shall have been paid * * * and the policy shall have been signed by the secretary of the company." It argues that the contract became binding and complete upon the company accepting surrender of the old policy, the secretary signing the new one in New York and mailing it to its agent for delivery, for the reason that the last act necessary to the validity of the control was the conversion to its own use from the surrender value of the old policy of the amount of the first two premiums upon the new. While the liability of the company might perhaps attach under some circumstances even if the policy were never delivered (*Cooper v. Pacific Mutual Life Ins. Co.*, 7 Nev. 117; *Fried v. Royal Ins. Co.*, 50 N. Y. 243), the fact of liability does not always control and determine the question as to the locality of the contract. Other circumstances may enter as factors in the determination of this. The transaction with the agent was not a contract for the new insurance alone. It was for the payment of the surrender value of the old policy as well. This part of the transaction was not completed until the delivery of the

new policy evidencing the application of a part of this value as premium on a new policy, and the payment of the remainder due on the surrender value of the old. These acts were all performed in Nebraska. The defendant is not entitled to sever the transaction and to say that, because a portion of the agreement was carried out in New York, that portion of it which constituted a new insurance contract controlled and governed the legal status of the whole transaction. Moreover, in this contract, as in every other contract, there must be a proposal and an acceptance, and that acceptance communicated to the person who proposed the contract or to some one acting for him and in his behalf. The evidence shows that Haas made the proposal, but that he had no notice or knowledge of its acceptance until the delivery of the policy. The only person with whom he dealt in the transaction was Winston. It was through him he made the proposal, and it was through him he acquired knowledge of the acceptance. If the policy had been sent direct to him by mail, thus evidencing the intention of the insurance company to part with its dominion or right of recall over it, the acceptance would probably be deemed complete, and the constructive notice of such acceptance given by its deposit in the mails would be sufficient. But this is not the case here.

In *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356, the insured was a resident of Missouri. His application for the policy was made in Missouri to the local agent of defendant, accompanied by a note for premiums, and was forwarded by the agent to the home office in the city of New York. Upon the issuance of the policy it was forwarded through defendant's St. Louis office to the local agent for delivery in Missouri. In that case, as in the one at bar, it was contended that, since the premium accompanied the application and a receipt was given which made the contract binding when the application was accepted in New York, the acceptance of the application completed the contract without the actual de-

livery of the policy into the hands of the insured, and that, acceptance having taken place in New York, the transaction was a New York contract.

The conditional receipt referred to provided that the payment of the first two premiums was received "upon condition that, should the said application not be accepted by the New York Life Insurance Company, said note shall be returned upon surrender of this receipt; but, should the risk be accepted, the said insurance shall be in force from this date." After stating the law with regard to the making of contracts by mail, to the effect that where one makes a proposition by mail he thus invites response by mail and makes the mails his agent, the court said: "This does not change the rule of law that an acceptance to be binding must be communicated to the proposer; it only makes the deposit of the letter of acceptance in the mail, under those circumstances, constructive notice to him who made the proposal that his offer has been accepted. Until there is an actual or constructive notice to the other party of the acceptance it is still in the breast of the acceptor and may be revoked before it becomes binding. *Bruner v. Wheaton,* 46 Mo. 363; *Lungstrass v. German Ins. Co.,* 48 Mo. 201. Actual delivery of the policy was not essential to the consummation of the contract, if the company had chosen to signify to the insured by other means that his application was accepted. But the company did not choose to do so; the first intimation that the insured had that his application was accepted was the delivery to him of the policy. When the company resolved to accept the application it kept that resolution within its own breast, and took the precaution to send the policy to its own agent in Missouri to be delivered on condition of payment of the first premium, and withheld from the insured notice of its acceptance. This was simply a resolution within itself, with no outward indication, and within its own power to reconsider and change." The court pointed out that it was within the power of the company to recall the policy at any time while it was yet in the

hands of its own agent, and, while it did not base its decision upon this point alone, it was held that the contract was not complete until the policy was delivered, and, therefore, it was a Missouri contract.

In *Wall v. Equitable Life Assurance Society*, 32 Fed. 273, opinion by Brewer, J., the facts were that the defendant was a New York corporation doing business in the state of Missouri. The insured made his application in that state, which was forwarded to New York. The application was accepted in New York and sent to Missouri for delivery to the applicant there. By the terms of the policy the premiums were payable in New York, and, if the sum insured became payable, the payment was to be made in New York. This was held to be a Missouri contract. In the same case which was taken on error to the supreme court of the United States (*Equitable Life Assurance Society v. Clements*, 140 U. S. 226; *Equitable Life Assurance Society v. Pettus*, 11 Sup. Ct. Rep. 822), the opinion recites that it was alleged, and not denied, that the first and two later premiums were paid in Missouri, and it was implied in the pleadings that the policy was delivered by the company's agent in Missouri. The court say: "There is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri." It was held it was a Missouri contract.

*Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291, 33 Atl. 731. In this case it is said: "Upon these facts the contract was made, and concluded by the delivery and acceptance of the policy—not because of its delivery, but because until that moment the plaintiff had no notice of the acceptance of his application. Prior to that time the plaintiff was at liberty to revoke his application, and the defendants to withdraw their acceptance and countermand their instructions for the delivery of the policy. A proposition does not become a contract until the maker or his

agent is notified of its acceptance. *Beckwith v. Cheever,* 21 N. H. 41; *Stebbins v. Lancashire Ins. Co.,* 60 N. H. 65, 70; *Dickinson v. Dodds,* 2 Ch. Div. (Eng.) 463."

*Expressman's Mutual Benefit Ass'n v. Hurlock,* 91 Md. 585. This was a policy of fire insurance, and, while there may be a difference between policies of life and fire insurance in this respect, the principle as to acceptance applies. See *Heiman v. Phœnix Mutual Life Ins Co.,* 17 Minn. 153 (127).

The general rule is that the state where the application is made and where the premium is paid and the policy delivered is that where the contract is entered into. *Mutual Life Ins. Co. v. Cohen,* 179 U. S. 262; *New York Life Ins. Co. v. Russell,* 77 Fed. 94; *Albro v. Manhattan Life Ins. Co.,* 119 Fed. 629; *Millard v. Brayton,* 177 Mass. 533; *Swing v. Wellington,* 44 Ind. App. 455; *Berry v. Knights Templar & M. L. I. Co.,* 46 Fed. 439; *Knights Templar & M. L. I. Co. v. Berry,* 50 Fed. 511; *Dolan v. Mutual Reserve Fund Life Ass'n,* 173 Mass. 197; *Equitable Life Assurance Society v. Winning,* 58 Fed. 541; *Fletcher v. New York Life Ins. Co.,* 13 Fed. 526; *Roberts v. Winton,* 100 Tenn. 484, 41 L. R. A. 275; *Cowen v. Equitable Life Assurance Society,* 37 Tex. Civ. App. 430, 84 S. W. 404; 1 Cooley, Briefs on Law of Insurance, 564. See exhaustive note to *Johnson v. Mutual Life Ins. Co.,* 63 L. R. A. 833 (180 Mass. 407). Haas was not bound to accept the policy or the check if the policy did not comply with his application. The insured has a right to inspect the policy to see whether it conforms in its stipulations to the terms proposed in the preliminary negotiations. If the policy conforms to the application, the contract becomes complete on delivery, but, if not, then it constitutes a mere counter proposition. 1 Cooley, Briefs on Law of Insurance, 457, 458.

The agreement in the policy that the first premium "shall be paid in advance on the delivery of this policy" requires action by both parties to the contract, payment of the premium by the insured and delivery of

the policy by the insurer, so that it is clear that the intention of both parties as to the ordinary method of paying by money or check was that the last act in the contract should be the delivery of the policy. In *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, it is said: "Where the parties to an insurance contract are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into." We think that the delivery of the conversion receipt, which was in effect an order to apply the money in its hands to the payment of the premiums, was equivalent to payment, so far as the locality of the transaction is concerned, and, the final act of delivery being made here, brings the case within the rule of the cases cited.

At the trial plaintiff offered in evidence certain rules and regulations governing the manner of transacting the business by the defendant's general and local agents. These rules provided that a policy, when sent to an agent for delivery, should not be delivered until the first premium was paid, and unless defendant was in good health and his occupation unchanged, and, further, that at the time of delivery the agent shall take a receipt from the insured reciting that the policy is the one for which he applied and that he has accepted the same. The introduction of these rules in evidence was objected to by the defendant, the objection sustained by the trial court, and this ruling is assigned as error.

The evidence of the assistant actuary of the defendant was taken by deposition. He testified that, when the policies were sent to the general agent who had charge of the territory, he was authorized to accept the first premium and to deliver the policy to the insured, provided that the insured was in good health at that time. The witness also testified that, when the policy was sent to the general agent through whom the application came, the agent would not have authority to deliver the policy if he knew that the applicant was not in good health, unless

the company had issued to him a binding receipt. Objections were made by defendant to the introduction of the printed rules and of all this line of testimony, as being incompetent, irrelevant, and immaterial, and seeking to modify the written contract. These objections were sustained and the evidence excluded. This is complained of by plaintiff. In the view we have taken of the facts in evidence, we think it hardly necessary to determine whether or not the exclusion of this evidence was erroneous. It could throw light on what the purpose of defendant was in sending the policy to its agent for delivery instead of to the insured, and its admission, we are inclined to think, would not have been improper, but we do not so decide.

Haas died from the result of an accident on May 1, 1902. He had paid the premiums due on one policy up to December, 1899, and to July, 1900, on the other, but failed to pay the subsequent premiums. The plaintiff proved that at the time of the defaults the reserve accumulated on policy No. 775,891 was $323.29, and on No. 803,280 $238.18, which, in the case of No. 775,891, would have carried it for its full amount between four and five years, and, in case of policy No. 803,280, would have carried that policy between three and four years, and until after the death of the insured; so that there was more than enough money in the defendant's hands to have kept these policies in force until after after the death of Haas, unless a forfeiture had taken place.

We have already decided in this case that the policies contained no forfeiture clause, and there is no competent evidence in this record to show that a forfeiture was ever attempted to be made or declared in the lifetime of Haas. The reserve in the company's hands was more than sufficient to carry the policies until after the death of Haas, hence, unless in his lifetime he had abandoned or surrendered the contract, the liability became fixed on the happening of that event. In *Rye v. New York Life Ins. Co.*, 88 Neb. 707, the refusal to enforce the contract was

based in part on the fact that there was no reserve in the hands of the insurer at the time the policy matured. We find it unnecessary to consider the New York statutes and cases cited, but merely remark that, in cases where the court found the policies had not been forfeited by notice under the statutes, the views of the courts of that state, if we understand them correctly, are not inconsistent with those herein expressed.

The provisions in the policy giving options to the insured after a default in the payment of premiums on the day fixed must be considered in connection with the law as to the nature of the life insurance contract and the fact of there being no forfeiture clause in the policy. While Haas might have exercised one of these options, he did not choose to do so. He was not bound by his contract so to do, but had the right to rely upon the main and not upon the ancillary or subordinate stipulations, if it seemed best to him. We are also of opinion that the incontestable clause of the policy does not apply to the nonpayment of premiums, and that the insurance company had the right to predicate its defense upon that ground, or on that of abandonment, after the expiration of the time limited in that clause as well as before.

There remains only the question of abandonment. This is a question of fact for the jury to determine under proper instructions.

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

REVERSED.

HAMER, J., not sitting.

GOMER THOMAS, APPELLEE, V. PETER W. SHEA, APPELLANT.

FILED FEBRUARY 29, 1912. No. 16,602.

1. Trial: INSTRUCTIONS: SUBMISSION OF PLEADINGS TO JURY. A judgment will not be reversed because the trial court, instead of stating the issues of fact in concise form, gave an instruction containing the substance of the petition, answer and reply, and permitted the jury to take the pleadings with them to the jury room, where such issues were fairly stated in other instructions, and it appears that the appellant was not prejudiced by the erroneous practice adopted.

2. Libel: TRIAL: DIRECTING VERDICT. An instruction to find for plaintiff in an action for libel, unless the charges therein and each and every part thereof are found to be true, may not be prejudicial to defendant, as requiring stronger proof of the truth of the charges than substantial accuracy and as demanding proof of immaterial statements, where plaintiff, on undisputed evidence, was entitled to a verdict for nominal damages at least.

3. ———: ———: INSTRUCTIONS: REFERENCE TO SPECIFIC EVIDENCE. In the trial of an action for libel, where evidence is admitted to prove charges not pleaded for the purpose of showing malice, it is not error for the trial court in limiting such evidence to that purpose alone to single it out in an instruction.

4. Appeal: INSTRUCTIONS. On appeal, harmless error in an instruction is not a ground of reversal.

5. Trial: WITHDRAWAL OF EVIDENCE BY INSTRUCTION. The admission of improper evidence may be cured by an instruction withdrawing it from the jury.

6. Libel: DAMAGES. In an action for libel resulting in injury to plaintiff in his profession of attorney at law, a verdict for $3,000 *held* not excessive.

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

*C. M. Miller* and *W. S. Morlan,* for appellant.

*John Everson, J. G. Thompson* and *Gomer Thomas, contra.*

ROSE, J.

This is an action for libel, in which plaintiff recovered a judgment for $3,000. Defendant has appealed.

The libel was published a few days before the general election in 1908, when defendant was a member of the county board of Harlan county, and when plaintiff, to succeed himself as county attorney, was the candidate of the democratic, people's independent and republican parties. The libel is a six-column document resembling in appearance the front page of a metropolitan daily. It is addressed "To the Taxpayers of Harlan County," in bold letters nearly an inch high, emphasized by a heavy rule-line. It is introduced by a scarehead warning that plaintiff never would have received the nomination of any party had the honest citizens of Harlan county known how he served them as county attorney during the past two years. A discussion of five cases of public interest follows. If the statements published by defendant are true, plaintiff, in each case, neglected his official duties or betrayed his trust as county attorney. Portions of that part of the publication relating to the cases may be summarized thus:

(1) "Mullally Case." Mullally failed to report for taxation a deposit of money in excess of $17,000, and the assessor was directed by the county board to list it. Mullally appealed to the district court, and there, through a technicality, defeated the county. Afterward plaintiff was elected county attorney, and "advised the board to order an appeal to the supreme court and that he would win the case for the county." An appeal was accordingly taken and briefs costing the county $16 were printed. When plaintiff was present in the supreme court the case was stricken from the docket for want of briefs. "It developed later that the briefs which meant $400 to Harlan county were securely locked in the county attorney's desk in Alma."

(2) "The Wirt Cattle Company's Decision." The

county board refused to strike from the assessment rolls a list of fat cattle on the ground they had been assessed in Colorado. The owner appealed to plaintiff, "who promptly ruled that the cattle were exempt from taxation and that they should be stricken from the schedules." The board "called in all of the Alma attorneys," and stated its positions and findings and plaintiff's opinion overruling the same. They decided plaintiff's opinion was not sound, and that such cattle should be listed, thus saving several thousand dollars to the county.

(3) "Brandt v. Olson." Brandt fenced a highway, and enjoined Olson, a road overseer, from interfering with the fence. The case was appealed to the supreme court. A former county attorney wrote the briefs and turned them over to plaintiff as his successor. Defendant notified other attorneys to be on the alert, expressing the belief that plaintiff was against the county. Brandt's attorney made a motion to strike the case from the docket of the supreme court for want of a brief on behalf of the county, but admitted he had been served with a copy thereof. The court gave the county five days to furnish the missing briefs and the case was argued. Later another attorney found the briefs locked in plaintiff's desk at Alma. The supreme court decided the case in favor of the county, but a rehearing was granted on motion of Brandt. When the case was reargued the county was represented by attorneys Morlan and Miller, but plaintiff was in the supreme court room at the time, and his expenses were paid by the county, "supposing that he was there in the county's interest in the 'Mullally Case.'"

(4) "The Lucas Murder Trial." The trial and acquittal of this man by a Harlan county jury on a change of venue from Phelps county, where he had been charged with murder, is well known. "The stigma resulting from this verdict must remain a blot on the fair name of our county, which will require years to wipe out. Don't forget that at the time of the trial Gomer Thomas was not only county attorney and acting for the county, but

was also in possession of a very liberal retainer from Phelps county to further assist in the selecting of a jury." After the first trial in Harlan county, resulting in a verdict of guilty, defendant was told by one of the jurors that he was approached by two Harlan county citizens, "one of whom made a great effort to influence his verdict in that case, and that he could have made $1,000 for a dishonest verdict." Defendant kept this information in confidence until a new trial was ordered by the supreme court. Before the retrial he told the district judge to acquaint plaintiff with what the juror had said. When the county board met, after Lucas had been acquitted, defendant informed its members and plaintiff what the juror had reported and insisted that the matter should be investigated. At the next meeting plaintiff informed the board that he had seen the juror, who related the conversation substantially as repeated by defendant. There were other suggestions of attempted bribery. Plaintiff stated to the board that the evidence of bribery was insufficient to convict the offenders. Defendant offered a resolution requesting the district judge to convene a grand jury to probe the matter. The resolution was not adopted, but defendant was told by a supervisor that such action would be a useless expenditure of county funds so long as Gomer Thomas remained county attorney. "It certainly could not add to Mr. Thomas' reputation as county prosecutor to have all the ex-professional jury-fixers and railroad lobbyists lined up in the interest of his nomination."

(5) "The K. C. & O. Deal." Plaintiff, as county attorney, read and the board adopted a resolution ordering him to begin an action to annul as unconstitutional the merger of the Kansas City & Omaha Railroad with the Burlington & Missouri River Railroad. Ten months later he entered into a deal with the Burlington & Missouri River Railroad Company by which the latter deeded to the town of Alma some 40 acres of land, the consideration being $1, with the implied understanding that the action would not be pushed.

The foregoing is only a brief summary of a portion of the libel, but it indicates the nature of the accusations, when considered with the conclusion which is here quoted:

"I have *went* into these five cases in some length, and have produced sufficient facts to convince any fair man that County Attorney Thomas, in the five cases cited, gave the county, who pays him his monthly salary, the worst end of the bargain. And, as a matter of fact, Mr. Thomas could not have rendered a greater service to the opposition had he actually been retained by them and accepted their money.

"I fully understand how difficult the undertaking, with at least a show of indorsement by the three largest political parties, and the court house ring at his beck and call, it would be to bring about the defeat of Gomer Thomas for the office which he now holds, and which he brought into disgrace along with the fair name of our county; nothing short of a revolution can accomplish it. But history chronicles successful revolutions.

"Should this revolution be brought about, the taxpayers of Harlan county will witness a grand exodus of jury-fixers, political porch climbers and petty criminals such as this county never witnessed before in its history.

"Should C. M. Miller succeed to the office of county attorney, our people can rest assured that, in the event of another Lucas trial in the county, they will not be compelled to hang their heads for shame when the fact is mentioned. They can rest assured that their interests will be looked after regardless of the wealth of the offender against our laws. And land donations will not suffice to purchase immunity to a faction of our people when the interests of the taxpayers of the entire county are involved. Your humble servant,

"P. W. SHEA, Orleans, Neb."

