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WILLIAM S. ROWND V. STATE OF NEBRASKA.

FILED MARCH 28, 1913. No. 17,857.

1. **Forgery**: INFORMATION: SUFFICIENCY. In an information for forgery, the phrase, "did knowingly * * * utter and publish * * * as true and genuine, * * * a certain false, forged and counterfeited check," etc., sufficiently avers guilty knowledge that the instrument was forged. The use of the word "knowingly" is equivalent to an allegation that the person knew the facts subsequently stated.

2. **Criminal Law**: CONTINUANCE: REVIEW. Where the adverse party admits that witnesses, if present, would testify as stated in an affidavit for a continuance, and the party presenting such affidavit afterwards reads such statement in his affidavit as evidence to the jury, there is presented no ground for a reversal of the final judgment of the trial court because of its refusal to grant the continuance asked. *Catron v. State*, 52 Neb. 389.

3. **Forgery**: IDENTIFICATION OF ACCUSED: EVIDENCE. Evidence that the defendant, during the time that the forged check, which he was charged with having uttered and published, was executed, presented for payment, and the payment of it obtained, was registered as a guest at a hotel in Omaha under the name of H. B. Sanford, and that the defendant and Sanford were one and the same person, when considered with the other evidence in the case, was competent as tending to identify the defendant as the person who uttered the forged instrument.

4. ———: ———: ———. Testimony that a niece of the defendant, who was intimate with the woman whose name was purported to be signed to the forged check, had access to her checks and private papers, knew of her business affairs, knew how much money she had and in what bank she kept it, that she was absent from the city of Omaha, that defendant and his said niece were intimate and were frequently together during that time, was competent as tending to identify the defendant and establish guilty knowledge on his part at the time he uttered and published the forged check.

5. **Criminal Law**: WITNESSES: INDORSEMENT OF NAMES ON INFORMATION. It is not a sufficient objection to the testimony of a witness that his name indorsed on the information was misspelled, in that, on the original information it was spelled Schmidt, while on the substituted copy it was spelled Schmitt, it appearing that the name on each information represented one and the same person.

6. **Forgery**: IDENTIFICATION OF ACCUSED: EVIDENCE. Evidence that the

defendant, when arrested, had in his possession another check payable to him under his assumed name of "H. B. Sanford," together with a pawn ticket issued to him under the name of "W. S. Sanford," was competent to connect the defendant with the commission of the crime charged against him.

7. **Criminal Law: INSTRUCTIONS: ALIBI.** An instruction containing the phrase, "The defendant has introduced evidence tending to establish what is known as an alibi," is not a disparagement of that defense, and is not subject to any just criticism. *Nightingale v. State*, 62 Neb. 371.

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

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

T. J. Doyle, for plaintiff in error.

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

BARNES, J.

William S. Rownd, hereafter called the defendant, was tried in the district court for Lancaster county on an information charging him with the crime of uttering and publishing a false, forged and counterfeited check for the payment of money. He was found guilty as charged in the information, and was sentenced to the penitentiary under the indeterminate sentence act, for a term of from one to twenty years. To reverse that judgment he has brought the case to this court by a petition in error.

The charging part of the information upon which the defendant was tried reads as follows: "That the said William S. Rownd, alias W. S. Raymond, in the county and state aforesaid, on or about the 19th day of April, 1912, in said county and state, he, the said William S. Rownd, alias W. S. Raymond, having in his custody and possession a certain false, forged and counterfeited check for the payment of money, which is in the words and figures as follows, to wit, 'Omaha, Neb., April 17, 1912. No. —

The Omaha National Bank. (27-2) Pay to the order of A. H. Stanton $220.00 two hundred and twenty dollars. Women's Department—Mary Sutman'—did knowingly, unlawfully and feloniously utter and publish the same as true and genuine; with the unlawful and felonious intent then and there to defraud, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the state of Nebraska."

It appears that to this information the defendant filed a demurrer, which was overruled, and defendant contends that the court erred in overruling his demurrer. It is argued that there is no averment in the information that the defendant uttered the check, knowing the same to be forged, and therefore the information was insufficient to charge the commission of a crime. Many authorities are cited in support of this contention, and it may be conceded that to charge the crime of uttering and publishing a forged check, as defined in section 145 of the criminal code, the words, "knowing the same to be false," or their equivalent, must appear in the information, and where such words are wholly omitted from the information it will not sustain a conviction. It must be observed, however, that the word "knowingly" is not omitted from the information. But it is argued that, as it is used therein, it must be held to modify and relate only to the charge of uttering and publishing the check in question, and therefore it is not charged that defendant uttered and published that instrument, knowing it to have been forged. This is not a new question, and there are some cases which support defendant's contention. But the rule announced in those cases is not sustained by the greater number and better considered decisions in this country. We think the rule is that the word "knowingly," as used in the information in this case, qualified all words following, and it is thereby equivalent to the words used in the statute, "knowing the same to be false." In *United States v. Clark*, 37 Fed. 106, it was held that "an indictment under Rev. St. U. S.

sec. 3893, charging that defendant did knowingly deposit for mailing and delivery certain obscene pictures, etc., is not open to the objection that it is not alleged that the defendant knew the character of that which he deposited." In 2 Bishop, New Criminal Procedure (2d ed.) sec. 556, it is said: "The adverb will suffice when so employed as to satisfy the demand for directness." In *State v. Williams*, 139 Ind. 43, the court held: "In an indictment for forgery the phrase, 'did * * * knowingly utter, publish and pass * * * as true and genuine, a certain false, forged and counterfeit promissory note,' etc., sufficiently avers the guilty knowledge that the instrument was forged." The court said that the use of the word "knowingly" is equivalent to an allegation that the person knew the facts subsequently stated; that to knowingly utter a forged instrument is the usual form of expression, and fully avers the guilty knowledge that the instrument was forged. As we view the weight of authority, the district court did not err in overruling the defendant's demurrer to the information.

It is also contended that the court erred in overruling the defendant's motion for a continuance. The affidavits in support of the motion alleged that two witnesses living in Kansas City were desired at the trial; that notice had been served to take their depositions in Kansas City, and before they were taken the defendant was arrested and placed in jail in that city until he was liberated by habeas corpus. In opposing the motion for a continuance, it was admitted in open court, by counsel for the state, that the witnesses named would testify, if present, that from April 12 to April 25, 1912, W. S. Rownd was in Kansas City every day, and that he was not in the city of Lincoln during that period.

The granting or refusal of a continuance is a matter of discretion with the trial court, and ordinarily will not be reviewed by the supreme court. Error can be predicated upon the ruling of the district court only in cases where there has been an abuse of discretion; and it has

been universally held by this court that, where the state offers to admit that an absent witness will testify to the facts alleged in the affidavit for a continuance, it is not error to overrule the motion. *Catron v. State*, 52 Neb. 389; *Russell v. State*, 62 Neb. 512; *Foster v. State*, 79 Neb. 259. It appears that the affidavits were read in evidence as though the statement contained therein was the testimony of the absent witnesses. Therefore there was no abuse of discretion on the part of the trial court in overruling defendant's motion for a continuance.

It is next contended that the court erred in receiving in evidence the hotel register and cashbook of the Wellington hotel in Omaha, which showed that H. B. Sanford of Kansas City, Missouri, registered at that hotel April 13, and that he paid his room rent on April 26, 1912. The proprietors of that hotel, a Mr. and Mrs. Hamilton, both testified positively that the defendant, W. S. Rownd, was the man who registered at their hotel as H. B. Sanford, and that they saw him practically every day of the time between April 13 and April 26. For the purpose of showing that the defendant Rownd and H. B. Sanford were one and the same person, this testimony was competent. After defendant's arrest there was found in his room, and among his effects, a check made payable to H. B. Sanford, and a pawnbroker's receipt indorsed by W. S. Sanford. This testimony was objected to as incompetent and immaterial, but was received by the trial court. It is now contended that the defendant's objections should have been sustained. It appears that these papers were taken from defendant's trunk in Lincoln, after his arrest. They were links in the chain of identification by which it was sought to prove that defendant was the man who uttered the check in question in the City National Bank at Lincoln. The fact that Rownd registered at the Wellington hotel at Omaha for two weeks, during which time he came to Lincoln and secured the money on the check, may be said to have been established, if the testimony of the Hamiltons was believed.

It also appears in evidence that, while defendant was registered at the Wellington hotel, he was in frequent communication with one Elsie Waters, who is admitted to be his niece. Defendant contends that this evidence was incompetent and highly prejudicial, and for its admission the judgment should be reversed. We think this testimony was competent, and was properly introduced for the purposes of identification. The testimony also developed the fact that Elsie Waters was intimate with Mary Sutman, whose name appeared to be signed to the forged check. It was also shown that Elsie Waters had access to the private papers of Mary Sutman; that she knew of her business affairs, knew how much money Mary Sutman had, and in what bank she kept it. The testimony also showed that Elsie Waters called upon the defendant while he was registered at the Wellington hotel under the name of Sanford, talked with him over the telephone at various times, and occasionally met him on the street. There was some evidence tending to show that the signature of Elsie Waters resembles that of the signature on the forged check. This testimony was strenuously objected to, and error is predicated for its reception. This evidence not only tended to identify the defendant as the man who uttered the check, but also tended to establish a guilty knowledge on his part at the time he uttered and published it. There was also a letter introduced in evidence, written by Elsie Waters to Mary Sutman, which was mailed in Omaha on April 16, some two days prior to the time the defendant appeared in the City National Bank of Lincoln and presented the check for payment. This evidence showing the close acquaintance of Elsie Waters with the defendant is material and competent. The state was required to identify the man who uttered the forged check as the defendant on trial, and this evidence was competent. It also tended to show the probability of the defendant's having the check purporting to be signed by Mary Sutman, as well as the knowledge on his part that it was a forgery. We are therefore

of opinion that all of this evidence was material and competent.

It is defendant's contention that the court erred in receiving the testimony of one John Schmidt, over the defendant's objection that his name was not indorsed upon the information. It appears that the original information was lost, and by agreement of the parties a copy produced by counsel for the defendant was agreed upon as a true copy of the original information. On motion of the county attorney, he was permitted to indorse on the substituted information the names of the witnesses that were indorsed on the original information. Among those witnesses was the name of John Schmitt. Objection was made to the testimony of this witness because his name on the original information seems to be spelled "Schmidt," instead of "Schmitt," as it appears upon the substituted information. It would seem that this objection was without merit. The two names are pronounced exactly alike, and it is not contended that they were used to designate different witnesses. But, as a matter of fact, they referred to the same person whose name was indorsed on the original information.

Defendant contends that the court erred in receiving in evidence the check made by one E. W. Roberts payable to H. B. Sanford. This check was in a picture frame behind a post card picture found in the trunk of the defendant Rownd at a time subsequent to his arrest. It is contended by the state that this check was an important piece of evidence, in that it tended to identify Rownd as the H. B. Sanford who stopped at the Wellington hotel from April 13 to April 26, 1912, and who uttered the forged check in Lincoln on the 18th day of that month. It is true that this evidence did not bear directly upon the crime committed by the defendant, but it served to identify the man who did commit the crime with the defendant Rownd who was charged with its commission. The fact that he had in his possession a check payable to H. B. Sanford, taken in connection with the other evidence

which we have previously discussed, was competent evidence to connect the defendant with the commission of the crime charged.

Defendant contends that the court erred in receiving the testimony of one Brouillette. That witness testified that he took Elsie Waters to two different dances in April, 1912; that on one occasion she told him that Mrs. Sutman was coming back from Canada because there had been a check forged on her for $200. It appears that this statement was made to Brouillette before it was known that the forged check in question had been passed. This testimony tended to show a plan of action between Elsie Waters and the defendant, which indicated an arrangement by which the check was forged, and finally presented to the bank in Lincoln for the purpose of having it cashed. The evidence found in the record in relation to the conduct of Elsie Waters and the defendant, together with their intimacy, rendered the evidence in question competent.

Error is also predicated on the admission of the testimony of one Scott. It appears that he was employed by the insurance company that was attempting to find the man who had defrauded the Omaha and Lincoln banks. The witness was present at the time the room and trunk of defendant were searched immediately subsequent to his arrest. He testified that he found among those effects the check signed by Roberts, a pawn ticket signed by the name of W. S. Sanford, which was issued by one L. Goldman of Kansas City under No. 9502. It appears that when Scott examined the effects of the defendant he made a memorandum in regard to the pawn ticket, and reported the same to a detective office at Kansas City, after which he destroyed his memorandum. The witness remembered the number of the pawn ticket which was signed by W. S. Sanford, but was compelled to refer to a copy of his report to identify the date, which was March 20, 1912. This testimony was competent under the rule announced in *Erdman v. State,* 90 Neb. 642, 651.

It appears from the evidence that the defendant was known by the name of W. S. Raymond; that he was known in Omaha under the name of H. B. Sanford. There is also in the record evidence of expert witnesses on handwriting to the effect that the same man signed W. S. Sanford to the pawn ticket, and H. B. Sanford on the register of the Wellington hotel in Omaha, and on the register of the Blossom House in Kansas City.

It is impossible, within the limits of this opinion, to discuss all of the 80 assignments of error contained in the record; but all of them have been carefully considered, and, as we view the record, the evidence objected to was competent and was properly admitted, and this is sufficient answer to those assignments.

It is contended that the court erred in giving to the jury instruction No. 5. It was the theory of the defendant that he was not in the city of Lincoln at the time the money was obtained on the forged check at the City National Bank, but was in the city of Kansas City. Instruction No. 5 stated the law relating to that defense. The only objection to the instruction is the use of the words, "tending to show what is known as an alibi." It is argued that this expression is a disparagement of the defense. We think this objection is too technical to receive serious consideration. A like instruction was given by the court in *Nightingale v. State,* 62 Neb. 371, where it was said: "This instruction, we think, is not subject to any just criticism." There was evidence in the instant case tending to show an alibi, and the court properly put the question before the jury by the instruction complained of.

Finally, it is contended that the evidence was insufficient to sustain the verdict. As we view the record, the state showed by Mary Sutman that the check in question was forged. It was shown by the testimony of Neil Dunn, the collection clerk for the City National Bank of Lincoln, that the defendant in this case came into the bank between 11 and 11:30 o'clock on April 19, 1912, and presented the check to have it cashed. Payment was refused;

but, at the suggestion of the witness, Rownd left the check with him for collection. He testified that he saw Rownd write on the back of the check the name "C. A. Clark." The check was sent to the Omaha National Bank for collection. On April 22 the City National Bank was notified that the Omaha National Bank had credited it with the amount of the check, and on April 25, about 11 o'clock, or shortly afterwards, Mr. Rownd, the defendant, entered the front door of the City National Bank, approached the desk of the witness Dunn, who handed him a cashier's check for the amount of the forged check, less collection. The defendant immediately indorsed it, took it to the paying teller, and there secured the money. The witness Dunn positively identified Rownd as the person who cashed this fraudulent check in his bank. The identification seems to be complete and positive. It is true that Dunn admitted on cross-examination that he was not infallible, but he was positive that the defendant was the man who obtained the money on the forged check. This evidence, if believed by the jury, would be sufficient to sustain the conviction.

The state also showed by Harold and Sadie Hamilton, proprietors of the Wellington hotel in Omaha, that the defendant William S. Rownd registered at their hotel April 23, 1912, as H. B. Sanford, and remained there until April 26. They related so many details about his visit that it is hardly possible that they could be mistaken about him. He was blind in one eye, and wore a glass eye. This was noticed by the Hamiltons at the time he was their guest. It appears that he frequently came to the desk and talked with them, and on one occasion got locked in his room, and had to come down on the fire escape. They also had some controversy with him at a time he was entertaining Elsie Waters in his room. These matters tend to show that the Hamiltons could not be mistaken in identifying the defendant as H. B. Sanford.

The state also showed that in Rownd's effects was the check made payable to H. B. Sanford. Defendant ad-

mitted that he was in Kansas City on May 19, and the register of the Blossom House in that city contains his signature on that date as H. B. Sanford. It appears that that signature was written by the same man who registered as H. B. Sanford in Omaha. The state showed the intimate acquaintance between Sanford and Elsie Waters, the niece of the defendant, by several witnesses. This tended to identify the man Sanford as the defendant Rownd, and also tended to show the guilty knowledge of the defendant in passing the forged check. The state further showed, by expert witnesses on handwriting, that the name C. A. Clark, as indorsed on the fraudulent check, and the name C. A. Clark, written on what is called exhibit 1, which is in evidence, were written by the defendant, and were written by the same man. The state also showed by several expert witnesses that the man who wrote the name H. B. Sanford on the hotel register in Omaha signed W. S. Sanford to the pawn ticket in Kansas City.