In his answer defendant admits that he caused the article pleaded in the petition to be printed and that he disseminated it throughout Harlan county. He pleads

that plaintiff at the time was a candidate for the office of county attorney and that the publication was a privileged communication. He further states in his answer: "Each and all the statements contained in said article of and concerning said plaintiff and his doings in said office were true and the same were published and printed without malice, and the same was a communication made by this defendant to the electors of said county in good faith for the sole purpose of advising them of the real character and qualifications of the plaintiff for the office he was then seeking."

The first assignment of error relates to an instruction, wherein the trial court stated to the jury the substance of the pleadings, and closed with these words: "You will be permitted to take the pleadings, viz., the petition, answer and reply to the jury room with you, where you will find the claim of the parties fully set out." The objection to the instruction is that the trial court gave the jury a copy of the petition, answer and reply, without a concise statement of the issues of fact, and allowed the pleadings to be taken to the jury room. With the exception of the libel, which is embodied in the petition and attached as an exhibit, the pleadings are brief. The substance of the allegations of both parties seems to be fairly stated in the instruction. Though the issues were not as concisely stated as they should have been, defendant nevertheless was protected by other parts of the charge. In another instruction the jury were told that the first issue of fact was whether defendant was actuated by malice in publishing the article in controversy. They were also directed to find in his favor unless plaintiff showed the existence of such malice by a preponderance of the evidence. Attention has not been directed to a request by defendant for an instruction containing a precise statement of all of the issues of fact raised by the pleadings. While there is no excuse for the practice adopted by the trial court, the record does not show that the error was prejudicial to defendant.

Defendant also challenges an instruction containing this language: "It is your duty to find a verdict in favor of the plaintiff and against the defendant, unless you further find from the evidence that the charges in said article, and each and every part thereof, to be true as alleged in the answer of defendant, and that the same was published without malice on the part of the defendant, and that its publication was with good motives and for justifiable ends." The argument is that, contrary to this instruction, defendant was in law only required to prove that the material parts of the accusations were substantially true and that the publication was made with good motives and for justifiable ends, without additional proof that he acted without malice. Neither party should have been embarrassed by the obvious blunder disclosed by the language quoted. While defendant pleaded in his answer that "each and all the statements contained in said article of and concerning said plaintiff and his doings in said office were true," this plea did not justify the use of a similar form of expression in the charge to the jury, since the publication contained many immaterial statements which were wholly disregarded in the making of the defense and which could not possibly have injured plaintiff, if shown to be true. There are reasons, however, why the judgment should not be reversed for the error in this instruction. The publication was libelous *per se*. Defendant stated on the witness stand that he sent a few copies outside of Harlan county. He admitted that he sent one copy to Adams county to the district judge before whom defendant practiced his profession. He also sent a copy to Holdrege to the county attorney of Phelps county. These communications were not privileged. There is no proof that defendant circulated the libel outside of Harlan county with good motives and for justifiable ends. To this extent his malice is conclusively established by his own proofs. It follows that when the case was submitted to the jury plaintiff was entitled to a verdict for nominal damages at least.

Plaintiff's right to a verdict having thus been shown, was the erroneous instruction prejudicial to defendant? The first instruction given by the court contained a statement of the pleadings. The language criticised is found in the next instruction, which is here copied in full: "You are instructed that the defendant has admitted that he published and circulated the article set forth by plaintiff. You are also instructed that said article charges the plaintiff with official misconduct, and of corruption in the discharge of his said office, which as a matter of law are libelous charges in themselves, and you are instructed that it is your duty to find a judgment in favor of the plaintiff and against the defendant, unless you further find from the evidence that the charges in said article, and each and every part thereof, to be true as alleged in the answer of defendant, and that the same was published without malice on the part of the defendant, and that its publication was with good motives and for justifiable ends." It will be observed that the charges which defendant, to escape liability, was required to prove were preceded in the same instruction by these words: "Said article charges the plaintiff with official misconduct, and of corruption in the discharge of his said office." It thus appears that the trial court, in requiring proof of the charges, and of "each and every part thereof," had reference to charges of official misconduct and of corruption in office. This is a fair deduction from all of the instructions, which must be interpreted together. Defendant requested and the court gave an instruction that "under the evidence in this case each part of the entire publication set forth in plaintiff's petition is entitled to equal credit with all other parts, and in arriving at a verdict the article alleged to have been published is to be construed by you as a whole, and each part given such construction as will make it consistent, if possible, with all other parts of the same writing." The trial court went further and also instructed the jury: "The defendant had a perfect right, by virtue of being an elector and

member of the board of supervisors of said county, and it was his privilege, to give the public any information on public matters that came within his knowledge and give a reasonably correct account of whatever occurred before the board of supervisors, not necessarily in every word, or every particular, but as to the substance; that is, he had a right to give a correct account of what he saw and knew. If it turns out that it is reasonably correct and he did not go beyond his duty in magnifying or making false statements or anything to show express malice in the case, he had a right to so do, and is in no manner liable to the plaintiff for so doing." In other instructions the jury were told that the truth, when published with good motives and for justifiable ends, is a sufficient defense; that if the statements made were substantially true defendant had a right to publish them, because they were privileged; and that the verdict should be in favor of defendant, unless plaintiff showed by a preponderance of the evidence the existence of malice on part of defendant in publishing the article. It has already been shown that plaintiff on undisputed facts was entitled to a verdict. The instruction criticised related to the liability of defendant for publishing the libel, and not to the measure of damages. When all of the instructions are considered, the jury were not instructed that, if defendant had failed to prove the exact truth of immaterial accusations, they must find for plaintiff. The conclusion is that the instruction does not contain prejudicial error.

Another instruction is criticised on the ground that it gives undue prominence to a part of the evidence. The trial court permitted plaintiff to prove that defendant subsequently published or uttered statements other than those found in the original accusations. The instruction assailed contains a reference to evidence of this character. By it the jury were told the burden was on plaintiff to convince them by a preponderance of the evidence that defendant acted maliciously in publishing his circular. They were also directed, in determining the question of

malice, to "take into consideration all the evidence bearing on the truth or falsity of the facts set out in the circular complained of in the petition, and any other publication or statements made by the defendant, relative to the plaintiff, similar to those charged in the circular complained of, if any such appeared in the evidence, the circular itself, and all the facts and circumstances surrounding the publication." Reference was made to the testimony as to other accusations for the sole purpose of limiting the jury's consideration thereof to the question of malice. This is clearly shown by another instruction directing the jury to consider such evidence for that purpose alone, and making it plain that it could not be considered to prove or enhance damages. The instruction was favorable to defendant, and properly singled out the evidence described with the object of limiting its consideration to the purpose for which it was admitted.

Inconsistency in instructions on the burden of proof is the basis of another assignment of error. Considering the charge as a whole, the instructions on the burden of proof seem to be as favorable to defendant as the law permits. The apparent conflict relates to proof essential to a recovery, or to the establishment of a defense, and not to the measure of damages. For reasons already stated, plaintiff was clearly entitled to a verdict. Under this assignment prejudice to defendant is not shown by the record.

It is further argued that the trial court erred in admitting in evidence proof of libels and slanders having no relation whatever to the substance or import of the publication on which the action is based. It is conceded by defendant that previous publications or repetitions similar to accusations pleaded in an action for libel are admissible in evidence to show malice. *Bloomfield v. Pinn*, 84 Neb. 472; *Fitzgerald v. Young*, 89 Neb. 693. It is insisted, however, that proof of independent charges which may be made the subject of separate suits is inadmissible. This proposition has been ably presented by counsel for de-

fendant, but a determination of the question does not seem to be necessary, for the following reasons: The trial court instructed the jury that damages could not be proved or enhanced by evidence of that character. It has often been held that the admission of improper evidence may be cured by an instruction withdrawing it from the jury. *American Building & Loan Ass'n v. Mordock,* 39 Neb. 413; *Nelson v. Jenkins,* 42 Neb. 133; *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239; *Missouri P. R. Co. v. Fox,* 60 Neb. 531; *Scott v. Flowers,* 60 Neb. 675. Plaintiff's right to recover was fully established by other evidence not disputed, and the jury were not permitted to consider independent accusations in determining the measure of recovery. It seems clear, therefore, that if errors were committed in the manner stated they were not prejudicial to defendant.

Excessive recovery is another ground of complaint. The evidence justifies findings that plaintiff neglected no official duty to the injury of the county, and that all statements reflecting upon his integrity, motives and conduct, or upon his ability and uprightness as a lawyer or public officer, are false. The entire publication was a vicious assault upon plaintiff in his profession of attorney at law. It strikes at his means of livelihood. If the accusations are true, he is unfit to be county attorney or to act professionally for an honest client. Those who believe the charges will not employ him, if they want honest service. Defendant admitted on cross-examination that 2,500 copies were printed and that he distributed 1,400 by mail. In determining compensatory damages in such a case, no method of exact computation can be devised, and the amount of recovery must generally be left to the sound discretion of the jury. Having asserted on appeal that the recovery is excessive, it is incumbent on defendant to establish the error. The reasons urged are not convincing, and substantial grounds for holding that the verdict is excessive have not been found in an examination of the entire record. All of the assignments of error

have been carefully examined without finding a reversible error.

AFFIRMED.

REESE, C. J., took no part.

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EDMOND HANS, APPELLEE, V. AMERICAN TRANSFER COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 29, 1912. No. 16,983.

1. **Trial:** INSTRUCTIONS: REVIEW. In reviewing instructions the charge to the jury should be construed as a whole.
2. **Appeal:** INSTRUCTIONS: REVIEW. An assignment that a particular instruction is erroneous may be overruled on appeal without an examination of its merits, where appellant disregarded the rule requiring him to insert in his abstract the entire charge, if he objects to any part of it.
3. ———: OFFER OF PROOF. Error cannot be predicated on a rejected offer of proof not within the limits of the question asked.
4. **Witnesses:** EXAMINATION. "Questions propounded to a witness must not assume the existence of a fact not proven in the cause." *Bennett v. McDonald*, 59 Neb. 234.

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

*McGilton, Gaines & Smith*, for appellants.

*H. S. Daniel* and *John A. Moore, contra.*

ROSE, J.

While plaintiff was in the employ of defendants, he fell from a wagon-load of manure at a dump in Omaha and broke one of his legs. This is an action to recover damages in the sum of $12,600 for the injuries thus sustained. The negligence imputed to defendants is their failure to furnish a key to keep the king-bolt of the wagon in place.

Defendants denied negligence, and pleaded that plaintiff was intoxicated and that his injury resulted from his own carelessness. The jury rendered a verdict in favor of plaintiff for $1,750, and from a judgment therefor defendants have appealed.

Two instructions are criticised by defendants in this language: "After correctly stating the law with respect to the facts which constitute negligence and of intoxication upon the part of the plaintiff, the jury were told that if they found from a preponderance of the evidence either that the failure upon part of plaintiff to act in a manner in which an ordinarily prudent person would have done under the circumstances, and said failure contributed to cause his injury, or if they found from a preponderance of the evidence that at the time of the accident plaintiff was intoxicated, and such intoxication directly contributed to his injury, then they would be justified in finding the plaintiff guilty of contributory negligence, and in either of such cases their verdict should be for defendants. Our criticism of this instruction is that it lacks the element of command." It is unnecessary to consider the merits of the criticism on the two instructions assailed for the following reasons: The case was submitted on a printed abstract. In the preparation of abstracts the rule relating to instructions is: "Where no objection is made to the giving or refusing of any instruction, omit all, but where there is objection as to the giving or refusal to give any instruction or instructions, set out the whole charge, pointing out specifically the instructions excepted to." 89 Neb. viii. In utter disregard of this rule, the abstract contains only the two instructions criticised, which are numbered 13 and 14. The charge to the jury must be construed as a whole. Without a resort to the official transcript of the proceedings below, it cannot be said that the trial court did not give, at the request of defendants, or on its own motion, an instruction containing the elements of command not found in the instructions appearing in the abstract. Since the merits of defendants'

criticism depend on matters not found in the abstract, the transcript will not be examined in this case for the purpose of establishing error.

The remaining errors assigned are based on the refusal of the trial court to permit the assistant pay clerk of the Union Pacific Railroad Company to answer the following questions: (1) "Do you know the reason why Hans left the services of the Union Pacific?" (2) "You may state why Hans was let out of the services of the Union Pacific." The substance of defendants' argument on this point may be stated thus: Plaintiff testified that at the time of the injury he was a strong, able-bodied man, capable of earning $100 a month; that his regular occupation had been railroad work; that he worked for the Union Pacific four or five months in 1907, having had charge of an engine as foreman of the switchmen, and that he had earned from $100 to $135 a month. The testimony of the assistant pay clerk of the Union Pacific showed that the entire sum earned by plaintiff as switchman during the year 1907 was $70.88, and there was no proof that he had worked for any other railroad company. To meet his proof that he was capable of earning from $100 to $135 a month as switchman, defendants offered to prove that such an occupation was not open to him; that when he had such a position his habits of intoxication unfitted him for the performance of his duties and caused him to lose his employment. Though this argument is directed to both questions and to all of the offers thereunder, the trial court ruled separately on the questions presented, and they will be reviewed separately.

(1) After objections to the question, "Do you know the reason why Hans left the services of the Union Pacific?" had been sustained, defendants offered "to show that the witness knows why," and "that Hans' habits were those of intoxication, so that he was unfitted to perform his duties." The rejection of the first offer was clearly not prejudicial, if proper, and the second was not responsive to the question. Error cannot be predicated on a rejected

offer of proof not within the limits of the question asked. *Barr v. Post,* 56 Neb. 698.

(2) When the trial court sustained objections to the question, "You may state why Hans was let out of the services of the Union Pacific," defendants made the following offer: "We offer to show that the reason why was that because his habits of intoxication were such he was unfitted to perform his duties." The question was propounded on direct examination to defendants' own witness and clearly assumed that plaintiff had been discharged by the Union Pacific, a fact not proved. On that ground the question was improper. "Questions propounded to a witness must not assume the existence of a fact not proven in the cause." *Bennett v. McDonald,* 59 Neb. 234.

No error having been found, the judgment is

AFFIRMED.

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CARL CHRISTIAN PETERSON, APPELLEE, V. JOHN W. PURINTON ET AL., APPELLANTS.

FILED FEBRUARY 29, 1912. No. 16,857.

Appeal: HARMLESS ERROR. A judgment will not be reversed on account of harmless error.

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

*J. J. Thomas, J. W. Purinton* and *Edwin Vail,* for appellants.

*Power & Meeker, contra.*

FAWCETT, J.

This is a suit to foreclose a mortgage for a balance due for the construction of three dwelling-houses. Cross-petition for damages by reason of alleged defects in

workmanship and inferior material used by plaintiff in such construction. Findings and judgment of foreclosure for plaintiff and against defendants on their cross-petition. Defendants appeal.

The points argued by defendants are: (1) That the court erred in permitting plaintiff to amend his petition, asking for a deficiency judgment against the defendant Ida M. Purinton. The reply having specifically admitted "that the contract evidenced by the note and mortgage described in the petition of the plaintiff did not relate to the separate business or estate of the defendant Ida M. Purinton, and was not made upon the faith and credit thereof," we think the amendment of the petition should not have been allowed; but as the decree does not contain either a finding or judgment against Mrs. Purinton, personally, she has nothing to complain of, and the error in permitting the amendment was, therefore, without prejudice. (2) That the court erred in overruling defendants' request for a jury. (3) That the findings and judgment of the court are not sustained by sufficient evidence. These two assignments will be considered together. The evidence is so overwhelmingly against defendants' contention that we do not deem it necessary to set it out here. It shows conclusively that, if there were any defects in material or construction, long after such defects were fully known by Mr. Purinton, he figured up with plaintiff the balance due him upon his contract for the construction of the houses, and adjusted that balance by the giving of the note and mortgage in suit. No other judgment than that entered by the court could have been permitted to stand, and, if a jury had been impaneled, as requested by defendants, it would have been the duty of the trial court to have directed a verdict in favor of plaintiff. Such being the fact, the question as to whether or not a party is entitled to a jury in a case like this need not be considered.

AFFIRMED.

STATE, EX REL. BARTON L. GREEN, APPELLEE, V. E. B. COWLES, COMMISSIONER OF PUBLIC LANDS AND BUILDINGS, ET AL., APPELLANTS.

FILED FEBRUARY 29, 1912. No. 17,027.

1. **School Lands**: LEASES: DEFAULT OF LESSEE: NOTICE. The requirement of section 17, ch. 80, Comp. St. 1911, that, in the event of a default by any lessee of educational lands in the payment of the semiannual rental due the state, the commissioner of public lands and buildings may cause notice to be given to such delinquent lessee or purchaser that, if such delinquency is not paid within 90 days from the date of the service of such notice, his lease or sale contract will be declared forfeited by the board of educational lands and funds, and that the service of the notice contemplated is "to be made by registered letter," is not satisfied by the mailing by the commissioner of the required notice, in a registered letter addressed to a lessee not then living; notwithstanding the fact that said section contains the further proviso that, "In serving the notice of delinquency and forfeiture herein provided for the commissioner shall recognize as the lessee or owner of the lease or sale contract the person, or persons, whose title appears last of record in his office."

2. ———: ———: FORFEITURE: SUBSEQUENT LEASE: DISCRETION OF BOARD. And where the board, acting upon such insufficient notice, forfeits a lease on account of such a default, and again offers the land at public sale, and the county treasurer accepts an application and bid from a proposed subsequent lessee, and makes due report of his proceedings; and the commissioner of public lands and buildings, prior to having executed a lease to such subsequent lessee, becomes advised of the fact of the want of jurisdiction by the board in canceling the former lease, and of the further fact that the executor of the will of such former lessee has made good the default, with interest and all penalties, by payment of the money therefor to the county treasurer, it is not only within the sound discretion, but it is the duty of, the commissioner to refuse to issue a lease to such subsequent lessee.

3. **Mandamus**: DENIAL OF WRIT. In an action for mandamus, where it clearly appears that to compel the respondent to do the act demanded in the application for such writ would be to compel him to do a wrong, the writ will be denied.

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

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

*Barton L. Green, contra.*

FAWCETT, J.

From a judgment of the district court for Lancaster county, awarding the relator a writ of mandamus commanding the respondent to issue to relator a lease of certain saline lands in Lancaster county, respondent appeals.

The case was submitted in the court below upon the pleadings and stipulation of facts. From the affidavit of relator and the stipulation of facts referred to, we are advised: That the land in controversy was sold to one William Robertson on May 14, 1894; that on May 24, 1904, Mr. Robertson died, testate, and letters testamentary were issued March 11, 1905; that the will made no reference to the lands in controversy, but left all of the property of the deceased, not specifically devised, to certain of his children who at the time of the making of the will and at the time of the trial were minors; that on January 1, 1908, default was made in the payment of the annual instalment of interest due the state; that this default continued until after November 17, 1909; that on January 1, 1909, the then commissioner of public lands and buildings sent a notice in writing, by registered letter, addressed to "William Robertson, Lincoln, Neb.," stating that if delinquency was not removed within 90 days from the date of service of said notice his contract would be declared forfeited by the board of educational lands and funds; that the return card for this letter was received and bore the signature "William Robertson;" that this signature was made by an adult son of the deceased, of that name. This son was not one of the children of the deceased who, by the terms of the will, became the owners of the property in controversy or of the leasehold interest therein,

nor is it shown that he was executor of the will or administrator of his father's estate. On October 13, 1909, the board of educational lands and funds declared the contract forfeited, the board at that time being ignorant of the fact that William Robertson was dead and that legal notice of the forfeiture had not been given to his devisees or legal representatives. The land was again offered for sale in public manner on November 8, 1909, after publication of notice for three weeks prior thereto. At this public sale the relator made the highest bid, filed his written application for a lease, and his payment and application were accepted by the county treasurer. The relator subsequently demanded of the respondent a lease for the land, which respondent refused to issue, assigning as his reason for such refusal "that there was irregularity in the notice of delinquency upon said contract issued to William Robertson, for the reason that said William Robertson was deceased at the time notice of delinquency was sought to be served upon him, and for the further reason that the card acknowledging receipt of delinquency issued by the commissioner was signed by some other person than the said William Robertson." The public sale, it will be remembered, was on November 8. The stipulation of facts recites: "Said William Robertson, deceased, left a will, but in it did not specifically refer to said lease, and the executor of said will did not know until after the 9th day of November, 1909, that said William Robertson, deceased, was the owner of record of said lease, but that, as soon as he discovered said fact, he immediately paid to the county treasurer of Lancaster county all of the rentals on said land for the year 1909 and the first half of 1910, with all expenses, premiums and charges required by the said county treasurer, which said sum was by him accepted."

The question presented is simply this: Will the court, in the face of the facts and circumstances above outlined, compel the respondent by mandamus to execute and deliver to the relator a lease for the lands in controversy?

We are unable to discover any theory upon which this should be done. It is not disputed that, under the provisions of the statute, the lease to Mr. Robertson could not be forfeited and the lands again leased, except after due notice of delinquency. The statute in force at the time the Robertson lease was executed required personal service. As subsequently amended it provides: "The service of the notice herein contemplated, to be made by registered letter." Comp. St. 1911, ch. 80, sec. 17. It is contended by the respondent that this amendment is inoperative as against leases executed under the prior statute. We find it unnecessary to decide that question, for the reason that, in our opinion, no notice was served as contemplated by either statute. It is true the statute provides: "In serving the notice of delinquency and forfeiture herein provided for the commissioner shall recognize as the lessee or owner of the lease or sale contract the person, or persons, whose title appears last of record in his office." It is also true that "William Robertson" was the name of the person whose title appeared last of record in the office of the commissioner at the time of the mailing of the notice; but we think it would be imputing to the legislature the most absurd and unheard of ideas of justice to hold that its intention was that the statute requiring notice of delinquency and of a proposed forfeiture could be satisfied by mailing a registered letter to a dead man. A dead man is no man. The moment the breath of life leaves his body he ceases to be a man under every reasonable construction of either law or common sense. If, then, on January 1, 1909, there was no such man in existence as "William Robertson," no notice could be given to him, and it would be the duty of the commissioner to serve the notice upon the heirs, devisees, or executor of the will, of such deceased person. Had the registered letter been mailed to them, it is possible, although we do not so decide, that the forfeiture might have been sustained.

There is another reason why this writ should not issue. It having come to the knowledge of the respondent that

there had been no service of the notice upon the executor or devisees of Mr. Robertson, and that the executor immediately upon learning of the default had removed the same by making full payment of all rentals due, together with all penalties by reason thereof, it was not only within his sound discretion, but it was his duty, to refuse to issue a lease to relator. For him to have issued a lease under such circumstances would have been to perpetrate a wrong and to place the state in a very unenviable light, to say the least. We said in *State v. Scott*, 17 Neb. 686: "We will not grant a mandamus, however, to compel the board to accept a bid for the sale or lease of the school lands unless it is clear that there is an abuse of discretion." In this case it is clear that the respondent was not guilty of any abuse of discretion. The district court, therefore, erred in granting the writ.

The judgment of the district court is reversed and the action dismissed at relator's costs.

REVERSED AND DISMISSED.

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MARY A. BAYER ET AL., APPELLANTS, V. FRANK J. BAYER ET AL., APPELLEES.

FILED FEBRUARY 29, 1912. No. 16,616.

1. **Pleading**: PETITION IN EQUITY: JOINDER OF CAUSES OF ACTION. A demurrer to a petition in equity on the ground that several causes of action are improperly joined cannot be sustained because of uncertainty as to which of the plaintiffs is entitled to the relief demanded. If the uncertainty as to the respective rights of the plaintiffs arises from the language of the grant under which they claim, it is for a court of equity to determine their respective rights.

2. **Quieting Title**: PARTIES. A plaintiff who claims a life interest in real estate may join with those who claim the remainder in an action to quiet title against one in possession who refuses to recognize the right of either and claims the land under a clause in the deed through which all of the plaintiffs derive their rights.

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

*J. L. McPheely,* for appellants.

*Adams & Adams, contra.*

SEDGWICK, J.

This action was begun in the district court for Kearney county by the plaintiff Mary A. Bayer and her six children. Five of the children being under age, the action was brought in their behalf by their mother as next friend and guardian. The defendant Frank J. Bayer filed two several demurrers to the petition, which were sustained, and, the plaintiffs electing not to plead further, the action was dismissed, and the plaintiffs have appealed.

The petition alleges that on the 5th day of December, 1902, one Thomas Bayer and his wife deeded the land in question to the plaintiff Mary A. Bayer and the defendant Frank J. Bayer; that at that time these grantees named in the deed were husband and wife, and the other plaintiffs in this case were their children. The deed is set out in the petition and appears to be in form an ordinary warranty deed to "the legal heirs of the body of Frank J. Bayer and Mary A. Bayer." The deed contained the following provision: "Reserving however unto Frank J. Bayer and Mary Bayer his wife, or either of them so long as they or either of them may not marry again, a life estate in and to said premises. It is further provided that none of the children of said Frank J. and Mary Bayer, or the representatives of a deceased child, shall maintain a partition suit for said premises until the youngest child of said Frank J. and Mary Bayer shall have reached its majority. It is further provided that neither Frank J. Bayer nor Mary Bayer shall have the right to sell or convey their said life estate, the grantors herein intending that the said lands shall be a home for the said

children and their parents until said youngest child shall attain its majority." The petition then alleges that soon after the 3d day of June, 1906, the plaintiff Mary A. Bayer began an action in the district court for Box Butte county for a divorce against the defendant Frank J. Bayer on the ground of extreme cruelty, and for the care and custody of the six children, and for alimony; that in that action judgment was rendered granting her all the relief prayed for, and that she has since that time had the care and custody of the children and provided for them, and that the defendant has not paid the amount adjudged against him in the divorce proceedings. The petition then alleges that in September (without alleging the year) the defendant Frank J. Bayer and the defendant Bonnie Bayer were married, and ever since that time have been living together as husband and wife. The petition demurred to was an amended petition, which appears to have been filed September 18, 1909, so that the alleged marriage must have taken place before that date and after the decree of divorce. There is no direct allegation that the defendants are in possession of the real estate described in the petition, but it is alleged that the defendant Frank J. Bayer farmed the real estate in 1907, 1908 and 1909, and refuses to pay any rent for the same. This, as against a general demurrer, must be taken as a sufficient allegation of possession.

The two demurrers filed by the defendant Frank J. Bayer were upon the ground that "several causes of action were improperly joined," and "for that the petition does not state facts sufficient to constitute a cause of action in favor of the said Mary A. Bayer, plaintiff, and against this defendant," and "for that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against this defendant." There was no oral argument on behalf of the defendant, but the reason for sustaining these demurrers is stated in the brief, as follows: "Our contention is that there was a misjoinder of causes of action; also, that on account of the relation

of the parties the petition did not state facts sufficient to constitute a cause of action in favor of Mary A. Bayer, in her own right, nor did it contain facts sufficient to constitute a cause of action in favor of the children, when joined in the same petition with Mary A. Bayer in her own right." It is then stated in the brief that "the legal title or the fee simple title is conveyed to the legal heirs" of Frank J. Bayer and Mary A. Bayer, and it is also stated in the brief that the provision in the deed reserving "a life estate" to Frank J. Bayer and Mary A. Bayer, his wife, "or either of them so long as they or either of them may not marry again," must be construed to mean that the marriage of either of them would terminate the life estate of both. We think that the defendant is wrong in all of these propositions, and the demurrers should have been overruled.

The suggestion in the brief that the grantor in the deed referred to did not have in mind a divorce for the parties, but had in mind the possible termination of the marriage relation by the death of one of them, cannot be derived from the terms of the deed. The language seems to be plain and unambiguous. The provision contemplates that the marriage might be dissolved, and whether this happened by death or divorce would be immaterial. So long as "either of them" did not marry again he or she would be entitled to a life estate in common with the other, but when one of them married again his or her rights in the land entirely ceased. As the plaintiff Mary A. Bayer has not married again she would seem to be entitled to the use of this land, which right would continue as long as she lived single. This interest is a life estate and the remainder to the children.

The defendants' brief says that if Mary A. Bayer is entitled to the rents and profits, the children are not, and, if the children are entitled, then the mother is not. "Hence, here are two different parties entirely, joined in one petition with no community of interests against a defendant, both asking for relief, based upon the same

subject matter." This urges the doubt whether the mother or her children have a right to maintain the action as a sufficient reason for denying any of them relief. They are all interested in having that doubt resolved, and may maintain their action for that purpose. These defendants cannot complain of their doing so. This question is for a court to determine; and when that court has taken jurisdiction it should do complete justice to all parties. While there is no direct statement in the petition of the interest in the land claimed by the defendants, it sufficiently appears that one of these defendants has claimed and had the use of the land while the divorce proceedings were pending and continuously thereafter. If he does not now claim any interest in the land and is ready to surrender it to the other plaintiffs, he should make it appear by answer, and might avoid costs by so doing. The prayer is for judgment for rent and profits, and that the title may be quieted in the plaintiff's children, and that the defendants be barred from interfering with the title or possession, and for general equitable relief. There can be no doubt that under these facts a court of equity has jurisdiction to determine the rights of the parties in this land and to do complete equity by giving possession of the land to the parties entitled to it.

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

REVERSED.

LETTON, J., not sitting.

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FARMERS & MERCHANTS IRRIGATION COMPANY, APPELLANT, v. S. J. HILL, APPELLEE.

FILED FEBRUARY 29, 1912. No. 16,959.

**Waters:** ACTION ON IRRIGATION CONTRACT: LIABILITY OF SUBSEQUENT GRANTEE. A purchaser of land from one who holds a water-right contract thereon with an irrigation company, and who takes title

thereto by a deed containing the ordinary covenants of warranty, with no reference to the question of water rights, and who refuses to accept water from the company, is not personally liable for the maintenance fee mentioned in the water-right contract between his grantor and the irrigation company, and an action cannot be maintained against him to recover a personal judgment therefor.

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

*E. A. Cook*, for appellant.

*W. A. Stewart* and *H. M. Sinclair, contra.*

HAMER, J.

This is an appeal from the judgment of the district court for Dawson county dismissing the plaintiff's action. A trial was had to the court, and the result was a judgment for the defendant. The plaintiff filed a motion for a new trial upon the ground that the findings and judgment were not supported by sufficient evidence, that they were contrary to the evidence, and that the court erred in dismissing the action.

The plaintiff the Farmers & Merchants Irrigation Company (appellant in this court) commenced an action in the district court for Dawson county against the defendant S. J. Hill to recover a judgment for $750 and interest for a water maintenance fee for the years 1907, 1908 and 1909. The plaintiff alleged that it owned and operated an irrigation canal and furnished water to lands upon which water rights were held, and that the defendant owned section 5, in township 10 north, of range 21 west, in Dawson county, and that one of the main ditches of the plaintiff passed through said land; that there was attached to said land a water right which was evidenced by a "water-right deed" for 500 acres of said land lying under said ditch, which deed was of record at the time the defendant purchased the land; that in this water-right deed there was a provision which required the payment of 50 cents an acre

as an annual maintenance fee; that the plaintiff was engaged in furnishing water to water users under its said canal; that the land of the defendant was susceptible of irrigation; that no part of said maintenance fee had been paid, and that there was due the plaintiff from the defendant $750 and interest. The defendant answered that he was the present owner of the land, but denied all the other matters alleged.

Upon the trial the plaintiff offered in evidence the deed for the land described in the petition, together with the indorsements thereon, all of which were received without objection. There was also offered and received in evidence a "water-right deed" containing the covenants upon which plaintiff predicates its right of action. The deed for the land is one of general warranty running from the Nikaniss Company to the defendant, and contains only the ordinary and usual covenants in such a deed. The water-right deed from the plaintiff to the Nikaniss Company contains the following conditions: "That the said party of the first part (The Farmers & Merchants Irrigation Company), for and in consideration of the sum of $1,750 to it in hand paid, the receipt whereof is hereby acknowledged, and of the further annual payment hereinafter mentioned and provided for, to be made at the times named in this deed, has sold, subject to the limitations and conditions hereinafter named, and by these presents does sell and convey, unto the said party of the second part (Nikaniss Company), and to its heirs, assigns and legal representatives, the right to use water from the canal of the said party of the first part, during the irrigation season of each and every year, in an amount not exceeding the rate of one cubic foot per second of time for each 70 acres of land hereinafter described, to be used upon and for the purpose of irrigating the said land only, the same being situated in the county of Dawson, state of Nebraska, to wit: All that part of section 5, in township 10 north, of range 21 west, lying south of the main canal of the party of the first part (except that part taken up by

slough) containing 500 acres. The said party of the second part, its heirs, assigns and legal representatives agree to pay to the party of the first part, its successors and assigns, as a part of the consideration of this grant, annually in advance, on or before the 1st day of March in each and every year, the further sum of $250, the same being in addition to the consideration above expressed, and the amount named is hereby agreed upon as a liquidated sum as compensation to the first party for maintaining and operating said canal which it hereby promises and agrees to do, and the said party of the second part agrees to make said payments well and truly, at the times herein named, and it is hereby expressly agreed that in case the *second party* shall fail to make said payments promptly, then the first party may at its election collect said sum or sums with 8 per cent. interest thereon from and after default in payment of the same by suit in law or equity. It is further agreed that, if the first party shall elect to take judgment in a court of law for any sum or sums due on said annual payments, the same shall not be a bar to a suit in equity to foreclose the lien herein given. * * * It is further stipulated and agreed, and this conveyance is made upon the express condition, that if the said party of the second part, its heirs, assigns, shall at any time fail, neglect or refuse to make any of the annual payments hereinbefore provided for at the time the same shall become due and payable, according to the terms hereof, the said first party shall have the election, without notice, to *furnish the supply of water*, and to sue for said annual payment in law or equity, at its election, or upon such default to shut off such supply and to cease to furnish water, under the provisions of this deed, until payment is made of all such defaulted annual payments to the party of the first part, with 8 per cent. interest thereon, from the date of default, until the date of payment, and upon such payment, said second party shall be reinstated, with all the rights and privileges theretofore conferred by this deed, and it is expressly stipulated and

agreed that said second party shall not maintain any suit at law or in equity against the party of the first part, based upon the provisions of this contract, while in default of any of the annual payments hereinbefore referred to, the payment of such annual payments being a condition precedent to the performance on the part of the first party." The deed from the Nikaniss Company to Silas J. Hill is of the date April 6, 1906, and was filed for record May 10, 1906. The "water-right deed" from the Farmers & Merchants Irrigation Company to the Nikaniss Company is of the date February 13, 1904, and was filed for record February 24, 1904.

On the trial it was stipulated that the plaintiff was a corporation, and that the defendant had paid no part of the maintenance fee claimed by plaintiff in the petition; that the defendant owned the land at the time of the commencement of the action, and that he has owned it at all times since he purchased the same. It was also stipulated, for the purposes of the case, that at all times mentioned in the petition the plaintiff has been willing and able to furnish water as provided in the "water-right deed," but that the defendant at all times refused to recognize any rights or liabilities by reason of such deed, and refused to ask for water or to accept water thereunder. It was also agreed that the "water-right deed" was duly indexed against the land therein described at the time the same was filed for record.

It is the contention of the plaintiff that the "water-right deed" attached to the land and passed with the change of title, and that therefore the defendant was liable to pay the maintenance fee for each year as it matured. It is said in plaintiff's brief that, "under the rule established by this court, the water-right deed attached to the land, and cannot be severed from it. The appellee, the owner of the land, is the only person who can receive any benefit from this water right, and he in turn should be held liable to pay the annual maintenance fee." Counsel for the plaintiff contends in his brief: "The sole

question in this case is, can appellant maintain a cause of action against appellee to recover this maintenance fee, there having been no expressed assumption of the obligation in the deed conveying the land to the appellee?" The defendant contends that he cannot be held personally liable, and the district court adopted that view and dismissed the case.

The question to be determined is whether the defendant has assumed the obligations of the contract entered into between the irrigation company and the Nikaniss Company, the original owners of the land. The defendant bought the land and received a deed, which was in the ordinary form of a warranty deed, and did not mention or refer to the contract sued upon. By the purchase of the land and by receiving the deed, does the defendant assume the contract of his grantor and is he personally charged with the obligations of such grantor? It is argued that section 6825, Ann. St. 1909, obligates the ditch company to keep its canal in repair, and that therefore the duty which the legislature fixes upon the ditch company creates an obligation on its patrons to provide the funds necessary for the performance of the duty. The contract sought to be enforced is executory. The suit brought is *in personam*. It is brought against the person instead of against the thing, and is not a suit against the land to enforce an alleged lien, but it is an action against the defendant, and the theory upon which it is sought to be maintained of necessity would seem to imply the personal promise of the defendant to pay the money. The conveyance made by the Nikaniss Company to the defendant Hill may have transferred to him all the property rights which the Nikaniss Company had in the land conveyed, but if the grantee did not promise in any manner to assume the obligation of his grantor, how can he be bound? The argument of counsel for plaintiff is that "there was no reservation or suggestion of reservation in the deed from the Nikaniss Company to appellee Hill. That deed (exhibit B), it is submitted, carried with it the water

right attached to this land as an appurtenance to the land. The acceptance of the deed by appellee Hill from the Nikaniss Company was an acceptance of all the incidents attached to or belonging to the land transferred to appellee (defendant) and charged him with the conditions written therein." The defendant Hill is a stranger to the original contract made between the Farmers & Merchants Irrigation Company and the Nikaniss Company. If it may be properly said that the defendant Hill received the deed to the land from the Nikaniss Company with notice that the ditch is an easement, and with notice of all the rights of the ditch company (*Arterburn v. Beard,* 86 Neb. 733), and therefore he is charged with such notice, as is said in *Seng v. Payne,* 87 Neb. 812, it would seem that that does not in any way tend to establish the personal liability of the defendant. Counsel for the plaintiff seems to have been unable to find any case directly in point which supports his contention.