It further appears that Elsie Waters knew that the check in question had been forged, and that Mary Sutman, whose name appeared to be signed to it, was absent from the city of Omaha, and was in Canada at the time the check was presented for payment; that communication could not be had with Mary Sutman until a sufficient time would elapse to secure its collection; that a sufficient amount of money was deposited in the Omaha National Bank by Mary Sutman to pay the check, and that defendant and Elsie Waters were together at Excelsior Springs and Kansas City after the check in question was paid. It is true that defendant produced the depositions of four persons who declared that Rownd was in Kansas City during the time the forged check was cashed in Lincoln. Upon this question there was a clear conflict of testimony; but it was the province of the jury to determine the effect of this evidence.

It may be further said that, if the jury believed the testimony of the state's witnesses, it showed that Sanford

was at the Wellington hotel in Omaha from the 13th day of April, 1912, to the 26th of that month, during which time the check in question was presented to and cashed by the bank in Lincoln, and it was apparent to them that the defendant could come to Lincoln every day and transact business, if he so desired, and return to Omaha, and thus be seen about the hotel where he was registered on each day during the whole time he was stopping at the Wellington hotel.

As we view the evidence, it is sufficient to sustain the verdict, and finding no prejudicial error in the record the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

FRANK IAMS, APPELLEE, V. WILLIAM R. MELLOR ET AL., APPELLANTS.

FILED MARCH 28, 1913. No. 17,907.

Constitutional Law: OFFICERS: STALLION REGISTRATION BOARD. The act of April 10, 1911, which attempts to create a stallion registration board and to vest the same with state wide executive powers and jurisdiction, is in conflict with sections 1 and 26, art. V of the constitution, which specify the particular officers who shall constitute the executive department of the state, and provide that "no other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created." *State v. Porter*, 69 Neb. 203.

APPEAL from the district court for Howard county: JAMES N. PAUL, JUDGE. *Affirmed.*

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

John L. Webster, William H. Thompson and *T. J. Doyle, contra.*

LETTON, J.

This is an action to restrain the stallion registration board created by the act of April 10, 1911 (laws 1911, ch. 1), from collecting the fees prescribed in that act for the examination of stallions, for the renewal of the certificates provided for by the act, and for recording transfers of ownership, and from further enforcing the provisions of the act. The petition alleges that the defendants, while pretending to act under the statute, have interfered with the sale of horses by the plaintiff; that the market value of his horses has been reduced and depreciated and his business injured, and that the board, unless restrained, will continue its unlawful interference with his business. It is further alleged that the act violates the constitution of the state of Nebraska in a number of its provisions, and is therefore void. The admissions in the answer, together with the evidence, practically substantiate the main allegations of fact in the petition. The district court found that the facts stated in the petition were true, and further found that the act in question was unconstitutional as "an unlawful attempt to create state executive officers in violation of sections 1 and 26, art. V of the constitution of the state of Nebraska," and granted the relief prayed. The defendants appeal.

Section 1, art. V of the constitution of the state of Nebraska, is as follows: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings, who shall each hold his office for the term of two years from the first Thursday after the first Tuesday in January next after his election, and until his successor is elected and qualified: Provided, however, that the first election of said officers shall be held on the Tuesday succeeding the first Monday in November, 1876, and each succeeding election shall be held at the same relative time in each even year there-

after. The governor, secretary of state, auditor of public accounts, and treasurer, shall reside at the seat of government during their terms of office, and keep the public records, books and papers there, and shall perform such duties as may be required by law."

Section 26 of the same article provides: "No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created."

The fundamental question presented in this case is whether the act of 1911 violates these provisions of the constitution. Much condensed, the main provisions of the act are, as follows:

Section 1 provides, in substance, that every owner or keeper of any stallion or jack kept for public service or for sale, exchange or transfer, shall procure a certificate from the stallion registration board, "which shall be composed of the following named officers: The secretary of the Nebraska state board of agriculture, the professor of animal husbandry of the University of Nebraska, and the deputy state veterinarian."

Section 2. In order to obtain such certificate, there shall be presented to said stallion registration board an affidavit, signed by a veterinarian, who shall be approved and appointed by said board, to the effect that he has personally examined such stallion or jack, and that to the best of his knowledge and belief it is free from certain specified diseases; and if the animal is pure bred there shall also be presented a certificate of registration issued by certain specified stud book associations. The act further requires that the certificates issued shall bear the signature of the inspector and the stallion registration board, and shall have attached the official seal of the board; provides for the annual re-examination of the animals; that the board shall have power to revoke certificates for cause; requires the posting of the certificate or a copy of the same by the owner at the place of service, the recording of the certifi-

cates by the board, the issuance by the board of certificates of transfer of ownership in case of the sale, exchange or transfer of each animal; and provides for the collection of fees for the issuance and renewal of certificates. The funds thus derived shall be used by the board "for the printing of certificates, clerical service, payment of inspectors, and the publication of an annual report which shall contain an alphabetical list of stallions and jacks which have been granted certificates and such other information as will tend to promote the best interests of the horse breeding industry in Nebraska." It also provides that a violation of the provisions of the act shall be a misdemeanor punishable by fine or imprisonment or both.

The appellants argue that it was not the intention of the makers of the constitution that all administrative state offices, except those named in section 1, art. V, should be abolished, and the establishment thereof barred for the future by section 26 of the article, and, to illustrate, say there was at that time a warden of the state penitentiary, and a superintendent of the Nebraska hospital for the insane, who were each the chief executive officers respectively of the institutions named, were paid by the state, and charged with the duty of general supervision over the persons employed in such institutions, and argue: "Surely there is more reason for holding that the warden of the state penitentiary and the superintendent of the Nebraska hospital for the insane, who receive substantial remuneration from the state for their services and have charge of important state institutions, are executive state officers than there is for holding that the members of the stallion registration board, who receive no compensation whatever for their services rendered as members of said board, are such officers." They also argue that this court in *Wallace v. State,* 91 Neb. 158, has upheld the constitutionality of the "Indeterminate Sentence Law," which established a state prison board, and that the powers of this board are as executive in character as those of the stallion registration board. They also cite *In re Barnes,* 83 Neb. 443, as upholding their views.

The appellee contends that the language of the constitution is plain and unambiguous; that the duties of the members of the board are executive in character and state wide; and that the ordinary significance of the words used, and the prior decisions of this court, clearly show that the members of the board would, if they performed the duties imposed upon them by the act, be holders of "an executive state office."

The question presented is not a new one in this state. In 1883, only eight years after the constitutional convention was held, and while the memory of its discussions must have been fresh, under the practice then prevailing, the opinion of the judges of this court was taken upon the question as to whether railroad commissioners would be state executive officers, and as to whether such an office, if created by the legislature, would come within the inhibition of the constitution. In the opinion in *In re Railroad Commissioners,* 15 Neb. 679, it is said: "Even were it not inhibited by other clauses of the constitution, we do not think that it is desired or contemplated to invest such railway commission with the power to make laws, or even to interpret or apply them, but that such duties would be to aid in carrying the laws into effect. Hence their duties would be executive, and if state officers, if paid out of the state treasury, and their field of duty coextensive with the territorial limits of the state, they would be state executive officers." As a necessary consequence, it was held that the creation of such an office was inhibited by section 26. See, also, *In re Appropriations,* 25 Neb. 662.

In another case, when passing upon the question of the validity of an act of 1887, providing that the attorney general with four other specified existing state officers shall constitute a board of transportation, it was insisted that the law was invalid for the reason that, "under the provisions of our constitution, no such board could be created or have an existence;" but it was held that, since the duties of the board were imposed upon executive offi-

cials who were named in section 1, art. V of the constitution, the provisions of section 26 were not violated. In that opinion (*Pacific Express Co. v. Cornell,* 59 Neb. 364, 375) it is said: "The constitution makers sealed the doorway to any more executive state offices, and must have done so, knowing and contemplating the future growth and development of the state and the consequent birth and existence of further duties; and their manner of disposition of them was that the constitutional officers should attend to them." Following this decision, and that in *Nebraska Telephone Co. v. Cornell,* 59 Neb. 737, to the same effect, it became the practice in this state to create executive boards, the members of which were composed of existing state officials; and, in order to relieve these officers from the onerous additional duties imposed upon them, the several acts provided for the employment of deputies or secretaries to aid in or to carry on the administrative details necessitated in the work of the board. These acts have uniformly been upheld. *State v. Eskew,* 64 Neb. 600; *Merrill v. State,* 65 Neb. 509; *McMahon v. State,* 70 Neb. 722, 726. The validity of other acts making existing state officers commissioners of certain bureaus, or members of certain executive boards, as, for example, the Bureau of Printing, the State Board of Equalization, the State Fire Commissioner, the State Board of Pharmacy, the State Inspector of Oils, the State Board of Health, the State Board of Irrigation, and other executive departments, has never been questioned. The legislature itself has continuously for a long period of time construed the provisions of section 26 as prohibiting the creation of state executive boards composed of members other than the executive state officers named in the constitution. When it sought to establish a railroad commission with broad executive and administrative powers and duties extending throughout the state, it was thought necessary to amend the constitution in order to allow this to be done without imposing the additional burden of these duties upon the existing state officers. In 1899 the legis-

lature attempted to create a state registry of brands and marks and a state brand and mark committee, and cattle owners desiring to use a brand or mark were required to certify a description of the same and file it for record. The power to decide as to the right to use such a brand was conferred upon this committee, and a fee was required to be paid by the applicant for recording the brand. The duties of this committee were state wide, and their compensation and expenses were to be paid out of the fees derived from the cattle owners. The secretary of state was made a member of the committee, as well as three reputable, representative stock raisers to be appointed by the governor from those largely interested in cattle. The act was held invalid in *State v. Porter*, 69 Neb. 203. Judge SULLIVAN, writing the opinion, said: "The act of 1899 assumed to vest the brand and mark committee with executive powers and jurisdiction throughout the state. This being so, the members of the committee would, if the act were valid, be executive state officers; but there can be no executive state offices other than those mentioned in section 1, art. V of the constitution. The legislation we are considering was, of course, abortive and void."

We can see no substantial difference in principle between the duties and powers of the brand and mark committee and those of the stallion registration board. Paraphrasing the language of Judge SULLIVAN, the act of 1911 assumes to vest the stallion registration board with executive powers and jurisdiction throughout the state. This being so, the members of the committee would, if the act be valid, be executive state officers; but there can be no executive state officers other than those mentioned in section 1, art. V.

We can see no force in the argument of appellants that the offices of warden of the state penitentiary and superintendent of the state hospital for the insane are state executive offices, and that, if the stallion registration board is not warranted by the constitution, these offices are also unwarranted. The offices named are not within

the definition of state executive officers, as intended by the constitution and defined by this court. Their jurisdiction is not state wide, but is confined to certain specified local institutions. The case of *Wallace v. State*, 91 Neb. 158, which upheld the validity of the act of 1911, providing for the appointment by the governor of a state prison board, part of whose duties are concerned with the discipline and parole of prisoners in the state penitentiary, and whose duties with respect to the final pardon or discharge of prisoners are merely advisory to the governor, is relied upon by appellants. In that case it was held, without much discussion, that the act is not in conflict with section 26, art. V, and that the duties of the state prison board are not of such a character as to bring them within the definition of state executive officers. It is possible, as intimated in the opinion, that there may be room for doubt as to the constitutionality of some of the provisions of the act; but the court, following decisions in other states and in conformity with the settled law in this state, resolved the doubt in favor of the validity of the act.

In conclusion, unless we disregard the plain language of the constitution and depart from its settled construction, we must hold this act invalid. In so far as it attempts to create new executive officers, it is clearly a departure from the previous custom and practice of the legislature. The purposes of the act seem beneficial, and the fatal defect can easily be remedied by new legislation. It is within the power of the legislature now sitting, if the workings of the act have satisfied that body of its value to the people of the state, to re-enact its provisions, imposing the duties of the board upon the state officers named in the constitution; and we hasten to pass upon the question so that the opportunity may be afforded so to do.

The judgment of the district court is right, and is

AFFIRMED.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, APPELLEE, V. PAUL PETERSON, APPELLANT.

FILED MARCH 28, 1913. No. 17,043.

1. **Compromise and Settlement:** CONCLUSIVENESS. After an agreement to compromise and settle an actual controversy has been made by the parties in interest, the original matter in dispute is not a proper subject of suit or defense, where fraud, mistake or duress in procuring the contract is not pleaded.

2. **Insurance:** PROOF OF LOSS: MISSTATEMENTS. In the law of fire insurance, a misstatement of fact in the proof of loss, if made after the insurer and the insured have entered into a contract to compromise and settle the damages in dispute, is not a proper subject of suit or defense, where the insurer did not rely upon the misstatement, and where it was perfunctorily made, without any fraudulent intent.

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

Jefferis & Howell and *Herman Aye*, for appellant.

Greene, Breckenridge, Gurley & Woodrough, contra.

ROSE, J.

This is an action for money had and received. For the term of one year from March 23, 1909, plaintiff insured defendant against loss by fire to the extent of $1,300 on a linotype and $200 on a stereotyping plant, and authorized concurrent insurance, which was written in the Hartford Fire Insurance Company to the extent of $1,000 on the linotype and $200 on the stereotyping plant. The building containing the property was destroyed by fire April 27, 1909. This controversy is narrowed to the insurance on the linotype. Plaintiff's proportion of the liability, estimated at $889.67, was paid to defendant June 7, 1909. To recover back that sum is the purpose of this suit. In the petition the relief demanded is based on two grounds: (1) Defendant was not the sole owner of the property at the time of the fire, and for that reason was not entitled

to any indemnity under the terms of his policy. (2) In violation of his insurance contract, he procured payment by false statements in his proof of loss. The facts constituting both grounds of relief were denied in an answer containing an affirmative plea of the compromise and settlement of plaintiff's proportion of the loss at $889.67. In a reply plaintiff denied the compromise and settlement, and repleaded that payment was made in reliance upon false statements made by defendant in his proof of loss. The case was tried to the court without a jury. From a judgment in favor of plaintiff for $616.87, defendant appeals.

The judgment is challenged as being without support in the pleadings and evidence. That plaintiff's policy was issued, that it was in force when the fire occurred, that the linotype was damaged to some extent, are facts not open to controversy. At the time of the fire defendant, on the record made, was clearly the owner, within the terms of the insurance contract.

The other ground of relief pleaded by plaintiff is unavailing for the following reasons: The evidence shows, without contradiction, that before proof of loss was made an adjuster of plaintiff saw where the linotype stood in the ruins of the consumed building. He had the same opportunity as defendant to determine the nature and extent of the damages. After the terms of the compromise had been agreed upon, the proof of loss was made by defendant in a perfunctory way, without any intention of misleading or defrauding the insurer. That the statements therein were not relied upon by plaintiff is shown by its own testimony. Plaintiff not only entered into the contract of settlement, but paid the loss. The compromise was pleaded and proved by defendant. In absence of fraud, mistake or duress, it is binding on the parties. *Home Fire Ins. Co. v. Bredehoft,* 49 Neb. 152; *Gandy v. Wiltse,* 79 Neb. 280; *Slade v. Swedeburg Elevator Co.,* 39 Neb. 600; *Massillon Engine & Thresher Co. v. Prouty,* 65 Neb. 496. The truth is that the linotype had been in a

fire. Falling plaster and other debris had covered it in the ruins. Both parties saw the situation. The machine was injured. There was a loss to adjust. The parties were competent to make an agreement, and the amount of damage was a lawful subject of contract. The adjuster and defendant, each apparently relying on his own acumen, began and concluded negotiations for a settlement, without uncovering the machine. Evidence directed to the issue of fraud in the proof of loss indicates that defendant had the better of the bargain, that this was not discovered until after the linotype had been uncovered and cleaned, and that the debris had protected it. Plaintiff denied the settlement, but was mistaken. It did not plead fraud, mistake or duress resulting in an unconscionable settlement. Such a plea was necessary to relief based on that ground. *Gandy v. Wiltse,* 79 Neb. 280. It follows that the relief granted to plaintiff was outside of the pleadings and evidence. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

PAUL PETERSON, APPELLANT, V. HARTFORD FIRE INSURANCE COMPANY, APPELLEE.

FILED MARCH 28, 1913. No. 17,044.

Judgment: PLEADING AND PROOF. A judgment granting relief outside of the pleadings and evidence is erroneous.

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

Jefferis & Howell and *Herman Aye,* for appellant.

Greene, Breckenridge, Gurley & Woodrough, contra.

ROSE, J.

This is an action to recover fire insurance under a contract of compromise and settlement fixing the loss at

$711.11. For the term of one year from March 23, 1909, defendant insured plaintiff against loss by fire to the extent of $1,000 on a linotype and $200 on a steretoyping plant, and authorized concurrent insurance, which was written in the Springfield Fire & Marine Insurance Company to the extent of $1,300 on the linotype and $200 on the stereotyping plant. The building containing the property was destroyed by fire April 27, 1909. Plaintiff pleaded a compromise and settlement of defendant's proportion of the loss at $711.11. In its answer defendant denied the compromise and settlement, and pleaded the following defenses: (1) Plaintiff was not the sole owner of the property at the time of the fire, and for that reason was not entitled to any indemnity under the terms of his policy. (2) In violation of his insurance contract, he made false statements in his proof of loss and thus invalidated his insurance. The case was tried to the court without a jury. From a judgment in favor of plaintiff for $240.12 only, he has appealed.

This case was decided on the identical evidence considered in *Springfield Fire & Marine Ins. Co. v. Peterson, ante,* p. 446, and for the reasons therein stated the result here must be the same.

The judgment granting relief to defendant, being outside of the issues and evidence, is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM W. DE WOLF, APPELLEE, V. ALBERT RETZLAFF, APPELLANT.

FILED MARCH 28, 1913. No. 17,087.

1. Appeal: INSTRUCTIONS: HARMLESS ERROR. Harmless error in an instruction to the jury is not ground for reversing a judgment on the verdict.

2. ———: MOTION FOR NEW TRIAL: EXCESSIVE VERDICT. Where the verdict is not questioned as excessive in the motion for a new

trial, mere excess in the amount of recovery is not reviewable under the assignment that the verdict is not sustained by the evidence.

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

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

Morning & Ledwith, contra.

ROSE, J.

Defendant broke the fibula and the tibia of his left leg, and employed plaintiff, who is a physician and surgeon, to reduce and treat the fractures. For professional services rendered and expenses incurred between March 16, 1910, and April 20, 1910, plaintiff brought this suit to recover $239.35. Defendant admitted plaintiff's employment, but pleaded malpractice, and demanded damages in the sum of $5,000. Upon the verdict of a jury, judgment was rendered in favor of plaintiff for $250.50. Defendant appeals.

Complaint is first made of the following instruction: "If you find for the plaintiff, you will so say by your verdict. If you also find for the defendant on his damage claim, you will deduct the larger item from the smaller, as the case may be, and return a verdict accordingly."

The criticism is that the jury were permitted to allow plaintiff compensation for professional services, and to award damages for malpractice growing out of the same services, though one claim, if established, would necessarily defeat the other. If the position thus taken is correct, it is clear that defendant was not prejudiced by the instruction, because the verdict shows on its face that the jury specifically found in favor of plaintiff for the full amount of his claim, and against defendant on his cross-petition for damages. The occasion for deducting one claim from the other, therefore, did not arise.

The correctness of the following instruction is also

challenged: "It is the duty of a patient to exercise ordinary care and prudence, and obey all reasonable instructions given by the surgeon, and if he fails in these respects, and complications arise in the matter of healing the wounds or injuries being treated by the surgeon, and such complications are such as may have been caused by such want of ordinary care and prudence on the patient's part, or by his failure to obey reasonable instructions of his surgeon, the burden is upon him to show that such complications or unfavorable results were not due to his own want of ordinary care and prudence, but were due to the negligence or want of skill of the surgeon."

The instruction cannot be approved as an accurate statement of the law applicable to the issues and facts. Defendant attacks it as an erroneous direction that, in an action for malpractice, the burden is on a patient charging negligence to prove that complications or unfavorable results were not due to contributory negligence on his part. Assuming, but not deciding, that the position thus taken by defendant is tenable, should the judgment be reversed for the giving of the instruction quoted? In answering this question, further details of the case must be considered. The injury occurred on a highway while defendant was sitting on a wagon load of lumber, with his legs hanging over the front end. A horse kicked him and broke his left leg below the knee. Both bones were broken and protruded through the flesh, causing ugly lacerations. In that condition he drove to the home of his brother. Plaintiff arrived there within an hour, dressed the wounds, reduced the fractures, so he says, and wrapped the leg in a splint composed of wire and wood. The splint was devised by plaintiff after his arrival. It is described by experts as a "Cabot posterior splint." The evidence shows that it is one frequently used by skilful and careful surgeons. In two or three days the patient was taken a short distance to the home of his parents. After a week or more he was removed to his own home. There he had the attention of his wife and her mother. Nearly every day for

five weeks after the injury, plaintiff removed the bandages and dressed the wounds. He frequently stated to defendant that the fractures had been properly reduced, and that conditions and improvement were satisfactory, considering the nature of the injuries. The fears of the patient were often aroused by his wife and mother-in-law, who discussed the danger of blood-poisoning and censured the physician. Defendant became dissatisfied, complained of the treatment and consequent suffering, feared blood-poisoning, discharged plaintiff, and employed Dr. Finney, who removed the splint, broke whatever union had been formed, treated and dressed the wound, placed the bones in apposition, and put the leg in a plaster cast. Dr. Finney's testimony tends to prove that a complete use of the broken leg would not have been restored without a change of conditions as he found them. That defendant will entirely recover from his injuries is not now questioned. The principal charges of negligence imputed to plaintiff are that he failed to replace the broken ends of the bones in true apposition; that the leg below the fractures was left in an unnatural or crooked position; and that the splint used did not properly immobilize the limb. In all of these particulars the evidence is sufficient to sustain a finding that plaintiff in performing his professional services was neither unskilful nor negligent, though the testimony is not in perfect harmony on that issue. On the witness-stand defendant himself evinced a purpose to be both truthful and candid. The verdict of the jury, however, based as it is on all of the evidence, determines the fact that plaintiff's services were skilfully and carefully performed. Though there is proof that in a few minor particulars directions of the physician were not strictly observed, there is no convincing evidence that "complications" or "injuries" came from that source. Plaintiff's own testimony virtually shows that no harm was caused by disregarding instructions. He testified that the bones had been in continuous apposition during his treatment, and that when he made his last examination before being

discharged, the leg was in its natural position, and that the injuries were improving normally. Defendant had escaped dangerous infection. His wife's testimony indicates that Dr. Finney used considerable force in breaking the union before he reset the bones. In one of the instructions the jury were told that plaintiff could not recover, if the bones had been placed in apposition by Dr. Finney for the first time. With the record and the evidence in the condition outlined, it does not appear that the jury were misled or that defendant was prejudiced by the instruction criticised.

It is also argued that the recovery is excessive. Defendant urges this point on the ground that the evidence is insufficient to sustain the judgment, there being in the motion for a new trial no assignment that the verdict is excessive. Mere excess in the amount of the recovery cannot be corrected on appeal in that way. *Hammond v. Edwards,* 56 Neb. 631; *Lowe v. Keens,* 90 Neb. 565.

AFFIRMED.

MATTIE A. ELLIOTT, APPELLEE, V. GENERAL CONSTRUCTION COMPANY, APPELLANT.

FILED MARCH 28, 1913. No. 17,112.

1. **Appeal:** PARTIES: REVIEW. In the title of a petition, the naming of "Mattie A. Elliott" as plaintiff, instead of "Mattie A. Elliott, administratrix of the estate of Howard Elliott, deceased," is not a ground of reversal in a record showing that defendant answered to the merits of an amended petition containing the correct title, and that, without prejudice to defendant, the case was tried as if there had been no such defect.

2. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISKS. An employee does not ordinarily assume risks arising from conditions beyond his knowledge and not obvious to a person of his experience and understanding.

3. ———: ———: NEGLIGENCE OF MASTER. A master who puts an inexperienced servant to work in a hazardous position among

electric power wires carrying dangerous currents of electricity, without properly instructing him in regard to his duties and without giving him specific warning of incident dangers not obvious to a person of his experience and understanding, cannot justify such conduct by showing that the servant had represented himself to be an experienced lineman in telephone work involving no danger from electricity, where the master knew in advance that the servant had never had any experience in working among dangerous wires.

4. **Negligence**: QUESTION FOR JURY. Negligence in constructing and in using electric wires carrying dangerous currents of electricity is a question for the jury, where the evidence on that issue is conflicting.

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

Greene, Breckenridge, Gurley & Woodrough, for appellant.

W. C. Lambert and *S. L. Winters, contra.*

ROSE, J.

While Howard Elliott was in the employ of defendant, he came in contact with electric wires among which he was working at the top of a pole and was instantly killed. This is an action by his mother as administratrix of his estate to recover resulting damages in the sum of $25,000. Upon a verdict of a jury, judgment was rendered in favor of plaintiff for $7,500. Defendant has appealed.

A reversal is demanded because the mother of decedent brought the suit in her own name instead of suing for damages as administratrix. It is true that the title of the petition is defective in naming "Mattie A. Elliott" as plaintiff, instead of "Mattie A. Elliott, administratrix of the estate of Howard Elliott, deceased." The ruling on this point, however, is adverse to defendant for the following reasons: In the body of the petition there is a proper plea that plaintiff is the duly appointed and qualified administratrix of her son's estate. An amended petition

with a correct title was filed. Before trial the defect was not specifically called to the attention of the court by motion or demurrer. Defendant pleaded to the merits of the amended petition. The trial would not have proceeded differently had the action been brought in the name of the administratrix. It was shown by the evidence that she was a widow, with a number of children, and that her deceased son had contributed regularly to her support. In the instructions the administratrix was treated as plaintiff, and in her representative capacity the jury found in her favor. In this respect the judgment is the same. Defendant was not prejudiced by the irregularity challenged, and it would be carrying a technical objection too far to reverse the judgment on this ground.

One of the assignments of error presents this question: Was there an erroneous refusal to direct a verdict in favor of defendant on the grounds that Elliott accepted employment with full knowledge of its hazards; that his death resulted from assumed risks; that negligence on the part of defendant was not the proximate cause of his death; that defendant was not negligent in locating or constructing any wire at the place of the accident, or in failing to warn him of danger? Attention is thus directed to the evidence submitted to the jury. By means of extension-arms bolted to the top of a 30-foot pole 25 feet above the ground, Elliott was engaged with other employees in elevating electric power wires running along the north side of an electric street railway track between South Omaha and Ralston. Three wires, each carrying 5,300 volts of electricity, were attached to insulated pins on a cross-arm bolted in the center to the top of the pole. There was a wire at each end of the cross-arm. The other power wire was 17½ inches from the south wire and 35 inches from the north one. A metal trolley bracket, hanging over the street railway track, swung from the pole 31½ inches below the cross-arm. Two concatenated wires, one above the other, hung over the street car track, the upper wire being attached to an insulated pin on the south end

of the bracket. The bracket itself was supported by an iron rod running from the outer end to the top of the pole. The upper wire is the messenger and bears the weight of both, while the lower one is the trolley wire which carries electric currents and applies them to the trolley on the street cars. The trolley wire carried 500 volts of electricity and the messenger wire carried practically the same voltage. In addition to the wires described, a small, uninsulated copper wire was attached at one end to the messenger wire. It wound around the metal trolley bracket, followed it nearly to the pole, ran down the pole to a cluster of incandescent lamps, and from there, through a switch, to the ground. One of the obvious effects of this copper wire was to undo the insulation protecting the trolley bracket and the iron rod from the electric currents carried by the messenger wire.

It will thus be seen that within three feet of the top of the pole there were four wires, one metal trolley bracket, and an iron rod, all carrying electricity. Elliott ascended the pole by means of spur climbers, and, to prevent falling, fastened himself to the top with a belt. With the upper part of his body between the north power wire and the one next to it, and his left foot near the trolley bracket and the copper wire, he had taken a postion on the east side of the pole, intending to unscrew the nut from the bolt which held the cross-arm in place, and to assist in raising the cross-arm on extension-arms already bolted to the pole. He carried a metallic brace and bit, either attached to his belt or in one hand. A fellow servant on the west side of the pole a little lower down handed him a 12-inch iron monkey-wrench. He took it for the purpose of unscrewing the nut at the top of the pole. There were sputtering sounds. The brace and bit fell to the ground. His body swung from his belt.

The pleadings raised these issues: Did Elliott assume the risks of his employment knowing the conditions and danger? Was defendant guilty of negligence in failing to properly instruct Elliott of his danger or in using the un-

insulated copper wire connecting the messenger with the trolley bracket and the ground? Was such negligence the proximate cause of Elliott's death? He began work Monday, July 12, 1909, and was killed the next day. He had never before worked on lines carrying dangerous currents. During the two days he had been in defendant's service, his experience with high voltage wires was limited to four or five poles. The danger incident to his work where he was killed existed only on one other pole, and it does not appear that he had unbolted the cross-arm thereon. Defendant relies on testimony of the manager who employed Elliott, of the foreman in charge of the work, and of other witnesses, to show that the employee had represented himself to be an experienced lineman; that he knew the dangers incident to such service; that he had been told of the dangers; that he promised to be careful; and that he had presented himself already equipped for a lineman's work. The court, however, was not bound to accept all the testimony of this nature as conclusive of the issue. The manager admitted that Elliott told him his work as a lineman had been confined to telephone lines carrying electricity in harmless quantities only. The manager's warnings of danger, as shown by his own testimony, were general in their nature. From them a court or jury might properly infer that they were not intended for a lineman who was experienced in working among wires carrying dangerous currents of electricity. The foreman in charge of the work in hand was on the pole or near it when the accident occurred. He admitted that Elliott had asked him about the danger, and had told him of having had no experience with "hot wires." Elliott was not specifically warned of the danger of the copper wire and the bracket, carrying, as they did, the voltage of the messenger wire, running beneath the high potential power wires, and communicating with the ground. Nor does the evidence conclusively show that Elliott knew, or should have known, of such danger. If, therefore, testimony that Elliott represented himself to

be an experienced lineman and appeared for work with a lineman's outfit is uncontradicted, both the manager and the foreman, when he was employed, knew he had no previous experience among dangerous wires like those on the pole where he was directed to work. Not having such knowledge, they could not send him into a place of danger without proper instructions, and justify their conduct by showing that he represented himself to be an experienced lineman in telephone work involving no danger from electricity. When all the circumstances are considered, the evidence is sufficient to sustain a finding that Elliott's knowledge, experience and representations did not, under well-settled rules of law, prevent a recovery on the ground that he assumed the risks to which he was exposed. The question was one for the jury.

Was there evidence tending to show negligence in the use of the uninsulated copper wire, which carried electricity along the trolley bracket to the ground, and in failing to specifically warn the inexperienced employee of the danger? There is some direct proof on the affirmative of this issue. Exhibits introduced by defendant, in connection with other evidence, indicate that, except for the copper wire, the trolley bracket would have been protected by an insulated pin from the voltage of the messenger wire. There was the same necessity for insulating the copper wire that there had been for protecting the bracket. The effect of using the copper wire in the manner described, without insulation, was to make three unprotected conductors to the pole and one to the ground, where, otherwise, there would have been none. The evidence of negligence in this respect is sufficient.

Was the negligence proved the proximate cause of Elliott's death? Mere contact with one of the three power wires among which Elliott was working did not cause the accident. This is shown by the evidence. When Elliott was at the top of the pole his fellow servant told him that his arm was against a wire. He replied: "I know it." An electrician to whom Elliott had first reported for work

testified: "I told him that he wanted to be very careful of those wires in handling them, if he had to touch them at all." Of the three power wires, the one by the pole on the south side was the nearest to Elliott's left side. His left foot was near the copper wire and the bracket. His death could have been caused by a short circuit resulting from simultaneous contacts with two power wires, or with one power wire and either the copper wire or the bracket. If death resulted from contacts with two power wires, the negligent use or construction of the copper wire was not a contributing cause. The other explanation, however, is more substantial. Simultaneous contact above and below, when the conditions are observed, could have resulted from resetting the spurs in the pole or from natural motions of the limbs or the body, either in adjusting or in using tools. That the fatality occurred in this way is supported by proof of burns on the left arm and on the left side, by an opening in the sole of the left foot, and by a hole in the left shoe. Defendant insists, however, that the latter theory cannot be accepted, because, if the currents had been short-circuited in that manner, the voltage from one of the power wires, it is asserted, would have melted the small copper wire, which was left in its former condition. On conflicting evidence, the jury found otherwise and settled that question adversely to defendant. In this view of all the evidence, the case was properly submitted to the jury without error in the instructions. The rulings on evidence are also approved.

It is further argued that the judgment is excessive. On this point Judge BARNES and the writer are of opinion that the recovery exceeds the damages proved by at least $2,500. On the contrary, it is held by the majority that the district court did not err in sustaining the verdict as rendered.

AFFIRMED.

DORA BAKER, APPELLEE, V. CENTRAL IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED MARCH 28, 1913. No. 17,022.

1. Waters: IRRIGATION DISTRICTS: LANDS SUBJECT TO ASSESSMENT. In order to subject lands to the payment of taxes and assessments for the support of an irrigation ditch, the boundaries of the irrigation district must be sufficiently definite and certain to identify the land to be irrigated thereby, and the amount thereof. Section 28, art. II, ch. 93*a*, Comp. St. 1901.

2. ———: ———: BOUNDARIES: DESCRIPTION. In surveying the boundaries of an irrigation district, where straight lines are not followed, meander lines should be set out with sufficient definiteness to substantially indicate the route followed and to identify the lands sought to be embraced within the district. In such a case a description by metes and bounds, which would be sufficient in an ordinary deed, is sufficient.

3. ———: ———: ———: ———. In making such a survey, a call in one of the main lines or courses, "From a point on the section line about 800 feet east of the southwest corner of section 10, Tp. 21, R. 54, thence in a northeasterly direction to the east line of section 10," is too indefinite and uncertain to determine how much of the land through which such call is intended to run is within the irrigation district.