We have attempted to carefully examine each of the several irrigation acts passed by the legislature, and in not one of these acts do we find any attempt to charge the grantee of land purchased under an irrigation ditch with the obligation of his grantor to personally pay for the maintenance of the ditch. The first irrigation law passed was approved February 19, 1877, and is entitled "An act to enable corporations formed for the construction and operation of canals for irrigation and other purposes, to acquire right of way, and to declare any such canals works of internal improvement." Laws 1877, p. 168; Comp. St. 1881, ch. 16, secs. 158, 159. The next irrigation act is chapter 68, laws 1889. This was followed by chapter 40, laws 1893. In 1895 a comprehensive irrigation act was passed. Laws 1895, ch. 69. Section 46 of this particular act is the section referred to in appellant's brief as section 6825, Ann. St. 1909. In that section it is said: "It is hereby made the duty of the owner or owners of any such ditch or canal to keep the same in good repair and to cause the water to flow through the said ditch or canal to

the extent of its capacity during the period between April 15 and November 1 each year, *if the same be demanded and the supply at its source be sufficient.*" We call attention to the language of the statute to the effect that the water is only to be furnished by the ditch owner when "the supply at its source be sufficient." In *Crawford Co. v. Hathaway,* 67 Neb. 325, this court held that the act of 1877 was an implied recognition of the right to appropriate the waters of the public domain according to the custom prevailing in the arid states immediately west of us, and that the irrigation acts of 1889 and 1895 expressly recognized and prescribed the rights of those who had appropriated the public waters and applied them to agricultural uses. By section 42, ch. 69, laws 1895 (Comp. St. 1911, ch. 93*a*, art. II, secs. 42, 43), it is provided: "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided." And in the next section it is said: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied." These sections would seem to make the water in the natural streams of the state the property of the public; that is, the property of the state, subject however to appropriation for beneficial uses. This would seem to be specifically said by Judge SEDGWICK in *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch,* 67 Neb. 377. Section 6924$x^2$, Ann. St. 1911, provides: "Irrigation works constructed under the laws of this state are hereby declared to be common carriers." The further provision contained in the section is: "The owner or operator of any works for the storage, carriage, or diversion of water except irrigation districts must deliver all water legally appropriated to the parties entitled to the use of the water for beneficial purposes, at a reasonable rate, to be fixed by the state railway commission, according to the law in such cases relating to common carriers."

From the statutes and decisions referred to it would seem that the waters in the running streams of the state are public property, subject to be diverted and applied for beneficial uses. That ditches may be constructed to carry the water to agricultural lands for a reasonable compensation would seem proper, and the owner of the land may undoubtedly obligate himself to assist in the construction and maintenance of the ditch. If the owner of the land after incurring an obligation of this kind sells and conveys it, is there any obligation upon the part of his grantee to keep up a maintenance fee, although he has not undertaken to do so by any personal promise?

We think that the following authorities tend to show that the defendant is not personally liable, and some of these decisions perhaps tend to show that he is not liable as grantee for any burden unless he and the plaintiff in the case are privies in estate: 17 Viner, Abridgment of Law and Equity (Privity), p. 534; 2 Bouvier, Law Dictionary; *Hurd v. Curtis,* 19 Pick. (Mass.) 459; *Educational Society v. Varney,* 54 N. H. 376; 2 Washburn, Real Property (6th ed.) secs. 1203-1205; *Cole v. Hughes,* 54 N. Y. 444; *Scott v. McMillan,* 76 N. Y. 141; *Nesbit v. Nesbit,* 1 Taylor (N. Car.) 403 (318); *Webb v. Russell,* 3 T. R. (Eng.) 393; *Keppell v. Bailey,* 2 Myl. & K. (Eng.) 517; 4 Kent, Commentaries, *473; *Mygatt v. Coe,* 124 N. Y. 212; *Pool v. Morris,* 29 Ga. 374; *Patton v. Pitts,* 80 Ala. 373; *Kettle River R. Co. v. Eastern R. Co.,* 41 Minn. 461; *Bloch v. Isham,* 28 Ind. 37; *Weld v. Nichols,* 17 Pick. (Mass.) 538; *Bally v. Wells,* 3 Wils. (Eng.) 25.

In *Fresno Canal & Irrigation Co. v. Rowell,* 22 Pac. 53 (80 Cal. 114), it was held: "Where a grantee of the covenantor had notice of the water right when he purchased the land, but did not know its terms, such knowledge was sufficient to put him upon inquiry, and a failure to do so will not relieve him of the obligation upon the land." In the same case it was held: "Under civil code, Cal., secs. 1460-1462, specifying what covenants run with the land, the covenants under the contract in question do not run

with the land, not being contained in the grant of the estate, and no personal judgment can be had against defendant; but the lien must be foreclosed against the land, he not being a *bona fide* purchaser without notice of the lien." An examination of the civil code of California shows that proceedings against the land by foreclosure of the alleged lien are dependent upon the code of that state. Civil code of California, sections 1460, 1462, 2882, 2884. It will be seen from the foregoing California case that, although the statutes of that state make the lien created by the contract follow the land, yet the court said: "There can be no judgment against the defendant personally for money, but the lien can be enforced by foreclosure against the land, and every grantee who is not a *bona fide* purchaser without notice."

Counsel for the plaintiff cites *Farmers Canal Co. v. Frank*, 72 Neb. 136. We think that case cannot properly be applied to the consideration of this one. It required in its determination the consideration of section 6782, Ann. St. 1903. It was a consideration of the statement required in an application to the state board of irrigation for a permit to appropriate water. This court held that it was necessary to state in such application a description of the land to be irrigated. The thing determined was not whether there was a personal liability for the maintenance of a ditch. It was merely directory concerning the method of appropriating water for irrigation purposes. If A purchases a tract of land upon which there is a mortgage, he does not necessarily assume payment of the mortgage, nor does he become liable in an action at law upon the original note which the mortgage secures. Of course, if he does not pay the note and thereby satisfy the mortgage, he may lose his title to the land by foreclosure. Notwithstanding the fact that he may lose the land, he does not become personally liable upon the note. This is so plain that the citation of any authority would seem to be unnecessary. In *Lexington Bank v. Salling*, 66 Neb. 180, it is held that the conveyance of land subject to out-

standing incumbrances imposes upon the purchaser no obligation to pay such incumbrances. In discussing the case the court said: "It has long been settled in this state that the acceptance of a deed which in express terms conveys land subject to an incumbrance does not impose upon the grantee a personal obligation to pay the debt. He is in such case interested in discharging the incumbrance, but he owes neither the grantor nor the incumbrancer any duty arising *ex contractu*. The transaction being nothing more than the purchase of an equity of redemption, no implied agreement is deducible from it."

We approach the determination of this case with a full realization of the importance of irrigation to the state. While the great bulk of farming in Nebraska is done upon agricultural lands which are not irrigated, yet a very considerable section must always depend upon the successful application of water to agricultural uses. This section of our state is already prosperous and is destined to support a dense population. Irrigation is to be encouraged and protected in every legitimate way.

While the plaintiff may be obliged to furnish the defendant with water for irrigation purposes, if he demands it, and the plaintiff has it, yet the refusal of the defendant to accept the water does not create a personal liability against the defendant.

It is contended by the plaintiff that the maintenance fee is by the terms of the "water-right deed" made a charge upon the land, and that the defendant by his purchase of the land became personally liable for the payment of such maintenance fee. The trouble with this contention is that neither the terms of his deed nor the several irrigation acts impose upon him any such personal liability. We are of opinion that the trial court correctly determined the question before it.

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

AFFIRMED.

# INDEX.


**Abandonment.** See CRIMINAL LAW, 29.

**Abatement.** See CRIMINAL LAW, 8.

**Accord and Satisfaction.**

Plea of accord and satisfaction *held* bad where the performance necessary to constitute the satisfaction was not alleged. *Fredcrick v. Moran* ..... 86

**Acknowledgment.**

Notary *held* not disqualified from taking acknowledgment of mortgage because he was agent of mortgagee, nor because the mortgage was renewal of mortgage in which he had an indirect interest. *Girard Trust Co. v. Null*..... 713

**Action.** See PARTNERSHIP, 2. TRIAL, 1.

1. An action for money had and received will lie to recover money fraudulently secured without consideration. *Martin v. Hutton* ..... 34
2. Where one is induced by fraudulent representations to pay money for relinquishment of entry of land, an action for money had and received will lie without abandonment of the land as a condition precedent. *Martin v. Hutton*..... 34
3. Evidence *held* insufficient to sustain action for money loaned under oral agreement of repayment. *Longnecker v. Longnecker* ..... 784

**Alteration of Instruments.**

1. Where a blank is filled in a written instrument after delivery, *held* a question of authority and not an alteration. *Montgomery v. Dresher* ..... 632
2. The leaving of blanks in a written instrument *held* to imply authority to fill them. *Montgomery v. Dresher* ..... 632

**Animals.** See REPLEVIN, 3, 4.

**Appeal and Error.** See CRIMINAL LAW. DAMAGES, 1, 4. DRAINS, 8. EVIDENCE, 8. INTOXICATING LIQUORS, 13. MANDAMUS, 2. PHYSICIANS AND SURGEONS, 1. RAILROADS, 2, 3. SCHOOLS AND SCHOOL DISTRICTS. TRIAL.

1. A judgment on conflicting evidence will not be set aside unless clearly wrong. *O'Chander v. Dakota County*..... 3

Appeal and Error—*Continued.*

2. Exclusion of evidence which is immaterial unless other proof is made *held* not error, where the further proof is not offered. *Patrick v. Barker* ..... 31
3. In absence of bill of exceptions, it will be presumed that an issue of fact raised by the pleadings was supported by the evidence. *Cady Lumber Co. v. Reed*..... 293
4. It is prejudicial error to submit a controverted defense not supported by evidence. *Sabin v. Cameron* ..... 347
5. Where the evidence is conflicting the verdict will not be set aside. *Jacobs v. Goodrich*..... 478
6. Where limitations were pleaded as defense to action on a note, verdict on conflicting evidence sustained. *Sibley & Davis v. Rodgers* ..... 497
7. On trial to court, the judgment will be affirmed if sustained by sufficient competent evidence. *City of South Omaha v. Omaha B. & T. R. Co*..... 527
8. The record showing nothing to the contrary, it will be presumed that trial court examined and acted upon decisions of another state offered in evidence. *Steinke v. Dobson* .... 616
9. Verdict on conflicting evidence will not be disturbed unless manifestly wrong. *Smith v. McKay*..... 703
10. Where plaintiff, without objection to sufficiency of evidence, requests instructions on a material issue, which are given, he cannot assert that an adverse finding thereon is not sustained by evidence. *Cass County v. Sarpy County*..... 709
11. A party estopped by request for instructions from questioning sufficiency of evidence on one issue is not estopped from questioning its sufficiency on other issues. *Cass County v. Sarpy County* ..... 709
12. A finding on conflicting evidence, in a law action, will not be disturbed, unless manifestly wrong. *Price v. Fouke*..... 736
13. Error cannot be predicated on a rejected offer of proof not within limits of question asked. *Hans v. American Transfer Co.* ..... 834
14. A decision that a petition states a cause of action *held* an adjudication that the facts pleaded will, if proved, entitle plaintiff to the relief demanded. *Patrick v. Barker*..... 31
15. A judgment will not be reversed for variance, unless material and prejudicial. *Patrick v. Barker*..... 31
16. A verdict so clearly wrong as to induce the belief that it must have been found through passion, prejudice or mistake will be set aside. *Garfield v. Hodges & Baldwin*..... 122
17. On appeal, all presumptions are in favor of the correctness of a judgment. *Village of Winside v. Benshoof*..... 131

**Appeal and Error**—*Continued.*

18. Where the issues and evidence in the abstract do not show affirmatively that the judgment is wrong, it will ordinarily be affirmed. *Village of Winside v. Benshoof*..... 131

19. Sufficiency of abstract under sec. 675*f* of the code and supreme court rules 16, 20 (89 Neb. vii). *Modesitt v. St. Joseph & G. I. R. Co*..... 133

20. Where parties on a trial treat allegations of new matter in answer as denied, the supreme court will so treat them, though no reply appears in the record. *Gruenther v. Bank of Monroe* ..... 280

21. Amendment of pleadings in supreme court to conform to the evidence *held* permissible. *Bennett v. Baum* ..... 320

22. Order requiring defendant to make answer more definite will be sustained, unless abuse of discretion appears. *Bennett v. Baum* ..... 320

23. The supreme court may impose terms as a condition to affirmance of judgment. *Sabin v. Cameron* ..... 347

24. Where a case was determined on a stipulation of facts, the supreme court will consider them as true in determining motion for rehearing. *McCarthy v. Benedict* ..... 386

25. Where defendant pleads total failure of consideration of a note, and proves at most only a partial failure, *held* not error to refuse to submit the defense. *Sibley & Davis v. Rodgers* ..... 497

26. Where charges in *quo warranto* were severable, judgment affirmed as to issues properly determined, and reversed as to those upon which there was a failure of proof. *State v. Lincoln Traction Co.* ..... 535

27. In a law action, excess in recovery should be presented to trial court by motion for new trial, to be available on appeal. *Lowe v. Keens* ..... 565

28. In a law action, where the evidence will sustain a finding either way, finding of trial court will be sustained on appeal. *Holmvig v. Dakota County* ..... 576

29. In a law action, where the evidence would sustain a judgment either way, the judgment will be sustained on appeal. *Dorrington v. Sowles* ..... 587

30. To review misconduct of counsel, the alleged misconduct must have been called to attention of court, ruling had, and exception taken. *McDonald v. Brown* ..... 676

31. Nonprejudicial rulings cannot be made grounds of reversal. *Smith v. McKay* ..... 703

32. Where two actions are consolidated and submitted for de-

Appeal and Error—*Concluded.*

termination of all equities of the parties to both actions, failure of court to determine all matters may constitute reversible error. *Western Bridge & Construction Co. v. Cheyenne County* ..... 748

33. A judgment responsive to the undisputed facts will be affirmed, without considering reasons of the trial judge for his conclusion. *Longnecker v. Longnecker* ..... 784

34. Where the judgment responds to the undisputed facts, the supreme court will not consider alleged errors of practice or procedure. *Longnecker v. Longnecker* ..... 784

35. A judgment will not be reversed for harmless error. *Peterson v. Purinton* ..... 837

36. Where, on the entire record, it is evident that defendant was not liable, a verdict in its favor will not be disturbed because instructions on immaterial matters are inaccurate. *Bradley v. Chicago, B. & Q. R. Co.* ..... 28

37. Where complainant made no requests to charge, the instructions will be sustained, unless, when considered together, they are prejudicially erroneous. *Bradley v. Chicago, B. & Q. R. Co.* ..... 28

38. Giving of an unnecessary instruction *held* not reversible error, unless complaining party has been prejudiced. *Johnson v. Ish* ..... 173

39. Judgment will not be reversed for erroneous instruction, where the complaining party has not been prejudiced. *Smith v. Roehrig* ..... 262

40. Alleged error in an instruction will not be considered where no exception was taken, and no reference was made to it in motion for new trial. *Sabin v. Cameron* ..... 347

41. Instruction that employer should use *every* reasonable precaution to safeguard employees *held* not erroneous in view of the entire charge. *Neice v. Farmers Co-Operative Creamery & Supply Co.* ..... 470

42. On appeal, harmless error in instruction is not ground for reversal. *Thomas v. Shea* ..... 823

43. Assignment of error in an instruction will be overruled, unless the abstract contains the entire charge. *Hans v. American Transfer Co.* ..... 834

Assault and Battery. See INTOXICATING LIQUORS, 2.

1. In action for damages for assault, evidence *held* to support verdict for plaintiff. *Kast v. Link* ..... 25

2. In action for assault, instruction as to measure of damages approved. *Kast v. Link* ..... 25

**Assault and Battery—*Concluded.***

3. Damages of $600 *held* not excessive. *Johnson v. Ish*..... 173
4. In action for assault and battery, evidence as to physical condition of assailant's wife *held* properly excluded. *Johnson v. Ish*..... 173
5. Charge that a policeman's star gave assailant no special rights *held* proper. *Johnson v. Ish*..... 173

**Attachment.** See CHATTEL MORTGAGES, 2.

**Banks and Banking.**

Where drawer left money with a bank to pay a check, bank *held* liable to payee without reference to sec. 9330, Ann. St. 1911, requiring acceptance of check to be in writing. *Gruenther v. Bank of Monroe* ..... 280

**Bastardy.**

1. Bastardy proceedings are civil, and not criminal, in their nature. *McDonald v. Brown* ..... 676
2. Written examination of complainant before justice in bastardy proceedings may be given in evidence at the trial by either party. *McDonald v. Brown* ..... 676
3. Where complaint charged the intercourse on September 28, and the evidence showed that it occurred on September 30, an instruction that jury might find defendant guilty whether the intercourse was had on either date *held* not erroneous. *McDonald v. Brown* ..... 676
4. Evidence in bastardy proceedings *held* to sustain verdict and judgment of filiation. *McDonald v. Brown*..... 676

**Bills and Notes.** See APPEAL AND ERROR, 6, 25. EVIDENCE, 3, 4. LIMITATION OF ACTIONS, 1-3. USURY. VENDOR AND PURCHASER, 1.