4. ———: ———: ASSESSMENTS: INJUNCTION. In a suit in equity by a landowner to restrain an irrigation district from procuring the taxation of her lands for the support of its irrigation ditch, if it appears that the plaintiff in such suit has in fact used water from the defendant's ditch, upon a certain number of acres of said land, an injunction is properly refused as to such lands so watered, even though it may be found in the same suit that plaintiff's lands generally, by reason of uncertainty in the description of the boundaries of such district, are not taxable therein.

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

L. L. Raymond and *James E. Philpott*, for appellants.

W. W. White, *F. A. Wright* and *J. G. Mothersead*, *contra.*

FAWCETT, J.

Plaintiff is the owner of the south half, and the northeast quarter, of the southwest quarter, and the southwest quarter of the southeast quarter of section 10, township 21, range 54 west, in Scott's Bluff county. The defendant was organized for the purpose of purchasing the canal and franchises of the Central Canal, which purchase was made and bonds to the amount of $21,000 issued for carrying out the purposes of its organization. Plaintiff instituted this suit in the district court for Scott's Bluff county, and in paragraph 3 of her petition alleges: "That only a portion of said land is within the boundaries of said irrigation district, although said irrigation district has taxed all the said land for irrigation purposes. That so much of said land as lies south and east of a line commencing 800 feet east of the southwest corner of said section 10, running thence in a northeasterly direction until it intersects the east line of section 10 at a point south of where the east line of section 10 intersects the south bank of the North Platte river, was never included in the defendant district. That an exact description of the land included by the defendant district for irrigation purposes and the amount thereof cannot be given, for the reason that the field notes of the survey of said district do not show the point on the east line of said section 10 where the straight line commencing 800 feet east of the southwest corner of said section intersects the east line thereof. Plaintiff states that from natural causes but a small tract of plaintiff's land lying north and west of the said above described lands, amounting to not more than 26,695 acres, is susceptible of irrigation from the ditch of the said company, and such was the case when said district was formed." In paragraph 7 the petition alleges: "That plaintiff has frequently requested said district and its officers not to include her said lands within the boundaries of said district, and to exclude the same, and to levy no taxes on same for irrigation purposes, but defendant

refuses to comply and still refuses to do so." The prayer is: "Wherefore, she prays that her said lands be declared nonassessable for irrigation purposes for support of defendant district; that said lands be detached from said district, and that all persons acting for and on its behalf be enjoined from levying or assessing taxes against said land for irrigation purposes; that the taxes already assessed be declared null and void, and that the cloud upon her title to said lands be removed, and she have such other and further relief as equity and justice may require." We have quoted all of the petition necessary to be considered here.

For answer to paragraph 3 of the petition defendant denies the allegation that the land lying south and east of the line referred to was never included in defendant district; alleges that "the said 'straight line,' commencing 800 feet east of the southwest corner of section 10," is only assumed so to be by plaintiff and is fictitious; avers the facts to be "that a line commencing at said point 800 feet east of said southwest corner, thence northeasterly, east, northeasterly, etc., varying in the points of the compass only so as to pass over the most practicable route for defendant's canal to the east line of section 10, includes within defendant district all of plaintiff's lands as were, as it is alleged by plaintiff, never included in the defendant district; * * * that the last above named line, so including plaintiff's lands, is the line so commencing 800 feet east of said southwest corner of section 10;" that at the time of the organization of defendant district on or about June 10, 1901, plaintiff's said lands were included within the boundary of defendant district; that all of said lands then and there became, were, and ever since, and now are a part of the real property of defendant district, and as such are subject to assessment and taxation for the payment of the purchase by defendant of the central ditch and all its rights and franchises for the use of defendant, and also subject to assessment and taxation for the payment of all other

liabilities incurred in the necessary maintenance and operation of said central ditch for the use and benefit of the defendant; that 90 acres or more of plaintiff's lands included within the boundary of defendant's district are irrigable. As to paragraph 7 of the petition, quoted above, the answer is a general denial. The reply, in substance, is a general denial.

By its decree the court found: "That the boundaries of the defendant district are so indefinite and uncertain that they do not show, nor can it be determined therefrom, just how much of plaintiff's land is within the defendant district; that the plaintiff has used water to irrigate 20.59 acres of her land set out and described in her petition; and that she is liable for the taxes levied and assessed for such number of acres. The court further finds that plaintiff is entitled to the injunction prayed as to the taxes levied and assessed against 139.41 acres of her said lands; that injunction against the assessment and collection of taxes for irrigation purposes against the 20.59 acres should be denied. To which findings both plaintiff and defendant separately except. The court further finds that it is without jurisdiction to hear and determine just what lands are irrigable. To which finding plaintiff excepts." Judgment was entered in accordance with these findings. From this judgment defendant appeals.

It will be observed that only two questions are really before us for review: (*a*) Whether or not the court erred in holding that the boundary of defendant district is so indefinite and uncertain that it cannot be determined how much of plaintiff's land is within defendant district; and (*b*) whether the court erred in holding plaintiff liable for the taxes upon 20.59 acres of land, upon which the evidence shows she had actually used water, instead of upon 26,695 acres, which in paragraph 3 of her petition plaintiff said is susceptible of irrigation from defendant district. Upon the first of these points defendant argues that the allegations above quoted from paragraphs

3 and 7 of plaintiff's petition constitute an admission by plaintiff that her land is in defendant district. We are unable to concur in this construction of the pleading. It will be observed that the quotation from paragraph 3 of the petition consists of four sentences. If the allegation rested upon the first two sentences, it might possibly bear the construction defendant places upon it, but the third sentence precludes that construction. In that sentence it is distinctly alleged that the description of the land included in defendant district cannot be given, and states the reason why it cannot be done. The call of the survey in controversy is: "From a point on the section line about 800 feet east of the southwest corner of section 10, Tp. 21, R. 54, thence in a northeasterly direction to the east line of section 10, Tp. 21, R. 54, thence north on said section line to the south bank of the North Platte river." Who can say from this description where this "northeasterly" line would strike the east line of section 10? It cannot be and is not claimed that a "northeast" line was intended. Such a line would intersect the North Platte river some distance west of the east line of section 10, and therefore would never intersect the east line of the section. There is nothing in the call to indicate that a meandering line was intended, such line to correspond with the topography of the ground over which it was being run, so that the east line of the section might be reached by following the desired grade of the ditch. The call does not read, as brief of counsel for defendant suggests it might have read: "Thence northeasterly on a uniform grade of one and eight-tenths foot per mile to the intersection with the east line of said section 10." Even such a call would to some extent be uncertain, for the reason that one surveyor, in running such a line to the east line of section 10, might survey around high places or depressions, while another might go straight through the former and over the latter. We have carefully examined the evidence and plats submitted, and from neither are we able to determine where this so-called northeasterly line would,

or whether by the course indicated by defendant's counsel it ever could, reach the east line of section 10.

The defendant district was organized June 10, 1901. The record does not show whether it was organized under the provisions of section 28, art. II, ch. 93*a*, Comp. St. 1901, or under section 2, art. III of that chapter. In either case the description under consideration is insufficient. Section 28, art. II, *supra*, provides that, when an application to appropriate water is made, "said application shall set forth the name and postoffice address of the applicant, the source from which said appropriation shall be made, * * * and if for irrigation a description of the land to be irrigated thereby, and the amount thereof." Section 2, art. III, *supra*, provides that the petition "shall set forth and particularly describe the boundaries of said district." Under a provision exactly similar to the one last above quoted, the supreme court of California, in *Central Irrigation District v. De Lappe*, 79 Cal. 351, say: "Several objections are taken to the description contained in the petition. They are based upon the requirement of the second section of the act that such petition 'shall set forth and particularly describe the proposed boundaries of such districts.' It is probable that this provision requires a description by metes and bounds, for it is 'the boundaries' which are to be described, and not merely the district. But we think that a description by metes and bounds which would be sufficient in an ordinary deed is a compliance with the provision." We think the California court there applies the correct test. That the description under consideration here utterly fails to meet this test is too apparent to require discussion. We think the district court was warranted in holding that this description was entirely too indefinite and uncertain to warrant it in holding plaintiff's land subject to taxation for the support of defendant ditch.

On the second point, we think the court was right. Under its holding that the boundaries were too uncertain for it to decide what lands of plaintiff were in the dis-

trict, the court would have been compelled to grant plaintiff relief as to all of her lands, but for the fact that the evidence shows that she had actually used water upon 20.59 acres. Such being the fact, the court properly required her to do equity by paying the taxes assessed upon that much of her land. It could not consistently do more, and equity would not sanction less.

The judgment of the district court appears to us to be right. It is therefore

AFFIRMED.

REESE, C. J., BARNES and ROSE, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

AMASA E. MAINE, APPELLEE, V. MARTIN T. HILL, APPELLANT.

FILED MARCH 28, 1913. No. 17,085.

Appeal: STRIKING AMENDED ANSWER. Where an amended answer does not tender any defense not provable under the original answer, it is not reversible error to strike it.

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

James R. Wilhite and *Edwin Falloon,* for appellant.

Reavis & Reavis, contra.

FAWCETT, J.

Plaintiff brought suit in justice court in Richardson county upon an account for goods sold and delivered. Defendant filed an answer and counterclaim. In the district court plaintiff filed a petition substantially the same as the bill of particulars filed in justice court. Defendant filed in the district court the same answer and counterclaim which he had filed in justice court. The reply was a general denial. With the pleadings standing thus, the

case was called for trial and a jury impaneled. The only record of what then took place is the journal entry of the court, wherein it is recited that the case was called for trial on the petition, answer, and reply, both parties being ready for trial. Jury impaneled, naming the jurors. "Thereupon this cause came on further to be heard, the opening and closing of the case given the defendant. Whereupon plaintiff objects to the introduction of any testimony on the part of the defendant, and moves the court to instruct the jury to return a verdict for the plaintiff for the amount of his claim with lawful interest. Whereupon the defendant asked and obtained leave of the court to amend his answer to plaintiff's petition, which being done, the plaintiff moved the court to strike said amended answer from the files, which, after argument of counsel and consideration by the court, was sustained. Defendant excepts. Thereupon this cause came on further to be heard upon motion of plaintiff for an instructed verdict, and the defendant refusing to answer further, but standing upon his amended answer, said motion instructing the jury to return a verdict in favor of plaintiff was sustained and the jury was so instructed. Defendant excepts." The verdict of the jury is then set out, and the journal entry proceeds: "Now on this 13th day of October, it still being one of the days of the regular September term, 1910, the cause came on further to be heard on the verdict of the jury returned herein; and, it appearing that no motion to set aside said verdict and for a new trial of this cause has been filed by said defendant, it is now ordered, considered and adjudged by the court that said plaintiff have judgment on said verdict, and that he recover of and from said defendant the sum of," etc.

As defendant made no attempt, after his amended answer was stricken, to offer proof under his original answer, upon which he had asked and been given the right to open and close, but saw fit to stand or fall upon the ruling of the court upon his amended answer, the only

question presented for our review is, whether or not the court erred in striking the amended answer. We have carefully examined both answers, and are unable to discover wherein the amended answer tenders any different defense from that tendered in the original answer. Both answers set out quite fully the fact that the goods purchased by defendant were a worthless kind of cheap jewelry, of no value whatever; that when defendant received the goods he was not aware of their inferior and worthless character, or of the fraud which had been perpetrated upon him; that he tried to and did sell a small portion of them, but, with the exception of a very few instances, all of the goods so sold were returned to defendant, who had to refund to his customers the prices they had paid therefor. The first answer also alleged: "That said defendant has offered, and does now offer, to return all said goods unsold to said plaintiff." This answer was followed by a counterclaim for damages. The amended answer alleged: "But he has held said jewelry subject to the order of plaintiff, and upon the trial of this case he will produce said jewelry in court and tender the same back to the plaintiff. * * * That about $5 of the nominal value of said jewelry, as listed in said contract, which was so sold by this defendant was kept by the purchasers, and for this amount this defendant offers to confess judgment." The counterclaim was abandoned. As the amended answer tendered no defense not included within defendant's original answer, the court did not err in sustaining the motion to strike it from the files. When the amended answer was stricken, defendant made no attempt to offer proof under his original answer, as he might and should have done. As the record shows, he refused to answer further, and elected to stand upon his amended answer. We do not think a party should tenaciously insist upon an amended pleading in a case in the district court which has been appealed from a justice court, and particularly so when, under his original answer, he has stated a defense upon which he was able to

prevail in the justice court. He should not stand idly by and permit judgment to go against him, and then ask this court to reinstate him in the court below. His original answer in the district court tendered a defense. The justice court had sustained that defense, and there is nothing in the record to show that the district court would not have done the same. It should at least have been requested to do so.

AFFIRMED.

SEDGWICK, J., dissenting.

I think the decision is too technical. The defendant says plaintiff delivered fake jewelry as a compliance with the contract, and that it was entirely worthless. The case was fairly tried in justice court, and plaintiff failed; he appealed to the district court, and prevailed on a technicality. He says in his brief that the defendant's amended answer was stricken out because it changed the issues presented in justice court. This court does not justify that technicality, but now finds one, still less plausible, and the defendant is compelled to pay his money for nothing. I think I ought to dissent.

HAMER, J., concurs.

ANNA LIPPS, APPELLANT, V. MARIA PANKO ET AL., APPELLEES.

FILED MARCH 28, 1913. No. 17,115.

1. **Judgment:** JURISDICTION. One not served with process in an action, who does not in person or by an authorized attorney appear in such action, is not bound by a judgment rendered therein.

2. **Appearance by Attorney:** AUTHORITY: QUESTION FOR JURY. Where, in an action pending in court, one not made a party when the action is begun, nor served with process, is subsequently made a party by the written appearance of an attorney, who signs such appearance for and in the name of said person, and the authority of the attorney to make such appearance is denied, and, upon a

trial of that issue in another action, the evidence is conflicting, the question of the authority of the attorney to enter such appearance is one of fact for the jury.

3. Contracts: EXECUTION: QUESTION FOR JURY. In an action upon a contract partly written and partly in parol, where the making of the contract, by one of the parties who did not sign the same, is denied, and the issue thus presented rests upon conflicting evidence, the question is one of fact for the jury.

4. Wills: RELINQUISHMENT: LIABILITY OF SURETY. Where a daughter of a deceased father, who has filed a contest of the will of such decedent which gives the entire estate of $30,000 to decedent's widow, is induced by the husbands of two of her sisters to withdraw such contest and to execute a written relinquishment of all interest in her father's estate and all interest in the estate of her mother, the beneficiary under the will, at her death, for the stipulated sum of $4,000, under a written agreement that they will be surety for the payment of such sum, the fact that the mother, after such withdrawal, fails and refuses to pay the sum stipulated will not, of itself, relieve such sureties from liability upon their contract.

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

Samuel P. Davidson, for appellant.

George A. Adams, E. Ross Hitchcock, D. W. Livingston and *Hugh La Master, contra.*

FAWCETT, J.

This action was instituted in the district court for Johnson county to recover a sum alleged to be due on an express contract. The court directed a verdict in favor of defendants, and from a judgment thereon plaintiff appeals.

The issues presented by the pleadings, so far as it is necessary to consider them here, are substantially as follows: Matteus Panko died in Otoe county, leaving his widow, defendant Maria Panko, his sons, the defendants Matteus, Godfrey and Terman, and his daughters, the plaintiff and Minnie and Pauline Harms, wives respec-

tively of the defendants Harm and Henry Harms. After Mr. Panko's death, defendant Maria filed what she claimed was the will of the decedent, together with a petition for the probate of the same. This will devised all of the estate of the decedent absolutely to defendant Maria. Plaintiff filed objections to the probate of the will upon the grounds that at the date it was alleged to have been executed decedent was not mentally competent to execute a will, and was coerced into signing the same by the mother and three sons above named. Subsequent to filing such contest, the defendants, the mother, the three sons, and the two sons-in-law, acting for their wives, attempted to arrange a settlement of the estate. Plaintiff did not participate in these negotiations. It was considered by defendants that, if they could secure a settlement with plaintiff, the rest of them would have no difficulty in getting together. It was thereupon agreed that the defendants Harms should conduct the negotiations with plaintiff. In accordance with that arrangement, they called upon plaintiff, and, after first suggesting $3,000, which sum was rejected by plaintiff, the sum of $4,000 was finally agreed upon; plaintiff agreeing to accept that sum in full of her share of her father's estate, and also agreeing not to ask for any share of the estate of her mother, Maria Panko, at her death. Thereupon the defendants Harms presented to her, and she and her husband signed, the following instrument: "Sterling, Nebraska, March 12, 1906. I, Mrs. Anna Lipps, a daughter of Matteus Panko, deceased, and Mary Panko, wife of, and beneficiary under the will of, Matteus Panko, do hereby agree that for and in consideration of the payment of $4,000 or get the equivalent in notes owned by the said estate of Matteus Panko, deceased, I will accept the same in full of my share of said estate, and for the said consideration I further agree that I will not ask for any share or interest that I may have under the law in the property or estate of my mother, Mary Panko. Anna Lipps, Charles Lipps. In presence of Jno. Boatsman.