Holder of note for collection may sue thereon in his own name, if note is indorsed in blank by payee. *Antelope County Bank v. Wright* ..... 621

**Boundaries.**

1. Government monuments *held* to control field notes. *State v. Ball* ..... 307
2. Field notes of government survey *held* presumptively correct. *State v. Ball* ..... 307
3. Proof of error in other surveys *held* not to prevail over field notes of surveyor as to a particular corner. *State v. Ball* ..... 307
4. Evidence *held* to sustain state's contention that land in dispute is part of section 36, township 30, range 32 west of the sixth P. M., in Cherry county, Nebraska. *State v. Ball*, 307

**Boundaries**—*Concluded.*

5. Where government and plat monuments within a business district of a city cannot be found, surveys from curbstones established by legal authority *held* valid. *Jacobs v. Goodrich* ..... 478

**Bridges.** See COUNTIES AND COUNTY OFFICERS, 3-5.

1. It is the duty of a county in repairing a bridge, a part of the highway, to make it safe for the ordinary necessities of the public. *O'Chander v. Dakota County*..... 3
2. In action to recover for repairs to bridge between counties, evidence *held* not to sustain finding that a new bridge was constructed. *Cass County v. Sarpy County*..... 709

**Brokers.** See PLEADING, 5.

1. Inability of vendor to convey good title *held* not to release him from obligation to pay agent's commission. *Reasoner v. Yates* ..... 757
2. That contract for sale of land was canceled by mutual consent of vendor and vendee *held* not to affect agent's right to recover commission. *Reasoner v. Yates* ..... 757
3. General agent *held* liable to subagent for commission, though owner of land refuses to ratify sale or is unable to convey good title. *Reasoner v. Yates* ..... 757
4. In action by agent against owner for commission, where sale was not completed because owner could not furnish good title, *held* not essential to recovery that owner had represented that his title was good. *Reasoner v. Yates*..... 757
5. Sec. 10856, Ann. St. 1911, requiring contracts between owners of land and brokers to be in writing, *held* not to apply to a contract between agent and subagent for a specific commission. *Reasoner v. Yates* ..... 757

**Burglary.**

In a prosecution for burglary, evidence *held* to show malice, and breaking and entering. *Kemplin v. State*..... 655

**Carriers.** See RAILROADS. STREET RAILWAYS, 3.

1. In an action for injury to live stock in transit, evidence *held* to support verdict for plaintiffs. *Modesitt v. St. Joseph & G. I. R. Co.* ..... 133
2. Petition *held* to state a cause of action against carrier for loss of suit case. *O'Grady v. Chicago, B. & Q. R. Co*..... 339
3. Evidence in action for injury to elevator passenger *held* to sustain verdict for plaintiff. *Wagner v. Farmers & Merchants Ins. Co.* ..... 463
4. Instruction in action for injury to elevator passenger *held*

**Carriers**—*Concluded.*
not erroneous as assuming that defendant was negligent. *Wagner v. Farmers & Merchants Ins. Co.* ..... 463
5. In action for death of passenger, refusal of certain requested instruction *held* error. *Shanahan v. Chicago, B. & Q. R. Co.*, 637

**Chattel Mortgages.**
1. Where possession of property remains with mortgagor, and the mortgage, or a copy thereof, is not filed as required by sec. 14, ch. 32, Comp. St. 1893, the mortgage is void as to creditors, irrespective of notice. *Rothchild & Co. v. Van Alstine* ..... 441
2. Purchaser at attachment sale, without notice of an unfiled mortgage, takes the property discharged of the mortgage lien. *Rothchild & Co. v. Van Alstine* ..... 441

**Commerce.** See RAILROADS, 4. WATERS, 5.

**Constitutional Law.** See INTOXICATING LIQUORS, 1. STREET RAILWAYS, 1, 2. TAXATION, 9.
Ch. 147, laws 1909, amending ch. 161, laws 1905, by which certain provisions relating to claims for damages in connection with drainage assessments were omitted therefrom, *held* not in violation of sec. 21, art. I of the constitution. *Nemaha Valley Drainage District v. Marconnit*..... 514

**Contracts.** See INSURANCE, 5, 6.
1. All parts of the transaction will be considered to ascertain whether a consideration sustains a contract. *Bennett v. Baum* ..... 320
2. Where a written contract requires extrinsic evidence to explain it, interpretation is a question of fact. *Sabin v. Cameron* ..... 347
3. In absence of latent ambiguity, interpretation of a written contract is for the court. *Sabin v. Cameron*..... 347
4. A builder who does extra work by request *held* entitled to compensation therefor. *Sabin v. Cameron*..... 347
5. Whether an instrument is an agreement to enter into a lease or a lease must be ascertained from its terms in the light of surrounding circumstances. *Schultz v. Hastings Lodge* ..... 454
6. An agreement in writing *held* to be a contract for a lease, and not a lease. *Schultz v. Hastings Lodge*..... 454
7. A contract for a lease *held* not to create an interest in real estate therein described. *Schultz v. Hastings Lodge*..... 454
8. For breach of contract to lease, the expectant tenant may maintain an action for damages, or for specific performance. *Schultz v. Hastings Lodge*..... 454

Contracts—*Concluded.*

9. Mutual rights of parties to a contract for a lease may be waived by oral declarations and acts of the parties. *Schultz v. Hastings Lodge* ..... 454

10. In action on subscription to pay one-fourth of cost of the nave of a church, plaintiff *held* entitled to prove that defendant was estopped by conduct from urging the defense that the entire building was constructed at one time, instead of the nave alone. *Lowe v. Keens* ..... 565

11. Evidence of builders and contractors as to cost of nave constructed with other parts of a church *held* admissible in action on subscription for construction of the nave. *Lowe v. Keens* ..... 565

12. Contract between adult man and woman that, if she will act as his housekeeper, he will support her and leave her his estate, *held* not against public policy. *Goff v. Supreme Lodge Royal Achates* ..... 578

13. Private seals having been abolished by secs. 11850, 11851, Ann. St. 1911, all contracts are upon the same footing as simple contracts. *Montgomery v. Dresher* ..... 632

Corporations. See DRAINS, 12, 14, 16. INJUNCTION. INSURANCE, 1, 2. SALES, 8. STATUTE OF FRAUDS, 1. STREET RAILWAYS.

1. Corporation retaining benefit of transaction induced by fraud of agent *held* liable to injured party. *First Nat. Bank v. Exchange Bank*..... 225

2. Power of corporation to increase its capital stock is a trust, and must be so exercised that every stockholder may subscribe for the increased issue in proportion to his prior holding. *Bennett v. Baum* ..... 320

3. Where all stockholders of a corporation and the corporation are before a court, and rights of third persons will not be prejudiced, rules of equitable estoppel will be applied to prevent injustice. *Bennett v. Baum*..... 320

4. Stockholder accepting stock in corporation reorganized on account of defect in original incorporation *held* estopped to assert that the first one is legal and the subsequent one illegal. *Bennett v. Baum* ..... 320

5. A defendant who relies on failure of nonresident corporation to comply with ch. 16, Comp. St. 1907, must plead and prove facts showing noncompliance therewith. *Armsby Co. v. Raymond Bros.-Clarke Co*..... 553

Costs. See INTOXICATING LIQUORS, 15.

Allowance of costs against the corporation, in suit by stockholders for an accounting, approved. *Bennett v. Baum*.... 320

**Counties and County Officers.** See BRIDGES. DRAINS, 17-20.

1. A county treasurer who receives anything of value for the use of county funds is liable on his bond for the profit. *Furnas County v. Evans* ..... 37
2. Petition in an action on county treasurer's bond for receiving interest on county funds after enactment of ch. 56, laws 1891, *held* to state a cause of action. *Furnas County v. Evans* ..... 37
3. Where a county collected a bridge fund and made a contract for a bridge, and thereafter a new county was organized out of that part of the county in which the bridge was to be constructed, *held* that the former county could not abrogate the contract without the consent of the new county. *Western Bridge & Construction Co. v. Cheyenne County* ..... 748
4. County *held* liable for bridge, constructed in a new county organized from territory of the former, to amount of taxes previously collected for its construction. *Western Bridge & Construction Co. v. Cheyenne County* ..... 748
5. Where a county was divided, and in the division of property under sec. 16, art. I, ch. 18, Comp. St. 1911, the new county was entitled to one-third of a bridge fund in the treasury of the former county, *held* that the former county could apply the fund in part payment of a bridge constructed in the new county. *Western Bridge & Construction Co. v. Cheyenne County* ..... 748

**Criminal Law.** See BURGLARY. HOMICIDE. INDICTMENT AND INFORMATION. LARCENY.

1. Under sec. 436 of the criminal code, *held* error to require accused to immediately proceed with trial, without arraignment, after amendment of void information. *McKay v. State* ..... 63
2. One accused of felony *held* not placed in jeopardy a second time by being forced to proceed with trial immediately on amendment of void information. *McKay v. State*..... 63
3. Under sec. 20, ch. 7, Comp. St. 1911, private counsel *held* permitted to assist in prosecution for felony only when procured by the county attorney under direction of the district court. *McKay v. State* ..... 63
4. Order by district court, at opening of trial, permitting attorney appearing as private prosecutor to assist in the prosecution, *held* not a compliance with the statute. *McKay v. State* ..... 63
5. Overruling of timely objection to participation of private counsel in prosecution for felony *held* error. *McKay v. State* ..... 63

Criminal Law—*Continued.*

6. One accused of a crime *held* entitled to trial upon competent, relevant evidence. *McKay v. State* ..... 63
7. Rule calling for instruction as to weight of testimony of informers, detectives, or other persons employed to hunt up testimony against accused, *held* not to apply to county attorney, sheriff, or deputy. *Keezer v. State* ..... 238
8. Death of party convicted of felony, pending error proceedings, *held* to abate the proceedings. *Stanisics v. State* ... 278
9. Jurors should consider all the evidence bearing on mental capacity of accused, and should not be instructed to only consider opinions of experts. *Davis v. State*..... 361
10. Where there is evidence to impair the presumption that accused was sane, the state must prove beyond all reasonable doubt that he was mentally competent. *Davis v. State*.... 361
11. An erroneous instruction is not cured by another contradicting it. *Davis v. State* ..... 361
12. In a prosecution for murder in the first degree, *held* not reversible error to instruct on different grades of homicide, including murder in the first degree, though that charge is afterwards withdrawn and the case submitted on charges of murder in the second degree and manslaughter. *Flege v. State* ..... 390
13. Request for instruction that evidence of good character may be relied on to raise a doubt of defendant's guilt sufficient to acquit him *held* properly denied. *Flege v. State* ..... 390
14. Presumption of innocence of accused continues until overcome by evidence establishing guilt beyond a reasonable doubt. *Flege v. State* ..... 390
15. Rulings on exclusion of evidence considered. *Flege v. State* ..... 390
16. In a prosecution for murder, when the circumstances of the killing are proved, instruction that the law implies malice therefrom *held* erroneous. *Flege v. State* ..... 390
17. Instruction as to the circumstances under which the law will imply malice *held* to have no application to the evidence. *Flege v. State* ..... 390
18. Instructions attempting to define "reasonable doubt" *held* erroneous and prejudicial. *Flege v. State*..... 390
19. When time of murder is in dispute, but there is no question as to whereabouts of defendant at any time, *held* error to instruct that defendant relies on proof of alibi. *Flege v. State* ..... 390
20. Instruction that, if contradictory statements were made at former hearing through an honest fear of personal violence,

**Criminal Law**—*Concluded.*
they would not operate as impeaching statements, *held* erroneous. *Flege v. State* ..... 390
21. Instruction defining motive for crime should explain its application to the case in hand. *Flege v. State*..... 390
22. Instruction referring to "the pistol-shot wounds inflicted by the defendant" *held* incorrect, as assuming that defendant inflicted the wounds. *Flege v. State* ..... 390
23. In a criminal prosecution, based on the explosive quality of a substance, the utmost care should be taken in preserving it and its identity. *Erdman v. State* ..... 642
24. In prosecution for assault with intent to murder, evidence as to the procuring of dynamite by accused *held* too remote and of no probative force. *Erdman v. State* ..... 642
25. In prosecution for assault with intent to murder, certain evidence *held* immaterial, irrelevant, and prejudicial. *Erdman v. State* ..... 642
26. Reading by state's attorney of written statement by a witness conflicting with her testimony, after she testified she had concluded the statement was erroneous, *held* error. *Erdman v. State* ..... 642
27. Indorsement of name of additional witness on information after three jurors had been called *held* not prejudicial. *Kemplin v. State* ..... 655
28. Where a court has fully charged as to the law applicable to the facts, it is not required to give additional instructions. *Graham v. State* ..... 658
29. If the record contains competent evidence to sustain charge of wife abandonment, verdict will not be set aside. *Graham v. State* ..... 658
30. Limitation of time of argument *held* not ground of reversal, where no abuse of discretion is shown. *Graham v. State*.. 658

**Crops.** See LIMITATION OF ACTIONS, 4. PLEADING, 12. WATERS, 9.

**Customs and Usages.**
Evidence *held* sufficient to establish a custom. *Glantz v. Chicago, B. & Q. R. Co*..... 606

**Damages.** See ASSAULT AND BATTERY. EMINENT DOMAIN, 3. INTOXICATING LIQUORS, 13-15. LANDLORD AND TENANT. LIBEL AND SLANDER, 1, 3. PHYSICIANS AND SURGEONS, 4. SALES, 3, 4, 8-10.
1. In an action for injury to realty and for conversion of personalty, *held* error to permit plaintiff to show the entire damage by evidence as to the value of the farm before and after the injury and conversion. *Werger v. Steffens*..... 51

**Damages**—*Concluded.*

2. In action for death, verdict for $5,450 *held* not so excessive as to require a reversal. *O'Grady v. Union Stock Yards Co.*, 138
3. Verdict for $3,000 damages for personal injury *held* not excessive. *Neice v. Farmers Co-Operative Creamery & Supply Co.* ..... 470
4. In action for damages, if evidence shows that plaintiff was damaged in at least the amount found, judgment will not be reversed because exact amount is not definitely shown. *Steinke v. Dobson* ..... 616

**Deeds.** See MORTGAGES, 5, 11. WATERS, 10. WILLS, 15.

1. Delivery of deed by grantor to third person to be delivered to grantee *held* equivalent to delivery to grantee. *Haas v. Wellner* ..... 160
2. Covenant in deed against incumbrances is not broken by grantor's nonpayment of taxes which are not a lien until after deed is delivered. *Taylor v. Harvey* ..... 562
3. In a contest between heirs of the whole blood and of the half-blood of intestate, parol evidence *held* admissible to prove that the sole consideration for a deed to intestate from his mother was love and affection, notwithstanding the sole recital of a consideration is a substantial, valuable consideration. *Harman v. Fisher* ..... 688

**Depositions.**

Objection to deposition for defect in the certificate will not be considered unless in writing and filed before trial. *Essex v. Ksensky* ..... 437

**Descent and Distribution.** See DEEDS, 3. TAXATION, 9-13.

**Devises.** See WILLS, 2-4.

**Divorce.** See HUSBAND AND WIFE.

1. In suit for divorce, where neither party was blameless, decree dismissing petition and cross-petition affirmed. *Goings v. Goings* ..... 148
2. In suit by wife for absolute divorce, in which defendant seeks a similar decree, whether such decree should be granted to either party, or a decree from bed and board granted to the wife, *held* within the discretion of the court. *Goings v. Goings* ..... 148
3. On decree of divorce from bed and board, where property has been accumulated by the joint efforts of husband and wife, provision will be made for maintenance of wife. *Goings v. Goings* ..... 148
4. Though false accusations of marital infidelity may constitute extreme cruelty, whether divorce should be granted on that ground depends upon the facts of the case. *Votaw v. Votaw*, 699

**Domicile.**

Facts stated *held* to show change of residence. *Whitford v. Kinzel* ..... 573

**Drains.** See CONSTITUTIONAL LAW. WATERS, 9.

1. Under ch. 153, laws 1907, implied authority *held* given to apportion to highways within a drainage district their due proportion of the cost of drainage. *Cuming County v. Bancroft Drainage District* ..... 81
2. That units of cost of drainage are apportioned to a whole road, instead of to the portion benefited, *held* not to render the apportionment void, if limited to actual benefits. *Cuming County v. Bancroft Drainage District* ..... 81
3. School lands sold by the state under contract are properly included in a drainage district, and assessable for benefits; but, if sold for such special assessments, sec. 223, ch. 77, art. I, Comp. St. 1911, applies, and the rights of the state in the land are not affected thereby. *Morehouse v. Elkhorn River Drainage District* ..... 406
4. In levying drainage assessment, land taken for right of way of ditch *held* not assessable to owner from whom it is taken. *Nemaha Valley Drainage District v. Stocker* ..... 507
5. Drainage assessment upheld, where the improvement specially benefited each tract as a whole, though portions were not susceptible of cultivation. *Nemaha Valley Drainage District v. Stocker* ..... 507
6. Evidence *held* to sustain judgment determining drainage assessment. *Nemaha Valley Drainage District v. Skeen*... 510
7. To sustain a drainage assessment under ch. 161, laws 1905, the levy need not be confined to the portion of a tract liable to be covered with water in times of flood. *Nemaha Valley Drainage District v. Higgins* ..... 513
8. Jurisdiction is conferred on the district court on appeal from a drainage assessment under ch. 161, laws 1905, by filing a transcript of the hearing with the clerk of the court. *Nemaha Valley Drainage District v. Marconnit* ..... 514
9. That some of the laterals in a general scheme of drainage do not directly benefit a landowner will not relieve his land of its fair proportion of the common burden. *Nemaha Valley Drainage District v. Marconnit* ..... 514
10. That an exact measurement of benefits to lands in a drainage district cannot be made in advance does not render the damages speculative. *Nemaha Valley Drainage District v. Marconnit* ..... 514
11. On appeal from drainage assessment, evidence *held* to sustain findings and decree. *Nemaha Valley Drainage District v. Marconnit* ..... 514

Drains—*Concluded.*

12. In the taking or damaging of private property by a drainage district corporation, the same principles apply as to damages as in exercise of right of eminent domain for other purposes. *Nemaha Valley Drainage District v. Marconnit*.. 514
13. A landowner may sue to recover actual pecuniary loss sustained by reason of construction of drains. *Nemaha Valley Drainage District v. Marconnit* ..... 514
14. A drainage district corporation founded under ch. 161, laws 1905, by the terms of sec. 37 is a body politic and corporate, and may sue and be sued. *Nemaha Valley Drainage District v. Marconnit* ..... 514
15. A topographical survey, maps, and profiles for a drainage district, made by an engineer in conformity to ch. 161, laws 1905, and filed January, 1909, *held* sufficient to vest the board of supervisors with jurisdiction. *Nemaha Valley Drainage District v. Marconnit* ..... 514
16. One signing articles of incorporation for formation of drainage district under ch. 161, laws 1905, cannot limit the powers of the corporation by expressions in petition for formation of the district. *Nemaha Valley Drainage District v. Marconnit* ..... 514
17. Official employment of drainage engineer by county board, under sec. 5506, laws 1903, *held* to relate back to beginning of work under oral direction of members of board. *Holmvig v. Dakota County*..... 576
18. Where a county board, after having established a ditch and employed an engineer, under secs. 5500, 5506, Ann. St. 1903, subsequently rescinds its action establishing the ditch without notice to the engineer, he will be entitled to reasonable compensation for subsequent services and expenses. *Holmvig v. Dakota County*..... 576
19. County, and not petitioners for ditch improvement, *held* liable for services of engineer. *Holmvig v. Dakota County*, 576
20. Under ch. 89, Comp. St. 1907, county authorities must keep the channel of a county ditch free from obstructions. *Gray v. Chicago, St. P., M. & O. R. Co*..... 795

Ejectment. See EXECUTORS AND ADMINISTRATORS.