Subscribed and sworn to before me this 12th day of March, 1906. Jno. Boatsman, Notary Public. (Seal.)"

Before plaintiff would sign the above instrument, she demanded security that the $4,000 would be paid to her as agreed. Thereupon, in order to induce her to enter into the agreement, the defendants Harms, in whom plaintiff seems to have had great confidence, agreed to secure the payment of the money stipulated, in writing, as follows: "We, the undersigned jointly and severally agree that we will be surety for the payment of the above consideration upon the completion of the probation of the estate of Matteus Panko, deceased. Henry Harms. Harm Harms."

In compliance with the agreement, and in consideration thereof, plaintiff withdrew her objections to the probate of the will, and the same was admitted to probate as the last will of her father, and defendant Maria became the owner of all the estate, which the stipulation shows amounted to about $30,000. Plaintiff prays judgment for the $4,000, with interest from the date of the contract. The defendant Maria Panko denies that plaintiff had any grounds for objecting to the probate of the will; that any agreement was made between plaintiff and any of the defendants to which she was a party, or that she procured the written waiver set out in the contract; and alleges that plaintiff withdrew her objections to the allowance of the will on her own motion, and without any inducement on the part of the answering defendants. The main defense relied upon by all of the defendants, however, is a prior adjudication between the parties. Upon this point the answers of the defendants Panko allege that about October 6, 1906, the defendant Maria filed her petition asking that the estate be finally closed and the terms of the will carried out. When this petition was filed, Pauline Harms, wife of defendant Henry Harms, and others of the heirs of decedent filed their objections to the allowance of the petition for discharge, and filed a petition in the county court, setting out a contract of settlement with

their mother, which they claimed included the contract set out in plaintiff's petition, and under which settlement it was agreed between them and their mother that the latter should take as her share of the estate $7,000, and, after payment to plaintiff of the $4,000 stipulated in the contract, the rest of the estate was to be divided among the children. The county court found in favor of the petitioners and against their mother. She thereupon appealed to the district court, in which court judgment was rendered in favor of the mother, and upon appeal to this court the judgment was affirmed. The defendants allege that, after the case was taken to the district court, plaintiff entered her appearance in that proceeding and joined with the other children in their demand for an enforcement of the contract which they were litigating, and that by reason of such appearance she is bound by the judgment entered by the district court and affirmed by this court, and that her right to recover in this action is therefore barred. In her reply plaintiff specifically denies that she entered her appearance in that proceeding, or ever authorized any attorney or attorneys to enter her appearance therein; denies that she participated or authorized any one to act for her in prosecuting an appeal of that case to this court. The defendants Harms also plead that they signed the agreement set out in plaintiff's petition simply as surety for Maria Panko, and were only to be held liable thereon in case the contract was carried out and Maria Panko was unable to pay the amount named therein. This allegation is denied by plaintiff.

Upon the issues thus joined, a trial was entered upon to the district court and a jury. At the conclusion of the trial the court directed a verdict in favor of defendants, and each of them, upon the following grounds, as shown in the record: "Gentlemen of the jury: * * * I have heard the arguments on the part of counsel, and have concluded to make a disposition of this case myself without your assistance. * * * I reached the conclusion that the court in Otoe county and the supreme court have tried

and determined all the issues which have been tried before, and that there are no facts in the case which have not heretofore been determined in the other courts. That being true, there are no facts at this time to be submitted to you. That the courts in Otoe county have jurisdiction of the matter to try and determine any such matter they saw fit on facts and matters in controversy in the case. It is not for me to determine whether these courts acted wisely or not. Suffice it to say the supreme court has acted upon and adjudicated this case. You are therefore instructed, gentlemen of the jury, to return a verdict into this court finding in favor of the defendants, and each of them, and as against the plaintiff."

Plaintiff urges three principal grounds for reversal: (1) That the question as to whether plaintiff was a party to the proceedings in the district court for Otoe county and in this court should have been submitted to the jury. (2) That the question as to whether or not the contract set out in her petition was a binding contract between plaintiff and all of the defendants was conclusively established. (3) That, even if it should be held that plaintiff cannot recover as against the defendants Panko, she is still entitled to a judgment against the defendants Harms upon the indorsement on the contract signed by them. We will consider these assignments in the order named.

1. Should the question as to whether plaintiff was a party to the proceedings in the district court for Otoe county have been submitted to the jury; or, to state it another way, did the evidence so clearly and conclusively show that she was a party to that suit that the court could determine the question as a matter of law? It is undisputed that, when the petition was filed in the county court in that proceeding by Pauline Harms and others, it expressly alleged that Anna Lipps (plaintiff here) refused to join in their petition, and it is not claimed that she ever participated in that matter in the county court. When the case was appealed to the district court, Mrs. Harms and her associates filed their petition in that court,

in which they again alleged that Mrs. Lipps refused to join in their petition. After the appeal had been lodged in the district court, that court, on April 5, 1907, entered an order requiring all persons interested as heirs of Matteus Panko, deceased, to appear in said proceeding within ten days, and providing that, if they did not so appear, then an order should issue "bringing said persons into court on peril of forfeiting all interest in said estate." On April 23, 1907, Messrs. Hitchcock and Adams, who were appearing in said proceeding as attorneys for Mrs. Harms and her associates, and who are appearing here as attorneys for the defendants Harm and Henry Harms, filed an alleged written appearance of Mrs. Lipps, which recited that she was one of the parties who filed objections to the probate of the will of the decedent; that she now comes into court pursuant to the order of the court theretofore made, and joins in the application of Mrs. Harms and her associates, and adopts their application as her own, and prays that she may be joined as one of the applicants therein, and that the assets of said estate be divided and apportioned as therein prayed for. This appearance is signed "Anna Lipps, by E. Ross Hitchcock and George A. Adams, her Attorneys." Plaintiff and her husband both testify that they never authorized the attorneys, who signed that appearance, to sign the same, or to in any manner appear for her in that proceeding; that, when solicited by the attorneys to appear, she refused to do so; that, when told by the attorneys that the court had ordered her to be brought in, she insisted that she was not interested in that transaction; that she had no interest in her father's estate, but was relying upon her contract for $4,000. This is not a literal statement of her testimony, but it is a substantial statement of it. The testimony in opposition to plaintiff and her husband was mainly that of the two lawyers who made the appearance. Their testimony substantially is that, when Mrs. Lipps was asked to enter her appearance and join the proceeding, she objected on the ground that she did not want to

incur any more expense; did not want to pay attorney's fees; that one of the defendants Harms then stated that would be all right, that they would pay the attorney's fees; that thereupon she gave her consent for the attorneys to enter her appearance. This testimony is denied by plaintiff and her husband. There is no evidence that plaintiff or her husband ever signed or verified a pleading or paper of any kind in either the district court or this court. Upon this point it is somewhat significant that, when the case was appealed to this court, the appeal bond was signed by both of the defendants Harms and their wives, but was not signed by either plaintiff or her husband. If the case stood upon the above evidence alone, it was clearly error for the court to determine, as a matter of law, that the attorneys were authorized to enter plaintiff's appearance in that proceeding. No summons was served upon her, and if she never authorized any attorney to enter her appearance, nor participated in the prosecution of that case in the district court or in this court, then she is not bound by the judgment entered therein, and such judgment is not a bar to her prosecution of this action. This was a material issue of fact, which, resting, as it did, upon conflicting evidence, plaintiff was entitled to have submitted to the jury. But we think there was another strong reason why the court should not have directed the verdict upon that point. If the contract set out in plaintiff's petition was entered into between her and the defendants, and she had fully performed her part of that contract by withdrawing her contest of the will, and had thereby permitted the will to be admitted to probate without contest, and the estate of decedent to pass under the will to defendant Maria Panko, then plaintiff had no interest in the estate of the decedent, and the order of the court requiring all persons interested as heirs of Matteus Panko, deceased, to appear did not apply to her; and the lawyers were in error when they told her that it did so apply. Under that contract, if established, the defendants Panko and the defendants Harms were all antagonistic

parties to her. Under that contract defendant Maria Panko would be liable to her for the payment of the $4,000 expressed therein, and, in the event of her failure to pay the same, defendants Harms would be liable under their written agreement to be surety for the payment of the same. The lawyers who entered plaintiff's appearance in that suit were then and are now representing the antagonistic interests of the defendants Harms. Occupying that relation, they could not, disinterestedly, also act for plaintiff. As attorneys for defendants Harms, they were bound to know and to then understand that, if Mrs. Lipps entered her appearance and joined their clients in submitting the questions involved to the court in that proceeding, she would, to say the least, be jeopardizing her rights under the contract which they knew she held. We do not wish to be understood as holding that the attorneys acted in bad faith. What we do say is that those questions were proper for the consideration of the jury, and it was for the jury to determine whether or not plaintiff had joined in that proceeding and thereby submitted herself to the jurisdiction of the district court.

2. It is equally clear that the question as to whether or not the contract set out in plaintiff's petition was a binding contract should, at least, have been submitted to the jury. Indeed, there is much force in the contention of her counsel that her contract was conclusively established by the evidence. The testimony of plaintiff and her husband is that the contract was presented to them by the defendants Harms; that it was stated to her that an attempt was being made to settle the estate of her father; that $3,000 was first suggested, which sum Mrs. Lipps refused to consider. Thereupon, $4,000 was named. This amount she agreed to accept, provided they, the defendants Harms, would say it was all right. It is apparent that she did not have confidence in her mother and brothers, but did have confidence in the defendants Harms; that, as an inducement to her to sign the contract, they made and signed the indorsement upon the back of it.

The next morning after the contract was signed, the defendants Harms, all of the defendants Panko, and the Reverend Mr. Beckman, pastor of the church to which they all belonged, met at the home of defendant Maria Panko. Some attempt is made by Matteus Panko to show that he was not present during the interview which then took place, but there is ample testimony in the record to warrant a holding that he was present. One thing is not disputed: At that interview some question was raised as to whether the contract should not have been acknowledged or sworn to before a notary. At the conclusion of the interview Matteus took the contract to Mr. John Boatsman, a notary public, for the purpose of having it put in proper form by him. Mr. Boatsman called up Mrs. Lipps and her husband by telephone, told them that he had the contract there, and either took their acknowledgment or administered the oath to them by telephone. At any rate, at the conclusion of his interview with them over the telephone, he attached his jurat to the contract. We are unable to see how Matteus can escape responsibility, whatever it may be, for anything that occurred at that interview.

Coming now to the interview itself, it clearly appears from the testimony that the Reverend Beckman read the contract over to the defendants in English, and again in German. It was read in German for the benefit of defendant Maria Panko, who understood German much better than she did English. Reverend Beckman testifies, and in this he is corroborated by defendants Harms, that he explained the contract in both English and German, and then asked them all if they understood it and would agree to abide by it; that they all, including defendant Maria Panko, answered in the affirmative. Defendant Henry Harms testified that, after the paper had been explained to them all, he suggested to Mr. Beckman that a contract in writing should be drawn up and signed by all of the parties, but that Mr. Beckman said: "He knew the family as well as I did or better, and we'd all better stick to

the contract. That suggestion was made right in Mrs. Panko's house. Mr. Beckman got up and said, 'All should understand this agreement, and is willing to, all should understand this, all who do will come and shake hands with me for the binding of this agreement,' and she (referring to Maria Panko) was the first that went, and every one of us stood up. We were satisfied with it." After the contract was signed, plaintiff went to her mother to obtain the $4,000. Her mother told her "she would pay it just as soon as the will was probated. She said she would pay the $4,000." It is conceded that the contest was withdrawn by plaintiff. After it was withdrawn, defendant Maria told plaintiff's husband that she would willingly pay the $4,000, "but now Matteus Panko objected." Further discussion is unnecessary to show that the question as to whether or not the contract was duly entered into by all of the parties should, to say the least, have been submitted to the jury.

3. Are the defendants Harms liable under their written indorsement upon the contract in suit, regardless of the question as to whether or not sufficient was done by the defendants Panko to bind them? Again we say this question should, at least, have been submitted to the jury. The evidence shows that they were the parties who induced Mrs. Lipps to sign the contract set out in her petition, under which she agreed to accept $4,000, not only as in full of her share of the estate of her father, but also in full of any claim she might have as an heir of her mother upon her death. They were interested in having her make the contract. Their wives would be beneficiaries under it, and through their wives they would indirectly be beneficiaries also. They knew when they induced her to sign the contract that it would bind her to withdraw her objections to the probate of the will. They were conducting negotiations with Maria Panko and the brothers of their wives. They expected that, if Mrs. Lipps withdrew her contest and permitted the will to be probated, their wives would at once obtain a substantial portion of the estate of their

father; and if it subsequently transpired that the parties with whom they were acting in concert proved faithless to the agreement they were making among themselves, through no fault of Mrs. Lipps, we are unable to see how that fact would release them from the written obligation they had assumed.

We hold, therefore, that upon all three of the points urged by plaintiff, and above discussed, the district court erred in directing a verdict in favor of the defendants.

The judgment is therefore reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

REESE, C. J., BARNES and ROSE, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

MARTIN NELSON, APPELLEE, V. DANIEL SUGHRUE ET AL., APPELLANTS.

FILED MARCH 28, 1913. No. 17,122.

Judgment: CONSTRUCTIVE SERVICE: JURISDICTION. Record examined, and the case at bar *held* ruled by *Stull v. Masilonka*, 74 Neb. 322, and other cases cited in the opinion.

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

Wilcox & Halligan, C. H. Sloan, F. W. Sloan and *J. J. Burke,* for appellants.

L. O. Pfeiffer and *Hoagland & Hoagland, contra.*

FAWCETT, J.

From a judgment by the district court for Deuel county, in favor of plaintiff in a suit to redeem a quarter section of land from a foreclosure by the county of certain tax

liens, defendants appeal. No bill of exceptions has been presented. The only question for consideration, therefore, is whether the decree is supported by the pleadings.

The land involved is the southwest quarter of section 2, township 14, range 45, in Deuel county. The land was patented by the United States to Otto N. Holden, May 27, 1891. On February 18, 1909, Otto N. Holden and his wife, Emma C., conveyed the premises to plaintiff. The suit to foreclose the tax liens, being the suit under which defendants claim title, was commenced February 15, 1900. The petition was filed by the county attorney in the name of the county. In the petition the defendants were designated as "O. N. Holdeen and Mrs. O. N. Holdeen, his wife, real name unknown." The verification was by the county attorney, and recited that "I cannot discover the true name of the defendant designated 'Mary Holden, his wife.'" The affidavit for publication of summons was also by the county attorney. The affidavit recites "that the above named defendants O. N. Holdeen, first real name unknown, and Mrs. O. N. Holdeen, his wife, first real name unknown, are nonresidents of the state of Nebraska," and further recites: "Service of summons cannot be made on said defendants, or any of them, within this state." The published notice runs to "O. N. Holdeen, first real name unknown, and Mrs. O. N. Holdeen, his wife, first real name unknown, defendants."

The question now is: Did the court, by the petition, affidavit and published notice above set out, obtain jurisdiction to enter a decree of foreclosure in that suit? Under section 148 of the code, and numerous decisions of this court, that question must be answered in the negative. There is no contention here but what the patentee, under the patent from the United States, was Otto N. Holden. It is therefore established that that was his true name. It is not shown, nor attempted to be shown, that Mr. Holden had taken title to the land by his initials, so as to bring the case within the rule announced in *Stratton v. McDermott,* 89 Neb. 622, reaffirmed in *Butler v. Farm-*

land Mortgage & Debenture Co., 92 Neb. 659. We therefore hold that the case is ruled by section 148 of the code, and by *Enewold v. Olsen*, 39 Neb. 59; *Gillian v. McDowall*, 66 Neb. 814; *Stull v. Masilonka*, 74 Neb. 322; *Herbage v. McKee*, 82 Neb. 354; and *Butler v. Smith*, 84 Neb. 78.

AFFIRMED.

REESE, C. J., BARNES and ROSE, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

ADELAIDE BODE, APPELLANT, V. PETER H. JUSSEN ET AL., APPELLEES.

FILED MARCH 28, 1913. No. 17,135.

1. **Acknowledgment:** CERTIFICATE: IMPEACHMENT. "The certificate of an officer having authority to take acknowledgments cannot be impeached by showing merely that such officer's duty was irregularly performed." *Council Bluffs Savings Bank v. Smith*, 59 Neb. 90.

2. **Mortgages:** CONSIDERATION: MARRIED WOMAN. A mortgage executed by a wife upon her separate property, to indemnify one who is a surety upon an official bond of her husband, who has misappropriated the funds coming into his hands by virtue of his office, in the hope, or upon the assurance from her husband, that the execution of such mortgage will save him from arrest and imprisonment for his crime, is not void for want of sufficient consideration moving to the wife.

3. ———: DURESS. Nor is such a mortgage void as having been obtained under duress, where it appears that the mortgagee neither in person nor through an attorney or agent resorted to any undue means by way of threats or deception to obtain the execution of such mortgage.

4. **Husband and Wife:** MORTGAGE BY MARRIED WOMAN. A married woman may mortgage her separate estate or property to secure the individual debt, or to indemnify the sureties upon an official bond, of her husband.

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

Edwin Falloon, for appellant.

Reavis & Reavis and *A. R. Scott, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Richardson county to cancel a mortgage which she had executed, jointly with her husband, upon her separate property. She made the mortgagees and her husband parties; the latter under an allegation that he has a homestead right in the premises. From a decree dismissing her suit, she appeals.

The mortgage and the note which it was given to secure were both dated April 17, 1906. The note is signed by the husband, E. O. Bode, and his brother, Ernest A. Bode. The mortgage is signed by plaintiff and her husband. The certificate of acknowledgment is of the same date, and is made by Amos E. Gantt, notary public.

For three years or more prior to the date of the mortgage, E. O. Bode had held the office of city treasurer of the city of Falls City. It had developed that he was short in his accounts. On the day the mortgage was executed the defendants Jussen and Holland, who were sureties upon his official bond, met him upon the street in Falls City and asked him about his shortage. He stated that it was somewhere about $1,800, but, upon figuring the matter up, he concluded that it might run to $2,300. He was interrogated as to what he could do in the way of securing the defendants. He stated that his brother Ernest would sign with him, and, when asked if he could give any other security, he stated that he could give them a mortgage upon the home property. He was asked if his wife would sign. He answered that she would. The three then went upstairs to the office of Judge Martin, a practicing attorney of that city. Mr. Martin was advised as to the situation, and, upon his suggestion, the note and mortgage were drawn for $2,500, so that it would be

sure to cover any items Bode might have omitted in his calculations. Thereupon, Bode requested Mr. Gantt, a practicing attorney of many years' standing, who was also a notary public, to accompany him to the Bode home for the purpose of obtaining the signature and acknowledgment of the plaintiff. On their way to the home they met plaintiff. Mr. Bode, out of the hearing of Mr. Gantt, told his wife of the trouble he was in. It appears to have been the first notice she had had that her husband was a defaulter. Plaintiff and her husband both say that he then told her that he needed $2,500 to straighten matters out; that something must be done right away, or he was liable to be arrested and imprisoned, and stated to her that he wanted her to sign the paper he had with him, which was the mortgage. Thereupon, Mr. and Mrs. Bode proceeded to their home, the notary, evidently not desiring to intrude, following them at a short distance. Upon reaching their home, Mr. and Mrs. Bode had some further conversation, in which Mr. Gantt took no part, after which the mortgage was signed by plaintiff. It was then taken by Mr. Gantt to his office and his notarial seal affixed, when it was given to Mr. Bode and by him delivered to the defendants Jussen and Holland. As soon thereafter as the liability of Jussen and Holland upon the bond had been ascertained, they paid the same, aggregating $2,380, to the proper city authorities.

As the basis for her demand that the mortgage be canceled, plaintiff alleges substantially: That she derived no benefit from the mortgage; that it was executed and delivered without consideration; that she never acknowledged the execution of the same to be her free and voluntary act; that the notary never asked her that question; that the mortgage was executed under duress, in this, that she at that time was in a "delicate" condition; that she was greatly alarmed when told by her husband of the situation he was in, so much so that she did not know what she was doing; that she is a married woman; that the mortgage was upon her separate property, and was given

to secure a debt or obligation of her husband. In his answer the husband alleges that the defendants Jussen and Holland threatened him with prosecution and "hounded" him to fix up said shortage; that he told them that, if they would immediately place to his credit $2,500 in the bank, to be used by him in the discharge of his shortage, he would sign the mortgage and induce his wife to do likewise; that Jussen and Holland, after obtaining the mortgage, did not place the money to his credit as agreed, and that as a consequence thereof the investigation into the condition of his accounts was not stopped, and he was arrested, prosecuted, and convicted of the crime of embezzlement; that the mortgage was signed under fear and duress; that at the time it was signed he was laboring under great excitement, was distressed in mind and weakened in will, and, believing that the execution of the mortgage would save him from the calamity of threatened prosecution, he signed the same.

The answer of defendants Jussen and Holland deny the allegations as to any duress or attempted duress on their part, and allege the facts leading up to the execution and delivery of the mortgage, and the payment thereunder, substantially as above stated. The decree found generally for the defendants; adjudged the mortgage to be a valid mortgage, duly executed, acknowledged and delivered for a valid and sufficient consideration; that no duress or fraud was used or practiced upon plaintiff or her husband by the defendants, and dismissed plaintiff's action at her cost.

It will be seen that the questions involved here are: (1) Was the mortgage duly acknowledged within the meaning of the law in relation to acknowledgments? (2) Was there a sufficient consideration moving to plaintiff for its execution? (3) Was it executed under duress? (4) Can a mortgage by a married woman upon her separate property, given to secure a debt of her husband, be enforced, where it does not specifically state that it is her intention to charge her separate property or estate? We will consider these points in their order.

1. Was the mortgage properly acknowledged? Upon this point there is neither allegation nor proof that any fraud was practiced upon plaintiff to procure her signature to the mortgage. It is argued by counsel for plaintiff that in obtaining his wife's signature Bode was acting as the representative of defendants Jussen and Holland, and that his statement to his wife that, if the mortgage were not signed, he would be arrested and sent to prison was, in effect, and in law, the threat of Jussen and Holland. The clear preponderance of the evidence is against this contention. It shows that the giving of the mortgage was not even suggested by Jussen and Holland, but by Bode himself; that all they said to him about his wife signing was to ask him, when he made the suggestion, if his wife would sign; that they had nothing to do with sending Mr. Gantt along as a notary to take the acknowledgment; that they gave no directions, nor did they make any threats; that everything that was done by Bode in that connection was done on his own initiative. As to what transpired when the acknowledgment was taken, Mr. Gantt frankly states that he does not remember the conversation. He testified: "Mrs. Bode asked me where to sign the mortgage, and I told her where to sign. We spoke of it as a mortgage, but I am not positive that I told her where to sign the mortgage. * * * I have no recollection of Mrs. Bode being asked whether it was her voluntary act and deed. I presume I did. That is all I can say." The words, "I presume I did," were, upon motion of plaintiff's counsel, stricken. The testimony of Mr. Gantt is substantially that which any honest notary would be compelled to give when testifying four years after the time an acknowledgment had been taken. The only evidence offered by plaintiff to in any manner impeach the certificate of acknowledgment was the testimony of herself and her husband. In *Council Bluffs Savings Bank v. Smith*, 59 Neb. 90, we held:

"The certificate of an officer having authority to take acknowledgments cannot be impeached by showing merely that such officer's duty was irregularly performed.

"When the party executing a deed or mortgage knows that he is before an officer having authority to take acknowledgments, and intends to do whatever is necessary to make the instrument effective, the acknowledging officer's official certificate will be, in the absence of fraud, conclusive in favor of those who in good faith rely on it."

There is no question but what plaintiff and her husband knew that Mr. Gantt was an officer having authority to take acknowledgments. They knew that he had been taken out there for the express purpose of taking their acknowledgment to the mortgage which they there signed. No fraud or deception was practiced by the notary. The parties were in their own home. The mortgagees were not present. To hold that mortgagors can deny the acknowledgment of a mortgage and thereby defeat it, upon their naked assertion that a formal question was not asked, would open the door to fraud and perjury and make recorded acknowledgments a snare and a delusion. No one could safely deal with land on the faith and truth of public records if such a rule were to obtain. In *Pickens v. Knisely*, 29 W. Va. 1, 16, it is said: "For reasons of public policy and to protect innocent purchasers, it has been uniformly held that, when a married woman appears before a justice for the purpose of acknowledging a deed, and does in some manner attempt to do what the law requires to be done, the certificate is conclusive of the facts therein stated as regards innocent purchasers." If the notary failed to ask the formal question as to whether or not plaintiff acknowledged the deed to be her free and voluntary act, such failure was, at most, an irregularity only.

2. Was there a sufficient consideration moving to plaintiff for the execution of the mortgage? It seems unnecessary to discuss this assignment. She was told by her husband that he was a defaulter; that unless the mortgage was executed he was liable to be arrested and imprisoned for his crime. This would entail loss of support, and disgrace, not only upon the husband, but upon herself and

family. No true wife would, under such circumstances, refuse to execute a mortgage upon her home, and we do not think a court will ever be found to hold that a mortgage so executed is without consideration.

3. Was the mortgage executed under duress? If the testimony of E. O. Bode were to be taken as true, possibly it might be so held. But, as we have already stated, the clear preponderance of the evidence is against plaintiff upon the point that her husband was acting for the bondsmen in securing the mortgage. He was not doing anything of the kind. He was acting for himself in an earnest endeavor to save himself from arrest and prosecution, and protect the reputation of his family. Nothing was said to plaintiff by any person except her husband, and he was not delegated by Jussen and Holland to make any statements or threats to her. In such a case the rule announced in the cases cited in plaintiff's brief, and in the recent case of *Hoellworth v. McCarthy, ante,* p. 246, not cited, does not apply.

The allegation and testimony by Mr. Bode, that the agreement with Jussen and Holland was that they were to deposit $2,500 in the bank to his credit, is not only denied by them, but is too incredible to be believed. It is taxing our credulity to ask us to believe that two business men, who are sureties upon the bond of a public officer who confesses to them that he is a defaulter, would place a sum aggregating the amount of his defalcation in his hands, or in a bank subject to his check, and trust to his honesty in applying that money in the payment of the shortage. They would be much more apt to fear that if the money were so deposited he might immediately withdraw it and depart for parts unknown.

4. Can a mortgage by a married woman upon her separate property, given to secure the debt of her husband, be enforced? The law upon that point must be taken as settled in this state. Section 2, ch. 53, Comp. St. 1911, which is the same as it was at the time the mortgage in suit was executed, provides: "A married woman, while the mar-

riage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." This section of the statute was carefully considered by this court in *Grand Island Banking Co. v. Wright,* 53 Neb. 574. The authorities are there collated and carefully considered, and the conclusion reached that, where a wife executes a mortgage upon her own real estate to secure an indebtedness of her husband, the mortgage will be sustained; but, if the wife also signs the note, she cannot be held upon that for any deficiency after the sale of the premises, where it is not disclosed that in executing the note and mortgage it was the intention to bind her property generally. In *Buffalo County Nat. Bank v. Sharpe,* 40 Neb. 123, we said: "The wife executed and acknowledged as her voluntary deed and act, and delivered to Gallentine, the mortgage on her separate property to secure the payment of the note which evidenced the debt of the husband, and the consideration being its extension of payment. This was a contract which she had the power to make and by which she bound her property for the payment of the amount of the note." That is to say, she bound the property set out in the mortgage; but, under the rule announced in *Grand Island Banking Co. v. Wright, supra,* she did not bind any other estate she may have had outside of that set out in the mortgage. In *Watts v. Gantt,* 42 Neb. 869, we held: "A married woman may in this state mortgage her separate estate or property to secure the payment of the individual debt of her husband. A loan of the money to the husband creating the debt so secured is a sufficient consideration for her executing and delivering the mortgage." And so in this case, while plaintiff may not have received any direct cash consideration for the execution of the mortgage in suit, it was executed, as we have shown, upon a sufficient consideration, and is therefore valid.

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

AFFIRMED.

REESE, C. J., BARNES and ROSE, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

PETER H. JUSSEN ET AL., APPELLEES, V. ERWIN O. BODE ET AL., APPELLANTS.

FILED MARCH 28, 1913. No. 17,599.

The syllabus in *Bode v. Jussen, ante*, p. 482, applied to this case.

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

Edwin Falloon, for appellants.

Reavis & Reavis and *A. R. Scott, contra.*

FAWCETT, J.

This suit was instituted in the district court for Richardson county to foreclose the mortgage involved in *Bode v. Jussen, ante*, p. 482. By agreement of parties it was argued and submitted with that case. Both cases rest upon substantially the same evidence. The district court upheld the mortgage and entered a decree of foreclosure. Defendants appeal. For the reasons stated in *Bode v. Jussen, supra*, the judgment is

AFFIRMED.

REESE, C. J., BARNES and ROSE, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

KATE M. HOLLADAY, APPELLANT, V. WILLIAM HENRY RICH ET AL., APPELLEES.

FILED MARCH 28, 1913. No. 17,047.

1. **Witnesses:** COMPETENCY. In an action by a married woman for specific performance of a contract to convey real estate, her husband has a direct legal interest in the result, within the meaning of section 329 of the code.
2. ———: ———. In an action to set aside a deed executed by a person afterwards deceased, because the same was executed in violation of an alleged contract of the grantor with the plaintiff, the defendant who claims under such deed is the representative of a deceased person, within the meaning of section 329 of the code.
3. **Bills and Notes, Gift of:** RIGHTS ACQUIRED. One who takes promissory notes as a gift without paying any consideration therefor takes only the right of the donor therein.
4. **Vendor and Purchaser:** INNOCENT PURCHASER. One who purchases land to be paid for wholly in the future is not an innocent purchaser for value as against the rights of a third party of which the purchaser has notice before making payment.
5. **Quieting Title:** EVIDENCE. This being an action in equity, we have examined the evidence, some of which is outlined in the opinion, and find that it supports our former judgment in favor of the plaintiff, which is therefore adhered to.

REHEARING of case reported in 92 Neb. 91. *Former judgment affirmed.*

SEDGWICK, J.

Dr. Charles Badger some time before his death sold and conveyed the land in question to the defendant William Henry Rich, for the agreed price of $7,000, and took in payment therefor notes secured upon the land. Afterwards, Dr. Badger transferred the notes to the defendant Milton College, a Wisconsin corporation. The plaintiff brought this action in the district court for Valley county, and alleged that Dr. Badger had agreed to convey the land to her for a sufficient consideration, and had, pur-

suant to that agreement, actually executed and delivered a deed thereof to her, and asked that the conveyance to Rich be set aside and her title quieted in the land, or, if the deed to Rich was held valid, that the defendant Milton College be required to turn over the notes to her. The defendant bank was made a party because the notes had been deposited in the bank. The trial court found the issues generally in favor of the defendants, and the plaintiff has appealed. Upon a former hearing the judgment was reversed and a judgment entered in favor of the plaintiff. 92 Neb. 91.

William J. Holladay, the plaintiff's husband, was called as a witness for the plaintiff, and the defendants objected on the ground that he was disqualified under section 329 of the code, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness," with specified exceptions. In *McCoy v. Conrad*, 64 Neb. 150, it is said: "In order to justify excluding this testimony three things must concur: First, the witness offered must have a direct, legal interest in the result of the litigation; second, the evidence offered must relate to transactions and conversations had between the witness and deceased; third, the evidence must be offered against one who is a representative of the deceased person." Does Mr. Holladay have a direct legal interest in the controversy? In the commencement of this action he was joined as plaintiff. Later the action as to him was dismissed. It is insisted that his liability for costs makes him directly interested. But his liability for costs is limited to costs incurred by the defendants while he was a party. And it does not appear that the defendants incurred costs during that time that they could recover from Mr. Holladay if they were successful in the action. Is Mr. Holladay's interest as husband of the plaintiff of such a character as must be held to be a direct legal in-

terest within the meaning of the statute? In *Gillette v. Morrison*, 9 Neb. 395, it is held that in an action by a married woman in regard to her separate property the husband has no direct legal interest in the result of the suit. And in *Hiskett v. Bozarth*, 75 Neb. 70, the precise point here involved was presented, and it was held that the husband was not disqualified. But in *Wylie v. Charlton*, 43 Neb. 840, it was held that in a similar action by the husband the wife was incompetent as a witness because the wife's inchoate right of dower was a charge and incumbrance upon the real estate of the husband, and could not be avoided except by the voluntary act of the wife. This case was cited in *Hiskett v. Bozarth, supra,* and distinguished from that case on the ground that the husband's right of curtesy "may be defeated by the deed of the wife and without the consent of the husband," but this is not true under the statute, as it now exists. Comp. St. 1911, ch. 23, sec. 1. Under that statute the husband has an interest in the real estate of the wife that cannot be defeated by any act of the wife. So that now the rule announced in *Wylie v. Charlton, supra,* applies equally to husband and wife, and under that rule Mr. Holladay had a direct legal interest in the result of the suit, within the meaning of the statute.