1. Probate record of foreign-probated will admitted to probate in Nebraska *held* admissible in evidence in ejectment by administrator of estate of devisee. *Tillson v. Holloway* ..... 481
2. Where defendant in ejectment pleads, and offers evidence tending to prove, purchase of land in dispute from testator, under whose will plaintiff claims, *held* error not to determine the issue. *Tillson v. Holloway* ..... 481

**Elections.**

In election contest, ballots and other records of the election sufficiently identified *held* not to be excluded because of negligence of officers in caring for them. *State v. Barr*.... 766

**Eminent Domain.** See CONSTITUTIONAL LAW. DRAINS, 12, 13.

1. Petition *held* not to sufficiently allege that plaintiff's property had been damaged by erection of standpipe by city. *Bonge v. Village of Winnctoon* ..... 260
2. Petition for damages from erection of standpipe *held* to allege a simple trespass by officers, for which city would not be liable. *Bonge v. Village of Winnetoon* ..... 260
3. Where a carrier by condemnation acquired the right to maintain tracks for storage of cars on certain streets in city of South Omaha, the city *held* entitled to substantial damages, in view of sec. 20, art. II, ch. 13, Comp. St. 1901. *City of South Omaha v. Omaha B. & T. R. Co*..... 527

**Equity.** See PLEADING, 13. RECEIVERS. TRUSTS, 1.

Sec. 106 of the code, requiring that cross-demands compensate each other, *held* to apply in equity. *Taylor v. Harvey*.... 770

**Estoppel.** See APPEAL AND ERROR, 11. CORPORATIONS, 3, 4. GUARDIAN AND WARD.

1. Mere delay by the state in asserting title to a disputed tract of school land *held* not to bar its right to quiet title thereto. *State v. Ball* ..... 307
2. Unauthorized acts of taxing officers in collecting taxes on school lands *held* not to estop the state from asserting its title thereto. *State v. Ball*..... 307

**Evidence.** See APPEAL AND ERROR. BASTARDY, 2, 4. BOUNDARIES. CONTRACTS, 10, 11. CRIMINAL LAW. DEEDS, 3. DEPOSITIONS. EJECTMENT, 1. ELECTIONS. INSURANCE, 14-16. JUDGMENT, 1, 2, 14, 15. LIMITATION OF ACTIONS, 1, 3. MASTER AND SERVANT, 2-4. MORTGAGES, 3, 4, 7, 10. MUNICIPAL CORPORATIONS, 2, 3. PRINCIPAL AND AGENT, 1. QUO WARRANTO, 3. REPLEVIN, 1, 2. SALES, 1, 6, 7, 13. TRIAL, 5, 13. WILLS, 12, 14. WITNESSES.

1. Where the evidence as to an issue of fact in an equity suit is conflicting, the finding should be in favor of the party whose proofs are the more convincing. *Anderson v. Noleman* ..... 53
2. It will be presumed that a husband knew the age of his wife, with whom he had lived for 30 years. *Adler v. Royal Neighbors of America* ..... 56
3. Parol evidence is admissible to prove that indorsement on note when executed is a substantive part of the note. *Doll v. Getzschmann* ..... 370

**Evidence**—*Concluded.*

4. A note or other contract in writing cannot be varied or contradicted by parol evidence. *First Nat. Bank v. Burney,* 432
5. Account kept by tradesman in loose-leaf ledger, shown to be book of original entries, and verified as required by sec. 346 of the code, *held* admissible in evidence as a book account. *Armstrong Clothing Co. v. Boggs*..... 499
6. Under sec. 420 of the code, reports of decisions of supreme court of Missouri *held* properly admitted in evidence to prove the law of that state. *Steinke v. Dobson* ..... 616
7. Evidence *held* to show proper foundation for admission of copy of letter in evidence. *Reasoner v. Yates* ..... 757
8. It will not be presumed that documents in evidence were not sufficiently identified, unless that fact appears from the abstract. *State v. Barr* ..... 766
9. In action for injury to crops from flooding, certain letters *held* to afford no evidence of ratification of promise to remove obstructions from watercourse. *Gray v. Chicago, St. P., M. & O. R. Co*..... 795

**Exceptions, Bill of.**

A referee has sole authority to settle and allow a bill of exceptions of the evidence adduced during trial before him. *Bennett v. Baum* ..... 320

**Executors and Administrators.**

Under sec. 202, ch. 23, Comp. St. 1911, an executor or administrator has the right to possession of decedent's real estate, and may maintain ejectment therefor. *Tillson v. Holloway* ..... 481

**Forcible Entry and Detainer.**

1. Sec. 1022 of the code, relating to notice as a condition precedent to an action of forcible entry and detainer, *held* to confer on a tenant a right which he may rest upon or waive. *Dorrington v. Sowles* ..... 587
2. In forcible entry and detainer, objection to notice upon other grounds alone, *held* a waiver of insufficiency of time of notice. *Dorrington v. Sowles* ..... 587

**Fraud.** See INSANE PERSONS, 3. MORTGAGES, 8. SALES, 1, 2. STREET RAILWAYS, 6. VENDOR AND PURCHASER, 2.

A person is justified in relying on a representation made as a statement of fact, where an investigation would be required to discover the truth. *Martin v. Hutton* ..... 34

**Fraudulent Conveyances.**

Sec. 6048, Ann. St. 1909, commonly called "Bulk Sales Law," *held* not to apply to fixtures or manufacturer's stock of raw materials used by himself, and not offered for sale in ordinary course of trade. *Lee v. Gillen & Boney* ..... 730

**Guardian and Ward.** See INSANE PERSONS.

Final settlement between guardian and ward, after ward's majority, in which he received his share of proceeds of sale of land, *held* to estop the ward from questioning the validity of the sale. *Kulp v. Heimann* ..... 167

**Hawkers and Peddlers.**

A grocer taking orders for goods and delivering them by wagon *held* not a hawker under an ordinance imposing a license tax. *Village of Scribner v. Mohr*..... 21

**Highways.** See DRAINS, 1, 2.

1. Rule stated as to rights of persons driving in the same direction in a public road, and seeking to pass each other, prior to enactment of sec. 147, ch. 78, Comp. St. 1911. *Hackett v. Alamito Sanitary Dairy Co*..... 200
2. A traveler in a street must use it in such manner as not unreasonably to deprive others of their equal rights. *Hackett v. Alamito Sanitary Dairy Co*..... 200
3. In an action for injuries from collision in a street, question whether defendant or his servants were guilty of negligence, or plaintiff of contributory negligence, *held* ordinarily for jury. *Hackett v. Alamito Sanitary Dairy Co*..... 200

**Homestead.**

Removal by husband and wife from the state *held* to constitute an abandonment of homestead, so that the husband could convey by his individual deed. *Whitford v. Kinzel*... 573

**Homicide.** See CRIMINAL LAW, 12, 16-19, 24, 25.

1. In charging murder while attempting to perpetrate robbery, *held* not necessary to allege that the act was committed deliberately and with premeditation. *Keezer v. State*..... 238
2. Under an indictment for murder while attempting to commit robbery, premeditation and deliberation need not be proved separately. *Keezer v. State* ..... 238
3. In a prosecution for murder, jury *held* justified in finding that the victim was assaulted with intent to rob. *Keezer v. State* ..... 238
4. Where the court charged that accused were presumed to be innocent, *held* that they were not entitled to further instruction that the presumption was that they had no intent to rob the victim. *Keezer v. State* ..... 238
5. In homicide, the law implies malice if the killing alone is shown. *Davis v. State* ..... 361
6. Where the circumstances attending a homicide are fully testified to by eye-witnesses, it is error to charge that there is a presumption of malice from the fact of the killing. *Davis v. State* ..... 361

**Husband and Wife.** See DIVORCE, 3.

1. In suit by wife for separate maintenance, the court may at any time during its pendency make her an allowance for suit money, including attorney's fees. *Kiddle v. Kiddle,* 248
2. "During pendency of suit" defined. *Kiddle v. Kiddle*..... 248
3. Reconciliation of parties pending suit for maintenance *held* not to oust the court of authority to make allowance of attorney's fees. *Kiddle v. Kiddle*..... 248
4. Reconciliation and renewal of cohabitation will abrogate articles of separation executed by husband and wife. *Gaster v. Estate of Gaster* ..... 529

**Indictment and Information.** See HOMICIDE, 1, 2.

An information is fatally defective if it charges offense subsequent to date on which information is filed, or on an otherwise impossible date. *McKay v. State* ..... 63

**Injunction.** See JUDGMENT, 3, 4. NUISANCE. WATERS, 1-3.

1. A city will be restrained from interfering with the business of a corporation by destroying its property without compensation, after recognition of its rights for many years. *Omaha & C. B. Street R. Co. v. City of Omaha*..... 6
2. An injunction against a city's interference with the business of a street railway company will be limited to the duration of the company's franchise. *Omaha & C. B. Street R. Co. v. City of Omaha* ..... 6
3. Injunction will not lie when there is an adequate remedy at law. *Powers v. Flansburg* ..... 467

**Insane Persons.** See WILLS, 5, 6.

1. Husband appointed guardian of insane wife's estate will not be permitted to use her property or his position for his advantage or to her detriment. *Wilson v. Wilson*..... 353
2. Guardian of insane ward should apply for direction, where he holds funds and a threatened foreclosure of mortgage may result in the sacrifice of the ward's dower and homestead interests. *Wilson v. Wilson* ..... 353
3. Where husband and guardian of insane woman purchases at judicial sale real estate wherein she has dower and homestead estates, upon becoming sane she may hold him as trustee, without regard to whether there was active fraud. *Wilson v. Wilson*..... 353
4. Where the court appoints a guardian *ad litem* for an insane woman who has dower and homestead estates in land in foreclosure, the general guardian will not be liable in damages for failure to protect her interests. *Wilson v. Wilson* ..... 353
5. Liability of guardian for use of ward's funds stated. *Wilson v. Wilson* ..... 353

**Insurance.**

1. Insurance companies held not required to file statement with attorney general under sec. 4, ch. 162, laws 1905. *State v. American Surety Co.* ..... 154
2. Insurance companies *held* not engaged in "trade" or "commerce" within title of ch. 162, laws 1905. *State v. American Surety Co*..... 154
3. In a suit by attorney general on information of auditor under sec. 28, ch. 43, Comp. St. 1911, the court may, after decree for dissolution of insolvent insurance corporation, appoint a receiver to close its business under sec. 266 of the code. *State v. Farmers & Merchants Ins. Co*..... 664
4. Power to bring suit by attorney general to dissolve insolvent insurance company depends on statute; but, after decree, the court may appoint a receiver to wind up its affairs, rather than permit the business to be closed by its officers as trustees under secs. 62-66, ch. 16, Comp. St. 1911. *State v. Farmers & Merchants Ins. Co*..... 664
5. Insurance policy *held* to be a Nebraska contract. *Haas v. Mutual Life Ins. Co*..... 808
6. Whether or not insurance contract was abandoned *held* to be question for jury. *Haas v. Mutual Life Ins. Co*..... 808
7. Where insurer held a reserve on a policy sufficient to pay premiums until after death of insured, and there was no forfeiture clause in the policy, *held* that the insurance was in force at time of death. *Haas v. Mutual Life Ins. Co*.... 808
8. Incontestable clause in policy *held* not to apply to defense of forfeiture by nonpayment of premiums, or to abandonment of contract. *Haas v. Mutual Life Ins. Co*..... 808
9. There being no forfeiture clause in policy, insured *held* not bound to exercise certain options, but that he had the right to have the reserve applied to payment of premiums. *Haas v. Mutual Life Ins. Co*..... 808
10. Where a beneficiary forfeits his membership in a benefit association by engaging in a prohibited occupation, assurer *held* not to assume the hazards thereof by accepting dues on condition that insurance shall extend only to original risks. *Pendergast v. Royal Highlanders* ..... 117
11. In construing a contract of insurance in a beneficial association, a statement in the application will be construed a warranty only when it clearly appears that such was the intention of the parties. *Goff v. Supreme Lodge Royal Achates* ..... 578
12. That statements in application shall constitute defense to action on benefit certificate, the association must plead and

**Insurance**—*Concluded.*

prove that they were false in a material matter, and that the association relied thereon. *Goff v. Supreme Lodge Royal Achates* ..... 578

13. Housekeeper for member of fraternal beneficiary association *held* a dependent, eligible as his beneficiary. *Goff v. Supreme Lodge Royal Achates* ..... 578

14. To prove defense of suicide, the evidence must clearly point to conclusion of suicide, and to exclusion of all reasonable probability of death by accident or from natural causes. *Schrader v. Modern Brotherhood of America*..... 683

15. In action on life insurance policy, burden is on defendant to prove defense of suicide. *Schrader v. Modern Brotherhood of America* ..... 683

16. Evidence in action on policy *held* to sustain verdict for plaintiff as against defense of suicide. *Schrader v. Modern Brotherhood of America* ..... ..... 683

**Intoxicating Liquors.**

1. Sec. 15, ch. 50, Comp. St. 1881, substantially re-enacting sec. 340 of the criminal code of 1866, relating to civil damages resulting from sale of liquors, *held* constitutional. *Smith v. Roehrig* ..... 262

2. In action for damages from assault, resulting from sale of liquors to assailants, evidence *held* to support verdict for plaintiff. *Smith v. Roehrig*..... 262

3. A village board has no authority to permit the transfer of a license to sell intoxicating liquors. *In re Shue*..... 288

4. Two weeks' notice of filing petition for license to sell liquors is essential to jurisdiction to grant license. *Maxwell v. Reisdorf* ..... 374

5. A new notice must be given where full number of qualified petitioners first appear on petition at time set for hearing of remonstrance. *Maxwell v. Reisdorf* ..... 374

6. Record of village board granting license to sell liquors must show all jurisdictional facts. *Maxwell v. Reisdorf* ..... 374

7. Filing of petition signed by required number of resident freeholders is essential to grant of license for sale of liquors. *Maxwell v. Reisdorf* ..... 374

8. Signer of petition for liquor license, who purchased property and occupied it as a home, *held* a freeholder, though he received no deed therefor until he signed petition for liquor license. *Shank v. Lee* ..... 732

9. Where several witnesses testify in a general way that applicant for liquor license is a man of good moral character, and there is no evidence to the contrary, a finding for applicant will not be reversed. *Shank v. Lee* ..... 732

**Intoxicating Liquors**—*Concluded.*

10. Evidence *held* insufficient to show that applicant for liquor license had violated statute regulating sale of intoxicating liquors within the year prior to application. *Shank v. Lee*, 732
11. Applicant for liquor license *held* not a proper person to procure a license. *In re Shue* ..... 288
12. A bartender who has sold liquor to minors within a year prior to his application *held* not a proper person to receive a liquor license. *In re Sokol* ..... 290
13. Judgment for damages from sale of liquors will not be set aside as not supported by the evidence and excessive, unless clearly wrong. *Essex v. Ksensky* ..... 437
14. Evidence *held* to sustain verdict for $2,000. *Essex v. Ksensky* ..... 437
15. In action for damages on saloon-keeper's bond, where the verdict was less than $200, each party *held* to pay his own costs. *Deck v. Kautz* ..... 440

Judgment. See PLEADING, 6. QUO WARRANTO, 4. TRUSTS, 2.

1. To vacate a judgment for perjury, there must be clear evidence that false testimony was wilfully given, that it was material, and probably controlled the result. *Koop v. Acken*, 77
2. Evidence *held* insufficient to require vacation of a judgment for perjury. *Koop v. Acken*..... 77
3. A suit *held* to lie in the county where an execution is issued, to enjoin the sale of real estate of an incompetent and to enjoin the judgment creditor from collecting the judgment. *Spence v. Miner* ..... 108
4. Where jurisdiction has attached, error in amount of recovery or other irregularities *held* not to justify injunction to restrain enforcement of judgment. *Kramer v. Bankers Surety Co.* ..... 301
5. Unless allegations and proofs agree, or the litigants tried an issue as though joined by the pleadings, the decree will not be sustained. *Bennett v. Baum*..... 320
6. Where, through inadvertence of the clerk, a judgment or order was not entered of record, the court may, on motion and notice, cause entry to be made *nunc pro tunc*. *Reynolds v. Adams* ..... 343
7. In proceedings for entry of judgment *nunc pro tunc*, notice to defendants dismissed from the action before judgment *held* not required. *Reynolds v. Adams* ..... 343
8. If the person affected by failure of clerk to enter judgment dies, his legal representatives may maintain proceedings for *nunc pro tunc* entry. *Reynolds v. Adams*..... 343

Judgment—*Concluded.*

9. If the person benefited by failure of clerk to enter judgment dies, notice for *nunc pro tunc* entry may be served on his legal representatives. *Reynolds v. Adams* ..... 343
10. Petition *held* not so defective as to render a judgment void, where a cause of action was so identified as to enable the court to determine whether it was within its jurisdiction. *McCarthy v. Benedict* ..... 386
11. Decree foreclosing tax lien against nonresident, without proof of publication of constructive service, *held* subject to collateral attack. *Duval v. Johnson*..... 503
12. Recital in decree against nonresident *held* not to supply lack of facts necessary to confer jurisdiction. *Duval v. Johnson* ..... 503
13. Satisfaction of judgment without consideration *held* properly canceled. *Reed v. Fisher* ..... 697
14. In proceedings to revive a dormant judgment, plea of payment raises a presumption of payment, which the judgment creditor must rebut. *Hill v. Feeny* ..... 791
15. Evidence *held* insufficient to overcome presumption of payment of judgment. *Hill v. Feeny* ..... 791
16. Sustaining demurrer to first petition and judgment of voluntary dismissal pending demurrer to amended petition *held* not to constitute defense of former adjudication. *Haas v. Mutual Life Ins. Co*..... 808

**Jury.** See Trial, 3, 4.

**Justice of the Peace.**

Amendment of petition on appeal from justice *held* not to change cause of action. *Gruenther v. Bank of Monroe*..... 280

**Landlord and Tenant.** See CONTRACTS, 5-9. FORCIBLE ENTRY AND DETAINER. SPECIFIC PERFORMANCE, 3.

1. Measure of damages for breach of convenant for possession stated. *Sneller v. Hall* ..... 100
2. Where A leased to B, who took possession, and afterwards leased to C for the same term, in an action by C against A on covenants in his lease for possession and for quiet enjoyment, *held* that certain damages resulting from an action for a tort between A and B are not proper elements of damage for breach of such convenants. *Sneller v. Hall,* 100
3. Ordinarily a subtenant has no greater rights in leased premises than the original tenant. *Worth v. Ware*..... 443
4. A sublessee cannot recover damages from his lessor for interference by a third person with his possession and business, where he has not been ousted and no wrongful act of his lessor has been proved. *Worth v. Ware*..... 443

**Larceny.**

Evidence *held* insufficient to sustain a conviction of larceny from the person. *Rockwell v. State*..... 744

**Libel and Slander.**

1. In action for libel, instruction *held* not prejudicial to defendant, as requiring stronger proof, and as demanding proof of immaterial statements, where plaintiff, on undisputed evidence, was entitled to at least nominal damages. *Thomas v. Shea* ..... 823
2. In action for libel, where evidence is admitted to prove charges not pleaded for purpose of showing malice, *held* not error for court in limiting such evidence to that purpose to single it out in an instruction. *Thomas v. Shea*..... 823
3. Verdict for $3,000 *held* not excessive. *Thomas v. Shea*.... 823

**Licenses.** See HAWKERS AND PEDDLERS. MASTER AND SERVANT, 8.

A grocer maintaining a delivery wagon and an employee who delivers goods ordered when making a former delivery or directly from the store *held* not to be engaged in canvassing or in soliciting orders, under an ordinance imposing a license tax. *Village of Scribner v. Mohr*..... 21

**Liens.** See REPLEVIN, 2. SALES, 5-7.

**Limitation of Actions.** See ESTOPPEL, 1. PROCESS, 2.

1. Where plaintiff alleged payments on note which would remove bar of limitations, *held* that he cannot recover without proof of the payments. *Scott v. De Graw*..... 274
2. Payments on collaterals *held* payments on principal note as of the time the payments were made, and not of the time when received by the holder from one holding the collaterals for collection. *Scott v. De Graw* ..... 274
3. In action on note, evidence *held* not to show any payment on the note within five years preceding action. *Scott v. De Graw* ..... 274
4. Where crops are destroyed by negligence of railroad company in permitting a waterway to become obstructed, the cause of action accrues at the time the crops are destroyed. *Gray v. Chicago, St. P., M. & O. R. Co*..... 795