The plaintiff contends that the adverse party was not the representative of the deceased, within the meaning of the statute, and quotes the following also from *McCoy v. Conrad, supra:* "The statute is 'limited in its reason and spirit by fair construction to contests on litigation upon claims between other persons and the deceased, existing prior to his death; to such suits and proceedings as the deceased would have been, if living, a necessary party, and since which his heirs, devisees, and legatees, personal representatives or assigns, are compelled to prosecute or defend for him in his place.'" This language was quoted from the supreme court of Michigan. The last clause of the quotation is not as accurate as the first. The plaintiff's claim as against Dr. Badger existed prior to his

death. Dr. Badger conveyed this right to Rich. Mr. Rich, therefore, as Dr. Badger's assign, is compelled to defend for him in his place. In *McCoy v. Conrad, supra,* and *Williams v. Miles,* 68 Neb. 463, the right of property, the ownership and title of the deceased were not questioned. Here the case is entirely different. The right of this plaintiff existed before Dr. Badger's death and before his conveyance to Rich. Her right of action was then precisely the same that it is now. She could have maintained her action then as well as now, but it must then have been against Dr. Badger. Whatever right Dr. Badger had to withhold the property from her he has conveyed to Mr. Rich, and Mr. Rich now represents him in that controversy. This precise point was decided in *Kroh v. Heins,* 48 Neb. 691. This claim existed between another person and the deceased prior to his death, and this is the test applied in *McCoy v. Conrad, supra.* It follows that Mr. Rich, the adverse party, is "the representative of a deceased person." The evidence of Mr. Holladay cannot therefore be considered.

The evidence shows that the plaintiff's husband had a farm of 320 acres in Valley county, and that many years ago he transferred this farm to his wife, and that Dr. Badger had the benefit of the use of this farm and the rentals thereof for some 15 or 16 years. One witness testified that the rentals amounted to at least $250 a year, and we have not observed that this evidence was contradicted. There is also evidence tending to prove that the plaintiff many years ago received a legacy of $300, and that this was turned over to Dr. Badger, and also that the plaintiff earned money in school-teaching many years, which was used by the family; and that the plaintiff became the owner of a house and lot which was sold by Dr. Badger and a large part of the proceeds used by him. There is also evidence tending to show that Dr. Badger's wife, the plaintiff's step-mother, had a farm adjoining the land in dispute, known as the "Weaver farm," and that the plaintiff at the solicitation of Dr. Badger exchanged

a quarter section of her land for the Weaver farm. One witness testified that the land so exchanged by the plaintiff was much more valuable than the Weaver farm. He estimated that the difference in the value was at least $1,300, and there is evidence tending to show that Dr. Badger at that time represented to the plaintiff that, as the farm in dispute was her farm, the Weaver farm would be much more valuable to her because it adjoined the land in dispute, and that the two tracts together would be a valuable farm, and that it was upon this consideration that the plaintiff consented to make the exchange, relying upon the promise to convey this land in question to her. Mrs. Badger was a witness in behalf of the defendants, and testified to this exchange. She made no denial of the plaintiff's contention that the exchange was made upon the representation and promise that the land in dispute should be conveyed to the plaintiff. It will be seen from the above that the evidence tends to show that Dr. Badger received from the plaintiff at least $4,000 or $5,000; and, while the defendants called and examined witnesses who must have known at least some of the circumstances showing such a consideration for the promise relied upon by the plaintiff, there is no evidence contradicting the evidence produced by the plaintiff upon that branch of the case, nor any evidence tending to show that Dr. Badger rendered to the plaintiff any other consideration than the land in question.

It is alleged that Dr. Badger some time before his death was addicted to the use of narcotics, and was for that reason incapable of transacting business. This allegation is not sustained by the evidence. He was, however, more than 80 years of age. Mrs. Badger, as a witness for the defendants, testified in regard to his physical and mental condition at the time and prior to the transfer of the land to the defendant Rich, and afterwards several letters written by Mrs. Badger were offered and received in evidence without objection. In one of these letters, under date of March 15, 1903, she said: "You have no idea how feeble

and forgetful he (Dr. Badger) is, and it worries him so much. Says I will have to help him about the farm, etc., but when he is out of hearing and trying to do business I cannot be of much help as he is liable to forget before he gets into the house. * * * He is not fit to do business of any kind and he feels it, the Meyers boys left the farms in very bad shape." In another letter, under date of March 30, 1904, she said: "Unless people are perfectly honest they have all the chance in the world to take advantage of him for he takes their say-so about everything as he knows he cannot keep straight in his own mind. He so often asks me about business matters that he has done that I know nothing about, for I did not at the time, and he can't remember what he has done." He seems to have had great confidence in the plaintiff and her husband for many years, and was very anxious to have them live in his neighborhood. At one time it was understood that they would do so, but for some reason this plan was changed. The defendants contend that it was upon this condition that Dr. Badger was to convey this farm in question to the plaintiff, and there is some evidence to indicate that Dr. Badger so understood it. Several witnesses testified that Dr. Badger frequently said that this plaintiff was to have his farm after his death. This language is consistent with the idea that he intended to give her the farm at some future time as a gift. It is also consistent with the idea that the farm was regarded as hers, and that he expected to use it as he did her other land as long as he lived. Several witnesses testify positively that he frequently said that this was the plaintiff's farm, and that he was attending to it and fixing it up for her.

The plaintiff's husband frequently acted for her in regard to her property and interests, and defendants introduced in evidence a letter written by him to Dr. Badger under date of April 25, 1905, which was soon after the land in question was conveyed to the defendant Rich. In this letter he said: "I am more than sorry to learn that

you have sold your farm. Had I known that you wanted to sell, I would have bought it." The defendants rely upon this letter as an admission that the farm belonged to Dr. Badger; but the letter as a whole strongly indicates that the writer, at least, believed that the plaintiff and himself had been greatly wronged by the conveyance of the land to Mr. Rich. He also said in the letter: "I would not have allowed that farm to have gone out of my hands during my life. You know that the Weaver place is not good for much as it stands now, but what cannot be helped must be endured. You was the promoter of that land trade, and persuaded me that that trade was just the thing for me to do, and that it would give me a good home all in a solid block. I have been an easy mark for more than one. I left everything in your hands; you have done as you wanted with it; so all is well that ends well. I will drop the subject, as it is probably not particularly interesting to you." He considered that, until Dr. Badger had deeded the land away, it belonged to himself and his wife, but by Dr. Badger's deed it had gone out of his hands. He and his wife had no title of record, and that he should suppose that the deed to a third party would be an effectual bar to their rights, or at least that he should not then have contemplated legal process to recover those rights, is not strange. They contend that they had been induced to exchange for the "Weaver place" on the promise that the land in question, together with that place, would make a desirable farm, and he suggested to Dr. Badger that the "Weaver place is not good for much as it stands now." He upbraids him with being the promoter of that trade, and having "persuaded me that that trade was just the thing for me to do, and that it would give me a good home all in a solid block." This language is wholly unintelligible, upon any evidence in this case, unless Mr. Badger had induced the trade for the "Weaver place" upon the promise and understanding that the land in question should be conveyed to this plaintiff. The writer then says that he has been an easy mark for more than one, and fol-

lows it up with the statement that would have no meaning, unless it was a direct accusation that he had been an easy mark for Dr. Badger. The remark that the subject is probably not particularly interesting to Dr. Badger insinuates strongly that Dr. Badger must know that he had violated the contract.

The plaintiff was not allowed to testify, but there is evidence tending to prove that Dr. Badger executed a deed conveying this land to the plaintiff and delivered the deed to her, and afterwards upon the representation that he desired that the deed should name the plaintiff's husband also as grantee, and perhaps other representations, procured the deed from the plaintiff to make such changes, and failed to return it. There is evidence indicating that this deed still remained among Dr. Badger's papers after his death, and was destroyed by interested parties. Afterwards Dr. Badger executed a conveyance that is called a lease. It provided that the plaintiff and her husband should have the land in question as long as Dr. and Mrs. Badger lived, and should furnish them the necessaries for their support, and after their death should have the land absolutely. Still later the plaintiff and her husband executed an instrument for the purpose of canceling this so-called lease. It is a quitclaim of "all our interest, claim and demand in and to the certain leasehold interest heretofore made." It does not purport to quitclaim the land itself, but contains a clause granting Mr. Badger "full power and authority to deal with said above described property as they may deem proper." As Dr. Badger had been using all the lands of all the parties as he deemed proper, this last clause must be construed in the light of that fact. The evidence in regard to the execution and delivery of the deed is perhaps not so definite and conclusive as to establish that fact, but the clause in the so-called lease subsequently made, that after the death of Dr. and Mrs. Badger the plaintiff and her husband "shall come into full and immediate possession of said property, and this lease put on record shall be to the said Holla-

days a full and complete title to said property free and clear from all incumbrance of every form and kind," is consistent with the contention that the land was promised and conceded to be the property of the plaintiff. If the deed was executed and delivered, as contended by the plaintiff, and returned to Dr. Badger for correction, it may be that Dr. Badger intended this instrument, which he calls the lease, as equivalent of the deed which he had formerly executed. The plaintiff and her husband appear to have been very generous with Dr. and Mrs. Badger, and to have acquiesced in everything and anything that Dr. Badger saw fit to do with, not only his own property, but with their property also.

There is some claim put forth in the briefs that the defendant Milton College is an innocent purchaser of the notes, so that its title cannot be questioned. The evidence shows beyond a question that the notes were a pure donation to the college, and were so received and understood by all parties. The agreement to pay interest during the lifetime of Dr. and Mrs. Badger, or either of them, constitutes no consideration for the notes, as it merely amounts to allowing them the interest that was to be paid by the maker of the notes, the college taking the principal and the interest after the time limited. Mr. Rich was well acquainted with the land and existing conditions, and cannot, of course, claim to be an innocent purchaser; even if he were, he had not made payment at the time this action was begun, and therefore could not be an innocent purchaser as to such payments as he might make after notice. There is no doubt of the good faith of the college and its officers, and it would appear that to aid such an institution is a worthy object. Dr. Badger is not to be criticised for his desire to advance Christian education. In his age and infirmity he forgot his obligation to this plaintiff, and perhaps mistakenly supposed that because she had no title that she could place on record, and he himself had the legal title of record, he could withdraw his promise and dispose of the land as he thought best under all circumstances.

The evidence is in some respects complicated, and perhaps somewhat inconsistent, but we think that, taken as a whole, the proof shows that this plaintiff has fully paid for this land, and that, in consideration thereof, Dr. Badger considered this land to belong to the plaintiff and promised to convey it to her as alleged.

The judgment heretofore entered in this court is adhered to.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting.

ROSE, J., dissenting.

The evidence outlined in the opinion of the majority is, in my judgment, insufficient to justify the decree pronounced. I think the judgment of the district court should be affirmed. I am therefore compelled to adhere to my former dissent.

HAMER, J., dissenting in part, and concurring in the conclusion.

I concur in the conclusion that the court should adhere to the judgment heretofore rendered.

1. While the cogent argument contained in the majority opinion is strong, it appears to me that it might be still stronger and absolutely conclusive if it contained all of the material facts in the case, some of which, no doubt, are left out by inadvertence.

2. I am not satisfied that William J. Holladay, the plaintiff's husband, was disqualified to testify as a witness under section 329 of the code. I therefore dissent from so much of the opinion as holds that he was disqualified. Under the present decedent law, the plaintiff's husband had no direct legal interest in the result of the action, as the contingency by which he might possibly become entitled to the use of the land, or have an heirship in it, had not arrived. His wife was then living. And there is a waiver of the protection offered by section 329

because of the introduction of witnesses by the defense who testified as to the transaction and as to what was said by the neighbors and by Dr. Badger himself. When the defendant shows part of the transaction, the whole may be shown by the plaintiff. *American Savings Bank v. Harrington*, 34 Neb. 598; *Parrish v. McNeal*, 36 Neb. 727; *Bangs v. Gray*, 60 Neb. 457. See, also, *Dodd v. Skelton*, 2 Neb. (Unof.) 475; *McCoy v. Conrad*, 64 Neb. 150; *Williams v. Miles*, 68 Neb. 463. As the effect of the section, if given a literal interpretation, is to cut the court off from the evidence showing the facts, the rule should not be applied unless it is strictly required by a reasonable interpretation. In *Parker v. Wells*, 68 Neb. 647, it was held that a wife might testify in favor of her husband in relation to conversations and transactions had with a person since deceased in all cases, except where the result of the suit, if favorable to the husband, would invest her with some direct legal interest in the subject of the controversy, and it was held that a dower interest did not disqualify her. This rule is seemingly analogous to that which ought to be in force in the present case.

3. I dissent from so much of the opinion as finds that Dr. Badger was not using a narcotic. One witness, Oscar Babcock, saw him every day, and testified that the doctor told him he could not keep up without medicine, and that the doctor said to him: "I can't leave it alone, I can't live without it." He also said that he used the purest article that he could get; that he did not buy it in town; that he could get a better article by sending away for it; that he bought $4 worth at one time; that he said: "I can't keep up without it." A number of witnesses testified that he failed to recognize his nearest neighbors; that he would meet them and say "I don't know you"; that he got very bad physically; that he would say, "I can't call your name," and then, when the man told him his name, he would not be able to place him; that he gradually became weaker, and at times was seemingly unconscious of his surroundings; that he imagined there was something

the matter with the chimney when there was nothing the matter with it; that he gave away his library, and wanted to give away his household goods and furniture; that he gave the preacher, M. B. Kelly, his horse and buggy; that he seemed dazed, and would commence to run, and that he would then catch hold of a telephone pole near his house to prevent himself from falling; and, in the language of Mary B. S. Badger, he became very nervous and forgetful, and was unable to remember "while he was turning around." In another letter she describes the doctor as "not fit to do business of any kind." And again "I can see his memory fail every day. * * * There is no question but what his brain is bad and heart also." It is apparent that he used something that was expensive. It was a drug that he sent away to get. He said that he could not keep up without it. The evidence seems to justify a finding that it was a narcotic.

4. I dissent from so much of the opinion as fails to find that the deed to William Henry Rich and the donation of the notes and mortgage to the college were obtained by the undue influence of William Henry Rich, Mary B. S. Badger, and M. B. Kelly, the preacher.

Dr. Badger was frail, and his mental power was much reduced by illness and old age. He was frequently ill, and he was beyond 80. The step-mother of the plaintiff had a direct interest in the conveyance of the land to Rich and the donation to the college. She became a beneficiary by that transaction, because after her husband's death she was to receive the interest. In view of the doctor's weak condition, his probable habits as to the narcotic, and with these strong and designing people around him, there was plenty of evidence, as it seems to me, to fully justify the conclusion of undue influence. At the time of the execution and delivery of the deed to the defendant Rich, Dr. Badger was extremely feeble, very infirm in his body, and hazy and uncertain in his mind, and also at the time that he delivered the notes and mortgage to the defendant Milton College, through M. B. Kelley, the traveling preacher.

Kelly wrote to the president of Milton College: "You will doubtless be agreeably surprised to find it (the donation) $8,000 instead of $5,000." He wrote the president at another time: "Hoping this will all be satisfactory to you and rejoicing in the privilege of bearing even a very *small part* in this *worthy transaction,* I remain very sincerely yours, M. B. Kelly." When examined about the matter of the donation, he said: "This correspondence with Milton College in reference to acceptance of this donation and what they would do *nearly all transpired through me.*" Kelly seems to have been there when the notes and mortgage were made to Milton College. When he had received the notes and mortgage, *he sent them to the college.* He was proud of what he did. Milton College gave nothing for the mortgage and notes except a guaranty that the interest would be paid, and, of course, if Rich paid the interest, as he promised in the notes that he would, then the college would be out nothing. William Henry Rich knew Dr. Badger, and was farming the land. He was helping to keep the plaintiff from coming into her own. While he was not called as a witness, his deposition was taken in support of plaintiff's motion for a new trial, and in that deposition he describes the execution of the deed to himself at Dr. Badger's house, and the delivery to the doctor of the mortgage. At that time Rich testified that the doctor had told him that he had given the Holladays a deed, and that he had written to have it sent back. He therefore knew that the deed had been delivered, and whether that fact appeared from the deposition or from testimony taken at the trial proper was immaterial, as it was one of the things properly before the court to be considered by it. Rich knew that he was a party to this questionable transaction. Mary B. S. Badger and M. B. Kelly each knew the transaction was questionable.

Of course, it is always a worthy object to aid a school or college, but I believe the blame should be placed where it belongs. Mary B. S. Badger, the step-mother, William Henry Rich, who received the deed for the land and who

made the notes and mortgage, and M. B. Kelly were all in it, and they are all responsible for the wrong done, while the college is merely called upon to give up something for which it paid nothing. Mary B. S. Badger, the step-mother, William Henry Rich, the purchaser of the farm, and M. B. Kelly were all interested in persuading this frail old man to forget his daughter and his duty. I have not observed anything said in the majority opinion touching the father's statements, made from time to time to the neighbors, that the improvements on the farm were for the daughter, or that he joined her name with his as one of the lessors of the land in crops. At least three witnesses describe these improvements, and what the father said about everything being for his daughter Kate (Mrs. Holladay). I have not observed that anything is said in the opinion about the daughter (Mrs. Holladay) going home from Kansas City to North Loup in August, 1904, to take possession of the farm, as she had agreed to do, and when she got there finding that her father claimed that he had rented the farm the day before to the defendant Rich. Mrs. Holladay then had her daughter with her when she went up there ready to go ahead with the arrangement made to farm the land and take care of the old folks; but, as they could not get possession of the land, they went back to Kansas City. The step-mother, Mary B. S. Badger, and the defendant Rich were active in this. The omitted facts show undue influence. There can be no doubt about it under the law. *In re Estate of Paisley,* 91 Neb. 139; *In re Estate of Frederick,* 83 Neb. 318, 321; *Orchardson v. Cofield,* 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211.