**Mandamus.**

1. A mandamus proceeding is a law action. *State v. Porter*.. 233
2. Motion for new trial *held* necessary in mandamus to review of questions of fact. *State v. Porter* ..... 233
3. Mandamus will not lie to compel a public officer to do a wrong. *State v. Cowles*..... 839

**Master and Servant.**

1. A railway night switchman becoming color-blind *held* disabled by sickness under employer's contract for sick benefits. *Kane v. Chicago, B. & Q. R. Co*..... 112
2. A statement in a letter sent to plaintiff by defendant's superintendent of employment that plaintiff resigned from defendant's service *held* not of itself competent evidence against plaintiff of such resignation. *Kane v. Chicago, B. & Q. R. Co*..... 112
3. Trainmaster's statement that the medical examiner would have reported if switchman was color-blind *held* not to disprove that he is color-blind. *Kane v. Chicago, B. & Q. R. Co.*, 112
4. In an action for death, evidence *held* insufficient to sustain judgment for plaintiff. *Garfield v. Hodges & Baldwin*..... 122
5. Instructions in action for death of employee *held* properly refused. *O'Grady v. Union Stock Yards Co*..... 138
6. In an action for death, submission of certain questions to the jury *held* justified by the evidence. *O'Grady v. Union Stock Yards Co.* ..... 138
7. Instruction in action for death of employee *held* not erroneous as expressing opinion of court as to whether negligence has been established. *O'Grady v. Union Stock Yards Co*... 138
8. Employee *held* not a mere licensee in going to a boiler room where toilet conveniences were provided by the master for use of employees. *Neice v. Farmers Co-Operative Creamery & Supply Co.* ..... 470
9. Whether an employee remained in a boiler room during the rest hour with the implied permission of the employer *held* a question for the jury. *Neice v. Farmers Co-Operative Creamery & Supply Co.* ..... 470
10. If employer is guilty of negligence by which employee is injured while in a boiler room, *held* immaterial that employer did not know of his presence. *Neice v. Farmers Co-Operative Creamery & Supply Co*..... 470
11. Whether employer was negligent in allowing inexperienced man to blow off boiler *held* question for jury. *Neice v. Farmers Co-Operative Creamery & Supply Co*..... 470
12. In action for injury to railroad employee on track, evidence *held* sufficient to sustain verdict for plaintiff. *Glantz v. Chicago, B. & Q. R. Co*..... 606

**Mechanics' Liens.**

A subcontractor cannot extend time for filing mechanic's lien by substituting proper material for defective material theretofore furnished. *Cady Lumber Co. v. Reed*..... 293

**Money Received.** See ACTION.

**Mortgages.** See ACKNOWLEDGMENT.

1. Stipulation in mortgage authorizing acceleration of the debt if taxes become delinquent, *held* not forbidden by statute, nor against public policy. *Hockett v. Burns* ..... 1
2. Payment of delinquent taxes after commencement of suit to foreclose *held* not to deprive the mortgagee of his option to foreclose for such default. *Hockett v. Burns* ..... 1
3. In a suit to set aside confirmation of sheriff's sale on foreclosure, plaintiff must prove allegations of petition by a preponderance of the evidence. *Tierney v. Oleson*..... 177
4. In a suit to set aside confirmation of foreclosure sale, evidence *held* insufficient to sustain judgment for plaintiff. *Tierney v. Oleson* ..... 177
5. A deed of trust differs from a mortgage with power of sale only in its being executed to a third person, instead of a creditor. *Fiske v. Mayhew* ..... 196
6. An instrument given as security for payment of money or performance of a collateral act is a mortgage, whatever its form. *Fiske v. Mayhew* ..... 196
7. Possession of mortgage notes *held* to sustain finding that the holder was owner thereof, notwithstanding they were indorsed payable to order of third person. *Smith v. Potter*, 298
8. Assignee of unrecorded mortgage, who sues to foreclose after decree canceling the mortgage in a suit to which he was not a party, *held* not necessarily chargeable with fraud. *McCarthy v. Benedict* ..... 386
9. Writing his own name as mortgagee in blank in mortgage by person to whom it was delivered *held* not to invalidate the mortgage. *Montgomery v. Dresher* ..... 632
10. In suit to foreclose mortgage, evidence *held* to show plaintiff *bona fide* purchaser of the notes and mortgage. *Montgomery v. Dresher* ..... 632
11. Certain deeds and mortgage executed at the same time *held* to constitute one transaction. *Taylor v. Harvey*..... 770

**Municipal Corporations.** See EMINENT DOMAIN. HIGHWAYS. INJUNCTION.

1. Sec. 8977, Ann. St. 1909, *held* broad enough to permit a village to annex contiguous territory situated in an adjacent county. *Village of Wakefield v. Utecht*..... 252
2. In action to annex territory to village, burden is on village to establish that the territory sought to be annexed will be benefited, or that justice and equity require that it be annexed. *Village of Wakefield v. Utecht*..... 252
3. In action to annex territory to village, evidence *held* insufficient to sustain decree for its annexation. *Village of Wakefield v. Utecht* ..... 252

**Negligence.** See MASTER AND SERVANT, 7, 10, 11.

In action for injuries from collision of defendant's automobile with a hack, refusal to direct verdict for defendant on the ground of plaintiff's failure to show negligence on part of defendant *held* proper. *Russell v. Electric Garage Co*..... 719

**Newspapers.** See PROCESS, 1. TAXATION, 5, 6.

**New Trial.** See APPEAL AND ERROR, 27. MANDAMUS, 2. PLEADING, 10. TRIAL, 4.

1. Newly discovered evidence not relevant to the issues will not sustain application for new trial. *Clemont v. Cudahy Packing Co.* ..... 449
2. Petition for new trial for newly discovered evidence *held* insufficient in not alleging facts showing diligence in endeavor to procure such evidence before trial. *Clemont v. Cudahy Packing Co*..... 449
3. To entitle party to new trial for newly discovered evidence, diligence must be shown. *McDonald v. Brown* ..... 676
4. To entitle party to new trial for newly discovered evidence cumulative in its nature, it must appear that it would change the result of the trial. *McDonald v. Brown*..... 676

**Notice.** See CHATTEL MORTGAGES. FORCIBLE ENTRY AND DETAINER. INTOXICATING LIQUORS, 4, 5. JUDGMENT, 6, 7, 9. PROCESS, 1. PUBLIC LANDS, 2.

**Nuisance.**

A private individual cannot enjoin a public nuisance, unless he sustains special injury. *Powers v. Flansburg*..... 467

**Parent and Child.**

1. Ordinarily a father is not liable for clothing purchased by his minor son. *Armstrong Clothing Co. v. Boggs*..... 499
2. Father *held* liable for clothing purchased by minor son under circumstances stated. *Armstrong Clothing Co. v. Boggs* ..... 499

**Parties.** See BILLS AND NOTES. PRINCIPAL AND AGENT, 6. QUIETING TITLE, 2. QUO WARRANTO, 6.

Persons not jointly liable nor claiming some right in the subject matter of the action *held* not lawfully joined as defendants. *Cooper & Cole Bros. v. Cooper* ..... 209

**Partnership.**

1. The good will of a dissolved partnership is a part of the assets. *Iman v. Inkster* ..... 704
2. Partner's share of value of single asset, not included in settlement of partnership affairs, may be recovered in an action at law. *Iman v. Inkster* ..... 704
3. A partner does not forfeit right to assets by neglect of duty. *Iman v. Inkster* ..... 704

**Physicians and Surgeons.**

1. In action for malpractice, admission of evidence of a nurse *held* not prejudicial, in view of the instructions and the testimony of physicians as to defendant's competency as a physician and surgeon. *Mosslander v. Armstrong*..... 774
2. Instructions as to plaintiff's consent to an operation *held* to correctly state the law. *Mosslander v. Armstrong*..... 774
3. Instructions stating the issues *held* sufficient. *Mosslander v. Armstrong* ..... 774
4. Recovery of $2,000 for loss of the great toe *held* not excessive. *Mosslander v. Armstrong* ..... 774

**Pleading.** See ACCORD AND SATISFACTION. APPEAL AND ERROR, 14, 15, 20-22. CARRIERS, 2. CORPORATIONS, 5. COUNTIES AND COUNTY OFFICERS, 2. EMINENT DOMAIN, 1, 2. INSURANCE, 12. JUDGMENT, 5, 10. JUSTICE OF THE PEACE. NEW TRIAL, 2. QUO WARRANTO. SALES, 12, 13. SPECIFIC PERFORMANCE, 4. TAXATION, 1, 3, 4.

1. In an action for a money judgment, the pleadings should be liberally construed in the interest of justice. *Tacoma Mill Co. v. Gilcrest Lumber Co*..... 104
2. By answering to the merits, defendant waives right to demur to petition. *Kyner v. Whittemore* ..... 188
3. Affirmative matter in answer amounting to no more than a denial *held* not to require a reply. *Gruenther v. Bank of Monroe* ..... 280
4. Sec. 121 of the code *held* to require construction of pleadings with a view to substantial justice. *O'Grady v. Chicago, B. & Q. R. Co*..... 339
5. A counterclaim for broker's commission *held* to sustain a recovery, where no objection was made to its sufficiency before judgment, and it does not affirmatively appear that the contract did not comply with sec. 74, ch. 73, Comp. St. 1911. *Thackaberry v. Wilson* ..... 448
6. Where petition shows that every material matter complained of has been adjudicated in former actions between the same parties or their privies, a general demurrer thereto *held* properly sustained. *Van Etten v. Leavitt*.... 461
7. Where defendant goes to trial without challenging the reply as inconsistent with the petition, he waives objections thereto. *Lowe v. Keens* ..... 565
8. A fact not itself directly in issue, but relevant to the issue being tried, may be proved without pleading it. *Steinke v. Dobson* ..... 616
9. A petition omitting material averments is cured by an answer supplying them. *Iman v. Inkster* ..... 704

**Pleading**—*Concluded.*

10. Objection to sufficiency of pleading not brought to attention of court in motion for new trial *held* waived. *State v. Barr* ..... 766

11. Denial in reply *held* sufficient after verdict. *Mosslander v. Armstrong* ..... 774

12. In action against railroad company for injury to crops from flooding, *held* not error to permit amendment of reply that before crops were planted defendant promised to clear waterway so as to drain plaintiff's lands. *Gray v. Chicago, St. P., M. & O. R. Co*..... 795

13. Demurrer to a petition in equity for misjoinder of causes of action will not be sustained because of uncertainty as to which of the plaintiffs is entitled to the relief demanded. *Bayer v. Bayer* ..... 843

**Principal and Agent.** See CORPORATIONS, 1. TROVER AND CONVERSION.

1. Agency may be proved by circumstantial evidence. *Martin v. Hutton* ..... 34

2. Apparent authority of agent *held* to be such as he appears to have by reason of his actual authority. *Cooper & Cole Bros. v. Cooper* ..... 209

3. Manner of conferring ostensible authority to act as agent stated. *Cooper & Cole Bros. v. Cooper*..... 209

4. Plaintiff *held* to have granted agent ostensible authority to make certain contracts. *Cooper & Cole Bros. v. Cooper*.... 209

5. Where an agent was not authorized to make certain contracts, and because of his assumption of power to do so his principal is damaged, he will be liable to his principal. *Cooper & Cole Bros. v. Cooper*..... 209

6. Persons dealing with agent having apparent authority *held* not liable to be sued jointly with the agent by the principal. *Cooper & Cole Bros. v. Cooper*..... 209

**Principal and Surety.** See SUBROGATION. VENUE.

1. In an action by a surety company for premiums on a receiver's bond, evidence *held* not to warrant submission of case to jury, but to call for direction of verdict for plaintiff. *American Surety Co. v. Musselman* ..... 58

2. Refusal to submit to jury the question as to which of the defendants is principal and which surety, under sec. 511 of the co[illegible], *held* not error where the surety is a foreign corporation. *Smith v. Roehrig* ..... 262

**Process.** See TAXATION, 1, 5-7. VENUE.

1. Publication of notice for constructive service in a semi-weekly newspaper *held* to require insertion of notice in each regular issue during the week. *Smith v. Potter*..... 298

2. Amendment of summons *held* properly allowed, and that it related back to date of service of summons on the proper person, preventing running of limitations. *Haas v. Mutual Life Ins. Co.* ..... 808

**Public Lands.** See DRAINS, 3. ESTOPPEL.

1. Upon the approval by the federal government of a survey of the interior lines of a township, the state's title to section 36 vests absolutely. *State v. Ball* ..... 307

2. Under sec. 17, ch. 80, Comp. St. 1911, service of notice of delinquency and forefeiture of school lands by registered letter addressed to a lessee not living *held* void. *State v. Cowles* ..... 839

3. Where a lease of school lands was wrongfully canceled, it is the duty of the commissioner of public lands and buildings to refuse to issue a lease to a subsequent lessee. *State v. Cowles* ..... 839

**Quantum Meruit.**

In action for reasonable value of services as stenographer, award of less sum than claimed *held* not to show that plaintiff's testimony was disbelieved, and that therefore the verdict is not supported by the evidence. *McGee v. Hungerford* ..... 663

**Quieting Title.** See ESTOPPEL.

1. Party failing to recover decree quieting title to land *held* not entitled to benefits of recording act as against one whose deed is first recorded. *McCarthy v. Benedict* ..... 386

2. Life tenant and remaindermen may join in suit to quiet title against one in possession claiming the land under a clause in the deed through which the plaintiffs derive their rights. *Bayer v. Bayer* ..... 843

**Quo Warranto.** See APPEAL AND ERROR, 26.

1. An information charging a corporation with usurpation of powers is an action against the corporation; but, where it is claimed that the body has no corporate existence, the action must be against the individuals. *State v. Lincoln Traction Co.* ..... 535

2. In *quo warranto* respondent should disclaim or justify exercising a challenged franchise, and, in the latter event, should plead the precise authority for his conduct. *State v. Lincoln Traction Co*..... 535

**Quo Warranto**—*Concluded.*

3. In *quo warranto*, where plea of justification is traversed, the burden is on respondent to establish his right. *State v. Lincoln Traction Co*..... 535
4. Judgment confirming right to operate street railway *held* no bar to *quo warranto* challenging right to manufacture, sell and distribute electric current for illumination and power purposes. *State v. Lincoln Traction Co*..... 535
5. By challenging corporation's right to operate street railway, and subsequently challenging its right to manufacture, sell and distribute electric current, state *held* not to split its cause of action. *State v. Lincoln Traction Co*..... 535
6. Where *quo warranto* to try the right to a public office is brought by one claiming the office, *held* that he is the real party in interest, and need not join others who assist in the prosecution. *State v. Barr* ..... 766

**Railroads.** See CARRIERS. EMINENT DOMAIN, 3. MASTER AND SERVANT, 1-3, 12. WATERS, 9.

1. It is the duty of a railroad company to equip its locomotives with the best spark arresters. *Bradley v. Chicago, B. & Q. R. Co.* ..... 28
2. Instruction as to use of lignite coal as fuel in engines *held* proper. *Bradley v. Chicago, B. & Q. R. Co*..... 28
3. In action for damages for setting out fire, where the particular engine from which fire escaped is identified, *held* not error to exclude evidence as to escape of fire from other engines. *Bradley v. Chicago, B. & Q. R. Co*..... 28
4. Railroad company engaged in interstate commerce *held* entitled to demurrage on cars used in interstate shipments. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co*..... 488
5. That neither consignee nor one charged with duty of unloading is able to receive and unload cars within 48 hours, free time, after notice of arrival, *held* not to relieve consignee of obligation to pay service charges. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co*..... 488

**Receivers.** See INSURANCE, 3, 4. PRINCIPAL AND SURETY, 1.

Court of equity has power to appoint a receiver in a proper case independent of statute. *State v. Farmers & Merchants Ins. Co.* ..... 664

**Records.** See QUIETING TITLE, 1.

**Reference.** See EXCEPTIONS, BILL OF.

1. Sec. 299 of the code *held* to authorize district court to refer issues of fact or of law in equitable suits pertaining to accounts. *Bennett v. Baum*..... 320

**Reference**—*Concluded.*

2. It is not a jurisdictional prerequisite to a reference that the court first enter an interlocutory order that either party is entitled to an accounting. *Bennett v. Baum* ..... 320
3. Allowance of $7,500 as fee to referee approved. *Bennett v. Baum* ..... 320

**Replevin.**

1. While defendant's possession of a chattel, when replevied, is presumptive evidence of ownership, such presumption is overcome by evidence that plaintiff bought the chattel and is entitled to possession. *McIninch v. Evans* ..... 243
2. After plaintiff in replevin has adduced proof that he bought the chattel, the burden is on defendant, claiming under a verbal lien, to show that plaintiff, before completing his purchase, had notice of such lien. *McIninch v. Evans* ....243
3. One who takes up an estray under ch. 27, Comp. St. 1911, cannot prevent the owner from recovering it by refusing to accept a sum sufficient for the expense and cost of caring for the animal, or to submit his claim to arbitration. *Heinke v. Helm* ..... 746
4. Where one refuses to release an estray on tender of the amount of the expense and cost of caring for it, or to submit his claim to arbitration, the owner may deposit the money in court and replevy the animal. *Heinke v. Helm*.. 746

**Sales.** See FRAUDULENT CONVEYANCES.

1. In an action for fraud, evidence *held* to sustain judgment for plaintiff. *Straight v. Coleman* ..... 92
2. Instructions as to false representations approved. *Straight v. Coleman* ..... 92
3. Petition to recover for breach of an executory contract of sale *held* to state a cause of action for damages. *Tacoma Mill Co. v. Gilcrest Lumber Co*..... 104
4. The measure of damages for breach of an executory contract of sale ordinarily is the difference between the contract price and the market price at the time and place of delivery. *Tacoma Mill Co. v. Gilcrest Lumber Co*..... 104
5. A verbal lien on personalty is void as to subsequent purchasers in good faith. *McIninch v. Evans* ..... 243
6. There is no presumption that stranger to oral agreement creating verbal lien has knowledge of its existence. *McIninch v. Evans* ..... 243
7. Burden of proof that stranger to oral agreement creating verbal lien on personalty has knowledge thereof is on lienor. *McIninch v. Evans* ..... 243

**Sales**—*Concluded.*

8. In an action for damages for refusal to accept goods purchased from nonresident corporation, the purchaser cannot question plaintiff's capacity to sue. *Armsby Co. v. Raymond Bros.-Clarke Co.* ..... 553
9. A purchaser of goods cannot rescind the sale on account of financial depression without incurring liability for resulting damages. *Armsby Co. v. Raymond Bros.-Clarke Co.* ..... 553
10. Where a buyer refuses to accept fruit in transit, the seller may divert the shipment and resell, and recover damages. *Armsby Co. v. Raymond Bros.-Clarke Co*..... 553
11. Whether resale of goods by seller was unreasonably delayed depends upon the facts of the particular case. *Armsby Co. v. Raymond Bros.-Clarke Co*..... 553
12. In action by seller to recover the difference between contract prices and prices on resale, after buyer's refusal to accept goods, *held* unnecessary to allege notice of the resale. *Armsby Co. v. Raymond Bros.-Clarke Co*..... 553
13. In action for damages for buyer's refusal to accept goods, *held* unnecessary to allege and prove a tender. *Armsby Co. v. Raymond Bros.-Clarke Co*..... 553
14. Where a buyer refused to accept goods on the sole ground of financial depression, other grounds will not be considered. *Armsby Co. v. Raymond Bros.-Clarke Co*..... 553

**School Lands.** See ESTOPPEL. PUBLIC LANDS.

**Schools and School Districts.**

Where there was no final order on a petition to change boundary lines between school districts, *held* appeal will not lie. *School District v. Elliott* ..... 89

**Seals.** See CONTRACTS, 13.

**Set-Off.** See EQUITY.

**Specific Performance.** See CONTRACTS, 8. WILLS, 11.

1. Services rendered in consideration of a conveyance of land *held* to be of such character that a money judgment would not afford an adequate remedy. *Johnson v. Riseberg*..... 217
2. Evidence *held* to sustain a finding of a contract between a woman and her stepson, that, if he would remain with her and treat her as a son, he should have her farm at her death. *Johnson v. Riseberg* ..... 217
3. Equity will not decree specific performance of contract to lease, where the expectant tenant's declarations and conduct were such as to induce the belief that he had abandoned the contract. *Schultz v. Hastings Lodge*..... 454

**Specific Performance**—*Concluded.*

4. Petition for specific performance of agreement between husband and wife to execute reciprocal wills *held* sufficient. *Brown v. Webster* ..... 591

**Statute of Frauds.** See BROKERS, 5. WILLS, 7.

1. Promise by officer of corporation to repay the purchase price of stock at any time *held* an original obligation not within the statute of frauds. *Campbell v. Luebben* ..... 95
2. Acts of performance relied on to remove bar of statute of frauds to oral contract to transfer realty must be such that, if stated, an inference will arise that an agreement with reference thereto existed. *Johnson v. Riseberg*..... 217
3. Agreement to pay debt, in consideration of relinquishment of property pledged therefor, *held* an original undertaking not within the statute of frauds. *Oleson v. Oleson* ..... 738

**Statutes.**

1. Ch. 14, laws 1911, passed April 10, 1911, *held* to repeal sec. 8573, Ann. St. 1909, as amended by ch. 13, laws 1911, passed April 7, 1911, relating to creating of water districts. *State v. Bratton* ..... 382
2. Where a statute is unambiguous, courts will give the language under its plain and ordinary meaning. *State v. Bratton* ..... 382
3. Courts will not set aside an act of the legislature which is unambiguous, on the ground of mistake, or other equitable grounds. *State v. Bratton* ..... 382

**Stipulations.** See APPEAL AND ERROR, 24. TRIAL, 2.

**Street Railways.** See INJUNCTION.

1. Sec. 3, art. XI of the constitution, prohibiting consolidation of railroad corporations, *held* not to apply to street railway corporations. *State v. Lincoln Traction Co*..... 535
2. Sec. 5, art. XI of the constitution, relating to issuance of stock by a railroad corporation, *held* not to apply to street railway corporations. *State v. Lincoln Traction Co*..... 535
3. Valuation placed by consolidated street railway corporation on assets of constituent corporations will not bind railway commission in fixing price carrier may charge for transporting passengers. *State v. Lincoln Traction Co*..... 535
4. Courts have authority to cancel bonds and stocks issued without consideration by a street railway corporation, where such issuance would seriously impair its ability to discharge its duty to the public. *State v. Lincoln Traction Co*..... 535
5. Where the tangible property of constitutent corporations is conveyed to a consolidated corporation, that the stocks and

**Street Railways**—*Concluded.*

bonds of the constituent corporations were doubled by the consolidated corporation *held* not to justify a cancelation of the stock. *State v. Lincoln Traction Co*..... 535

6. That directors of two street railway corporations, consolidated under secs. 6-12, art. VII, ch. 72, Comp. St. 1907, agreed to exchange the stocks and assets of the constituent corporations for consolidated corporation's stocks and bonds at a valuation greatly in excess of the value of the tangible assets, *held* not such proof of fraud as to justify a dissolution of the consolidated corporation. *State v. Lincoln Traction Co.* ..... 535

7. One class of stock in a consolidated corporation will not be canceled to the injury of part of the stockholders if the consolidation be permitted. *State v. Lincoln Traction Co*.. 535

**Subrogation.**

In equity, a surety paying a judgment against himself and his principal may be subrogated to rights of judgment creditor, and have the judgment assigned to him or to another for his benefit. *Kramer v. Bankers Surety Co*..... 301

**Subscriptions.** See CONTRACTS, 10, 11.

**Taxation.** See DEEDS, 2. JUDGMENT, 11.

1. In an action against land to foreclose a tax lien, where the petition contained the allegation that the owner was unknown, the court *held* not without jurisdiction for want of such allegation in the affidavit for service by publication. *Gwin v. Freese* ..... 15

2. Sheriff's sale on foreclosure of tax lien *held* not subject to collateral attack for irregularity, after confirmation. *Gwin v. Freese* ..... 15

3. Answer in tax lien foreclosure *held* vulnerable to general demurrer. *Kyner v. Whittemore* ..... 188

4. Allegation in answer in tax lien foreclosure that defendant has been willing to pay his proportion of tax, but has been unable to agree as to the amount, *held* not to constitute a defense. *Kyner v. Whittemore* ..... 188

5. Publication of notice of tax lien foreclosure in a weekly newspaper once in each week for four weeks successively *held* a compliance with secs. 79, 80 of the code. *Claypool v. Robb* ..... 193

6. Notice of a tax lien foreclosure in a newspaper having more than one issue a week *held* not complete, unless inserted in all of the regular issues each week. *Claypool v. Robb*..... 193

7. Proof of publication of notice *held* insufficient to show publication for the required time. *Smith v. Potter* ..... 298

**Taxation**—*Concluded.*

8. Privilege granted licensee to sell intoxicating liquors *held* not subject to assessment under ch. 77, Comp. St. 1911. *Harding v. Board of Equalization* ..... 232

9. Enumeration of subjects of taxation in sec. 1, art. IX of the constitution, *held* not to preclude legislature from providing for taxation of inheritances. *In re Estate of Sanford*, 410

10. Widow who takes real estate in lieu of dower *held* not exempt from inheritance tax thereon to the value of her dower interest. *In re Estate of Sanford*..... 410

11. Personal property of a decedent being primarily liable for payment of claims against estate, devisee *held* not entitled to avoid inheritance tax by agreeing to satisfy claim against estate out of the real estate. *In re Estate of Sanford*..... 410

12. Agreement among devisees to satisfy claim against estate in favor of one of them by conveyance of a portion of the real estate *held* not to exempt it from inheritance tax. *In re Estate of Sanford* ..... 410

13. Under sec. 11203, Ann. St. 1909, devisees neglecting to ascertain or pay inheritance tax for more than two years after testator's death *held* liable for interest thereon. *In re Estate of Sanford* ..... 410

14. Refusal to confirm sale in state tax suit because of misconduct of purchaser upheld. *Prudential Real Estate Co. v. Battelle* ..... 549

15. Purchaser at sale in state tax suit, who was not guilty of wrongdoing prior to payment of bid, *held* entitled to return of amount of bid and money paid for subsequent taxes. *Prudential Real Estate Co. v. Battelle* ..... 549

16. Under Comp. St. 1907, ch. 77, art. I, sec. 14, general taxes on real estate do not become a lien until October 1st of the year in which levied. *Taylor v. Harvey* ..... 562

17. Foreclosure of tax lien by county without antecedent administrative sale *held* not void for want of jurisdiction. *Mathews v. Gillett* ..... 763

**Trial.** See APPEAL AND ERROR. BASTARDY, 3. CARRIERS, 4, 5. CONTRACTS, 2, 3. CRIMINAL LAW. EJECTMENT, 2. HIGHWAYS, 3. INSURANCE, 6. LIBEL AND SLANDER. MASTER AND SERVANT, 5-7, 9, 11. NEGLIGENCE. PHYSICIANS AND SURGEONS, 2, 3. PLEADING, 8. PRINCIPAL AND SURETY. REFERENCE, 1, 2. SALES, 2. WITNESSES, 1.

1. An appeal in district court from a guardianship accounting should be consolidated with a suit in equity involving the account. *Wilson v. Wilson* ..... 353

Trial—*Continued.*

2. Court has discretion to relieve parties from mistake in stipulation of facts. *McCarthy v. Benedict* ..... 386
3. Trial of issue of fact by jury in law action should not be abandoned because pleadings contain matter relating to an accounting about which there is no dispute. *Iman v. Inkster* ..... 704
4. Matters inhering in verdict of jury cannot be attacked by affidavits of the jurors. *Iman v. Inkster* ..... 704
5. Order of proof *held* not ground for reversal, unless abuse of discretion is clearly shown. *State v. Barr*..... 766
6. Admission of improper evidence may be cured by instruction withdrawing it from jury. *Thomas v. Shea*..... 823
7. A judgment will not be reversed because trial court permitted jury to take pleadings, where the issues were fairly stated in instructions. *Thomas v. Shea* ..... 823
8. Where the evidence is sufficient to sustain a verdict for plaintiff, but not for defendant, the trial court should direct a verdict for plaintiff. *American Surety Co. v. Musselman*, 58
9. Where reasonable men might differ as to whether all necessary facts were established by plaintiff's evidence, the trial court should refuse to direct a verdict for defendant. *Straight v. Coleman* ..... 92
10. Instruction on a theory, neither admitted nor supported by evidence, *held* properly refused. *Campbell v. Luebben*.. 95
11. Where the court has fully instructed on a particular point, *held* not error to refuse further instructions thereon. *Johnson v. Ish* ..... 173
12. Where the law imposes on defendant the burden of proving a material fact, the plaintiff is entitled to instruction to that effect. *McIninch v. Evans* ..... 243
13. Whether statements made by party to an assault were a part of the *res gestæ held* a question for the court. *Smith v. Roehrig* ..... 262
14. Where the evidence is not conflicting, *held* proper to direct verdict in accordance therewith. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co*..... 488
15. Error, if any, in overruling motion for directed verdict *held* waived by proceeding with trial. *Russell v. Electric Garage Co.* ..... 719
16. Questions of fact are for the jury. *Oleson v. Oleson*..... 738
17. Court *held* not justified in directing a verdict, if there is competent evidence from which the alleged facts may be reasonably inferred. *Oleson v. Oleson* ..... 738

**Trial**—*Concluded.*

18. Instructions should be few in number and should present the law applicable to the issues in simple language and terse sentences. *Mosslander v. Armstrong* ..... 774

19. An abandoned issue should be eliminated from the charge. *Gray v. Chicago, St. P., M. & O. R. Co*..... 795

20. Whether damming of flood-waters was caused by defendant negligently permitting its trestle to become obstructed, or by natural causes, *held* a question for the jury. *Gray v. Chicago, St. P., M. & O. R. Co*..... 795

21. Instructions should be construed as a whole. *Hans v. American Transfer Co.* ..... 834

**Trover and Conversion.**

Principal *held* not entitled to maintain conversion against third parties on account of transactions with agents. *Cooper & Cole Bros. v. Cooper*..... 209

**Trusts.**

1. A court of equity may require a trustee holding a bequest or devise under a naked legal title to yield possession and control to the beneficiary, or to convey the estate to whomsoever the beneficiary directs. *Hill v. Hill* ..... 43

2. Order of county court, directing administrator with will annexed to deliver to testamentary trustee possession of trust property, *held* no bar to a suit by *cestuis que trustent* against the trustee to compel him to deliver possession of the property. *Hill v. Hill* ..... 43

3. A bequest or devise in trust with no duties to be performed by the trustee, and no estate in remainder or gift over, vests only the naked legal title in the trustee. *Hill v. Hill* ..... 43

4. An order requiring a trustee holding a devise under a naked legal title to convey to the beneficiary *held* without prejudice to the trustee. *Hill v. Hill*..... 43

5. Though an express trust as to real estate cannot be created by parol, yet, where land is conveyed to A for the benefit of himself and B, heirs of A *held* not entitled to disturb possession and title of B to an undivided one-half of the land, though B has no written evidence of title. *Harman v. Fisher* ..... 688

6. Where one obtains property by theft or fraud, equity raises a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge. *Logan v. Aabel* ..... 754

**Usury**

1. Provision in note that maker will pay an attorney's fee if suit be instituted thereon, being invalid, will not render the instrument usurious. *National Bank v. Thompson*.... 223
2. Separate notes, executed for past-due interest on a note, will not taint the original contract with usury. *National Bank v. Thompson* ..... 223

**Vendor and Purchaser.** See WATERS, 10.

1. Where vendor takes notes for deferred payments, and indorses one of them "paid" and surrenders it to purchaser, the indorsement is a substantive part of the note, and the purchaser is not liable therefor. *Doll v. Getzschmann*..... 370
2. One defrauded in exchange of property may rescind the contract and return property received, or he may retain the property and recover damages, but he cannot retain the property received and in an action for damages establish an equitable lien on the property given in exchange. *Steinke v. Dobson* ..... 616

**Venue.** See JUDGMENT, 3.

Sureties on liquor dealer's bond given under sec. 6, ch. 50, Comp. St. 1909, *held* to have such interest in an action on the bond that the action may be brought in any county where they reside or may be found, and, under sec. 65 of the code, summons be issued to another county for service on the principal. *Kramer v. Bankers Surety Co*..... 301

**Waters.** See EVIDENCE, 9. LIMITATION OF ACTIONS, 4. PLEADING, 12. STATUTES, 1. TRIAL, 20.

1. Construction of a second ditch for irrigation purposes across land traversed by one ditch will be enjoined, if the first ditch can be made to answer the purpose. *Walker v. Anderson* ..... 119
2. Right to construct second irrigation ditch across land traversed by a suitable ditch cannot be given by the state board of irrigation or acquired, except by consent of the landowner, under sec. 3, art. I, ch. 93*a*, Comp. St. 1909. *Walker v. Anderson* ..... 119
3. Owner of land traversed by an irrigation ditch can enjoin construction of a second ditch, unless defendant can show that the first ditch is inadequate. *Walker v. Anderson*... 119
4. In granting right to appropriate water of running streams, the state may impose such limitations as are necessary to subserve the public welfare. *Kirk v. State Board of Irrigation* ..... 627
5. In granting right to appropriate water for power purposes, restricting of grant to the confines of the state *held* not to

**Waters**—*Concluded.*
violate federal constitution as interfering with interstate commerce. *Kirk v. State Board of Irrigation*..... 627

6. State board of irrigation, highways and drainage has a reasonable discretion to so limit a grant of right to appropriate water that it will not be detrimental to the public welfare. *Kirk v. State Board of Irrigation* ..... 627

7. The water of running streams is *publici juris*, and is controlled by the state in its sovereign capacity. *Kirk v. State Board of Irrigation* ..... 627

8. Riparian owners cannot appropriate the water of running streams without the permission of the state. *Kirk v. State Board of Irrigation* ..... 627

9. Where a natural stream was extended by a drainage ditch suitably constructed by a county, so as to pass under a railroad trestle, liability of railroad company for injury to crops from flooding *held* to depend on whether the company negligently obstructed the watercourse or the obstruction was caused by a gradual deposit of silt from natural causes. *Gray v. Chicago, St. P., M. & O. R. Co*..... 795

10. Grantee in deed containing the ordinary covenants of warranty *held* not personally liable for maintenance fee in water-right contract between his grantor and an irrigation company. *Farmers & Merchants Irrigation Co. v. Hill*..... 847

**Wills.** See EJECTMENT.

1. It is the duty of courts to so construe a will as to carry into effect the intent of the testator, subject to the rules of law, which he is presumed to have known and followed. *Hill v. Hill* ..... 43

2. A devise to "lawful heirs" *held* to refer to those who are such at testator's death, unless a different intent is plainly manifested. *Hill v. Hill* ..... ..... 43

3. A devise for future enjoyment will be vested or contingent according to the intent, as shown by the entire will, to annex the time to the enjoyment of the devise, or to the gift of it. *Hill v. Hill* ..... 43

4. Devise *held* not to lapse by death of devisee after death of testator and before probate of will. *Tillson v. Holloway*, 481

5. Sec. 7, ch. 23, Comp. St. 1911, providing for the time within which to elect not to take under a will, *held* not to prejudice an insane spouse for whom the county judge has made no election. *Gaster v. Estate of Gaster*..... 529

Wills—*Concluded.*

6. Oral demand by guardian *ad litem* of insane widow at time of entry of decree of distribution of her deceased husband's estate, if approved by county judge, constitutes an election sufficient to sustain her rights under the law. *Gaster v. Estate of Gaster* ..... 529
7. Oral agreement between husband and wife to execute reciprocal wills, consummated by their execution, *held* not to rest entirely in parol. *Brown v. Webster* ..... 591
8. Where husband and wife agree to execute reciprocal wills, the contract of each is a sufficient consideration for the contract of the other. *Brown v. Webster* ..... 591
9. Reliance by wife on contract with husband to make reciprocal wills, and permitting her will to remain unrevoked during his lifetime, *held* to constitute full performance by her of the contract. *Brown v. Webster* ..... 591
10. Reciprocal wills executed by husband and wife *held* not ambulatory, and not revocable by either so long as the other continues to perform the contract. *Brown v. Webster*..... 591
11. Where husband and wife execute reciprocal wills pursuant to an agreement, the survivor *held* entitled to a specific performance of the contract as against the heirs, devisees, legatees, and executors of the decedent. *Brown v. Webster*, 591
12. Where an instrument is offered for probate, parol evidence *held* admissible to prove the circumstances surrounding its execution, and that it was executed by decedent as his will. *In re Estate of Hopper* ..... 622
13. A writing in existence at the time of execution of will, and described therein, *held* to be a part of the will by reference. *In re Estate of Hopper*..... 622
14. Parol evidence *held* competent to prove signatures to a writing referred to in a will, and that the writing offered is the same instrument identified by the signatures. *In re Estate of Hopper* ..... 622
15. Deeds executed with and referred to in a will *held* to be a part of the will and a valid devise of lands described. *In re Estate of Hopper* ..... 622

Witnesses. See CRIMINAL LAW, 26.

1. Witness *held* competent to testify to appearance and actions of a certain animal; it being for the jury to determine whether it was infuriated and dangerous. *O'Grady v. Union Stock Yards Co.* ..... 138
2. Statements by patient to physician *held* properly excluded. *Neice v. Farmers Co-Operative Creamery & Supply Co*..... 470

Witnesses—*Concluded.*

3. Refusal to permit reporter called as witness to refresh his memory by reference to published report, his original notes having been destroyed, *held* error. *Erdman v. State* ..... 642
4. Questions propounded to witness must not assume existence of a fact not proved. *Hans v. American Transfer Co*..... 834