I refer to the former opinion of this court (*Holladay v. Rich*, 92 Neb. 91), because it contains a fuller and more complete discussion of the facts than I am able to give in this brief review.

GEORGE K. HOWELL, APPELLANT, V. MILTON B. NORTH, APPELLEE.

FILED MARCH 28, 1913. No. 16,777.

1. **Brokers:** CONTRACT FOR SALE OF LAND: VALIDITY. A contract in writing made by a letter of proposal and an acceptance between the owner of real estate and a broker or agent, authorizing him to sell the owner's land at a stipulated price and upon certain terms as to payment, which fails to state the amount of the agent's commission, is void, if such contract is made and is to be performed in this state. *Danielson v. Goebel*, 71 Neb. 300.

2. ———: ———: PLEADING. When such a contract is made for the sale of land situated in the state of Colorado, which is to be performed in that state, a petition for the recovery of the agent's commission, which alleges the making of the contract and performance on the agent's part, and so much of the statutes of Colorado as shows that the contract is valid under the laws of that state, is not vulnerable to a general demurrer.

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

Tibbets, Morey & Fuller, John A. McKenzie and *Guy A. Cox*, for appellant.

M. A. Hartigan, contra.

HAMER, J.

This is an action to determine whether the plaintiff should recover a judgment based upon defendant's alleged promise by letter to pay a commission for the finding of a purchaser for real estate sold in Colorado. The defendant at Hastings, Nebraska, wrote a letter to the assignor of the plaintiff at Lincoln, Nebraska, describing the land, which is near Akron, Colorado, and stating the terms of sale and price, and that he was willing to "allow a fair commission out of this." When the case was presented in the district court, the defendant called the attention of the court to the demurrer contained in his answer, and also demurred *ore tenus* to the petition, and

the demurrer was sustained and judgment rendered for the defendant. From this judgment the plaintiff appeals to this court.

It is contended that the facts will not support a judgment for the plaintiff, and section 10856, Ann. St. 1909, is quoted: "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."

The defendant sets forth the letter which he wrote to the plaintiff. This letter, among other things, provides that the writer will give until March 1 to sell at the price named. Attached to his letter is a plat of the 19 quarters of land proposed to be sold. On this letter, as appears by the copy in defendant's brief, is written the words: "Accepted, Jan. 10, '07, Conti. Realty Co. T. K." A copy of the letter, omitting the plat, is as follows: "Hastings, Neb. 1907. Continental Land Co., Lincoln, Neb. Gentlemen in reply to your of the 8 in regard to my ranch at Akron Colo. I hav 19 quarters all in a body & lays within a mile & a ¼ of Akron that is the north side of it & has a fair ranch house and stable for several horses & a shed for a 140 cattle and a good well & mill all fenced & cross fenced & about 60 acres of farm land, all this land lays very nice and my price is 6 dollars per acre one half cash & one fourth in One year & balance to two years at 6 per cent. Will low a fair comishen out of this. Will only give til March 1, to sel at this price the reanch is leased till november 1 next so if you care to take & try & sel it al rite I will make a smaul plat of it."

It is contended by the plaintiff that the only way by which the offer could be accepted was by the performance of its conditions; that is, finding a buyer for the land of the defendant at the price named and according to the terms designated. The petition contains a statement that

the assignor of the plaintiff, on the 14th of January, 1907, wrote and mailed to the defendant a letter as follows: "Omaha, Neb., Jan. 14, '07. M. B. North, Hastings, Neb. —Dear Sir: In reply to your letter of the 9th inst. addressed to our Lincoln office will say that we have a party for your 19 quarters S. W. of Akron, but Mr. Healey was just in our office and in talking over some other matters he incidentally mentioned that he had bought this land, paid for it, had a contract on record in Akron same having been recorded on the 7th day of this month. We would like to sell it to our party but cannot conveniently do so if you have already sold it. Kindly write me personally about the situation. I want your letter to me awaiting me at the Akron hotel the first thing Wednesday morning. Yours very truly, Continental Realty Company, By ———, Pres." That the Continental Realty Company, by and through its agent, Kharas, proceeded to Akron, Colorado, and there, on or about the 16th day of January, 1907, received from the defendant through the United States mail the following letter: "Hastings, Nebr., 1-15-07. Continental Realty Co. Mr. Healey has got no contract whatever to sell my ranch, and I am very much surprised to hear of such a move that he has made, and I will prosecute him if he makes any attempt to sell my property. He cannot have it for sale at any price now or at all, and as far as signing a contract I have not signed a contract with any one, nor will I give any one the exclusive right to sell it. I will see if he gets around there, and I will have him looked after, as I have men there looking after my business. So what Healey told about a contract is false. Yours Resp. M. B. North."

It is further alleged in the petition that on or about said date the said Kharas, as the agent of the said Continental Realty Company, at Akron, Colorado, sold said land to one George M. McCoid, and thereupon sent from Brush, Colorado, and caused to be delivered to the defendant, Milton B. North, the telegram of which the following is a copy: "Brush, Colo. 5:15 P. M. 1-16-1907.

M. B. North, Hastings, Nebr. My buyer accepts offer in your letter of the 9th or will give five fifty all cash. Wire me acceptance at Maekham Hotel, Denver, or he will buy elsewhere. Theodore Kharas." Also that said McCoid was and is ready, willing and able to comply with the terms of said contract to be performed on his part, but the defendant, wholly disregarding the terms of said agreement, refused to comply with the same, and refused to pay the said company for their services in selling the land. Also, that on the —— day of ———, 1907, the said company, for a valuable consideration, sold and assigned all their right, title, claim and demand in and to said claim and their cause of action against the defendant to the plaintiff, George K. Howell, who is now the owner and holder thereof, and that there is now due and owing from the defendant to the plaintiff the sum of $1,000 and interest on the same from the 1st day of February, 1907. Also, that the contract was understood by the parties to be performed in and governed by the laws of the state of Colorado, and that the law of the state of Colorado at that time was, and now is: "Where a landowner lists or enters into a contract with a real estate broker for the sale of his lands, the broker is entitled to recover his commission whenever he has procured a customer who is ready, able and willing to purchase the property at the price and upon the terms named by the landowner, even though said contract or listing was not in writing, and although no definite commission has been agreed upon."

When the defendant at Hastings, Nebraska, on the 15th of January, 1907, wrote to the Continental Realty Company at Akron, Colorado, that Mr. Healey had no contract to sell the ranch, and said that he was surprised to hear of Healey's move, and that he would prosecute Healey if he attempted to sell the property, and that Healey could not have the property for sale, and this letter was sent in response to the one written to North by the Continental Realty Company the day before, the defendant recognized the claim of the plaintiff to sell the land, and was inclined

to make the claim of the plaintiff exclusive by a proffer to prosecute Healey. It would seem that this letter was sufficient to justify the assignor of the plaintiff in the belief that the company was to go ahead with the sale. This was followed up by a wire from Brush, Colorado, on the 16th of January, to the defendant, to the effect that the buyer accepted the offer and would comply with it, or that he would give a less amount in cash. The telegram does not appear by the petition to have been answered. The offer made by the defendant with reference to the sale of the lands was represented and made for the second time in the state of Colorado, being first made in the state of Nebraska. This offer was likely to become a valid contract in Colorado by the performance of its conditions at that place. It would seem that the act made the offer a contract at the time when it was made and at the place where the act was to be performed. The act was to be performed out at Akron, Colorado, and it was to be performed concerning the subject of the contract which was then there. This contract would appear to be binding in any event whenever the plaintiff's assignor discovered a buyer and sold the land to him. Whatever may be the effect of the offer made in Nebraska, there can be no question about the effect of the offer and its acceptance when the purchaser was found in Colorado and the land was actually sold. The purpose of the statute was to protect landowners from the fictitious claims of real estate dealers who actually never sold the land they claimed to sell and never earned the commissions for which they were claimants, but it was never the intention of the legislature to protect the real estate owner against legitimate claims for services which he authorized in writing and which were honestly rendered. The facts alleged charge that plaintiff's assignor was the agent of the defendant to find a purchaser for the land. It was immaterial for what reason the sale failed. *Lunney v. Healey*, 56 Neb. 313; *Love v. Miller*, 53 Ind. 294; *Reasoner v. Yates*, 90 Neb. 757. There was a plat attached to the letter. The

description is sufficiently accurate. The rule is that, if the contract contains data from which the land may be identified and ascertained with certainty, that is enough. *Powers v. Bohuslav*, 84 Neb. 179.

The contract in this case is made for the sale of land situated in the state of Colorado, and the contract is to be performed in that state. The petition seeks to recover the agent's commission for work done in the state of Colorado. The statute of Colorado is shown by the petition. The contract does not seem to be in conflict with it. The contract is therefore valid under the laws of Colorado. It follows that a sufficient cause of action was stated in the petition. The judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

SEDGWICK, J., dissents.

GEORGE W. HADLOCK ET AL., APPELLANTS, V. FREEMAN S. TUCKER, MAYOR, ET AL., APPELLEES.

FILED APRIL 17, 1913. No. 16,813.

1. **Municipal Corporations**: ORDINANCES: PUBLICATION. Where a city charter requires that ordinances and other proceedings shall be published in a newspaper published in such city, but there is no requirement that the paper in which the publication is made shall be printed therein, and there is no paper printed therein, the publication of such proceedings is sufficient if published in a paper printed elsewhere, so far as the mechanical work is concerned, but circulated in the city from an office maintained therein to local subscribers generally to the same extent as though printed there, and such publication will not be held invalid.

2. ———: STREET IMPROVEMENTS: CONTRACT. Where a bid for the paving of a street exceeded the engineer's estimate to the extent of a few dollars, the excess being limited to one item, and the bid as made was accepted by the city council, but upon entering into the contract the slight excess was discovered, and the excess eliminated, and the contract brought within the estimate, the contract was not thereby void.

3. ———: ———: INJUNCTION. Where a city of more than 1,000 and less than 5,000 population, by its proper officers, entered into an agreement with a contractor to pave a street within the city, and the contractor proceeded with the work under his contract and under the direction of the city officers until the completion thereof, a taxpayer of the city, with full knowledge of the progress of the work, will not be heard to enjoin the payment therefor after the completion of the contract.

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

Will H. Thompson, for appellants.

Robert H. Olmsted, Carl E. Herring and *Frank L. McCoy, contra.*

REESE, C. J.

This is an action to enjoin the officers of the city of Florence, in Douglas county, from paving, curbing, guttering or subdraining Main street in said city, to enjoin the issuance of any evidences of debt to pay for the same, and to enjoin the contractor from doing the work or receiving pay therefor.

It is alleged in the second amended and supplemental petition that plaintiffs are resident freeholders and taxpayers of the city of Florence, which is a municipal corporation having a population of more than 1,000 and less than 5,000; that defendant Tucker is the mayor of the city; that defendants Craig, Price and Allen are each councilmen or aldermen thereof; that the population of the city is about 1,500, and the assessed value of the taxable property therein was $341,591 at the last assessment, and did not exceed that sum; that on or about the 2d day of August, 1909, the city council pretended to pass, and the mayor approved, an ordinance ordering the paving, guttering and subdraining of Main street therein from the railroad tracks near the south side of Jackson street to the south line of Briggs street, and advertised and called for bids for the work, but did not call for bids

for 8,390 square yards of the surface, which was within and along the street railway tracks, and the city has let the contract for the work to defendant Ford, but excluding the said strip along and within the street railway tracks; that the said ordinance formed but one paving district, which included all the property within the city, and the improvement district comprises the whole of the city; that the city is the owner of property fronting and abutting on said Main street and within the district, as well as the owner of certain other property within the city, but that it has provided no fund with which to pay the tax for the improvement, and that there is no money in any fund of the city which can be appropriated to pay the same; that the total appropriation for the fiscal year, from May, 1909, to May, 1910, was the sum of $8,000, apportioned as follows: For street and alley fund, $2,700; for water fund, $1,800; for lighting purposes, $1,250; for officers' salaries, $1,350; for park fund, $200; and for miscellaneous purposes, $700; that the city has drawn warrants against said fund to the extent and amount of $11,000; that on the day on which the contract was let there had been contracted debts against the city and against the street and alley fund, and for miscellaneous purposes, a sum in excess of $3,400, which had been appropriated, and debts contracted against the city, including the lighting fund, the water fund and salary fund, more than $5,500, and there are outstanding valid warrants for the current and previous years more than the sum of $18,000, but for the payment of which no appropriation had been made, and said warrants were drawing interest at the rate of 7 per cent. per annum, and for the payment of which no provision had been made, or funds provided; that the whole of said city is within the school district, of which it forms a part, and the school district has voted the limit of taxes that can be raised, and is unable to levy any tax on its property within the city to pay for the improvement of Main street, and that all the taxes levied by the school district will be needed for the purpose of

maintaining the schools therein; that the mayor and council had no authority to impose a tax for paving the street upon any property not abutting on or adjacent to the street to be improved, and are without authority to order Main street to be paved, or for the creation of an improvement district for the purpose of paying the cost of such improvement; that the ordinance requiring the improvement to be made was first introduced and read on the 2d day of August, 1909, and passed to a final vote on the same day, and was not read on three different days, nor was the rule so requiring suspended; that it is an ordinance of general nature; that it has not been passed, nor published in a newspaper printed or published within the city, but was printed and published in a paper published elsewhere, and that no other or further publication of said ordinance was made, but at the time of the publication of the ordinance there was printed and published in the city a newspaper, which had been published therein for more than one year; that no estimate of the cost of said improvement had been furnished by the city engineer of said city and approved by the council prior to the time of advertising and calling for bids, and no publication was made for bids as required by the ordinance; that the cost of paving, curbing, guttering and subdraining the intersections on said street will exceed the sum of $10,000; that no fund has been provided to pay the same, nor can be; that no vote of the people has been had on the question of paving the street, and no petitions therefor filed; that the ordinance was designed for the improvement of the street in accordance with the working plans prepared therefor, but that said plans were indefinite and uncertain, and did not form any basis upon which a contractor could bid with certainty, and upon which the city could award a contract; and for that, with other reasons, the whole proceeding was void. It is further alleged that after the institution of this suit the mayor and city council let the contract to defendant Ford upon his bid for the making of said improvement, but excluding the portion above

referred to as being within and along the street car tracks, and said Ford is about to and, unless restrained, will proceed to do the work, which will be to the irreparable injury of the taxpayers of the city; that the bid of Ford was not the lowest bid for said improvement; that the bid exceeded the estimates of the city engineer; that the contract entered into with Ford did not conform to his bid, and was signed by the mayor for a price and cost differing from the price and cost named in the bid, no other or further bids being called for or received prior to said change; that the bids were never advertised as required by the terms of the ordinance, nor published in a legal newspaper printed in said city; that the city of Florence has no sewer system, and that one will soon have to be provided for, in which case the sewers will have to intersect and cross Main street in many places, and in some parts will have to be constructed along and in the street, and it would be unwise and unjust to tax the people for paving before the sewer is laid; that the ordinance above referred to is indefinite and uncertain, in that it provides no method or system of assessment by which the taxes may be levied; that the advertisement for bids, and under which bids were received and contract let, is indefinite and uncertain, in that no time limit for either the beginning or completion of the work is given, thereby depriving the city of receiving fair bids for the work of constructing the improvement; that the contract described is the only one entered into between the city and Ford; that since the commencement of this suit the contractor has proceeded with the work, and is grading and paving that part thereof between the tracks of the street railway company and for one foot on each side thereof with the intention of charging the same to the city, and, unless restrained, the mayor and council will pay for the same in violation of the express terms of the contract. The prayer of the petition is sufficiently shown by the former part of this opinion.

Separate amended answers were filed by Tucker, Craig, Price, Allen, and the city of Florence, on the one part, and

by Ford and Jackson in their own behalf. They are of great length, but will have to be briefly summarized herein. The former admits the official character of the answering defendants; that the city of Florence is a municipal corporation having more than 1,000 and less than 5,000 population, and "is governed by the provisions of chapter 37, Cobbey's Annotated Statutes for the year 1909;" that plaintiffs are resident freeholders of that city; that on or about the 2d day of August, 1909, the improvement of Main street in said city was ordered by ordinance duly passed; that the improvement district thereby created included all the real estate within the city; that pursuant to the ordinance the city advertised for bids for doing the work; that bids were received, opened and considered; that the contract was awarded to Ford for doing the work; that he soon thereafter began and has now completed the same; that the school district comprises all the property in its district, and is the owner of the land where its schoolhouse stands, and the city is the owner of real estate within its limits. All unadmitted averments are denied. It is alleged that ample provision has been made for connection with any sewer system that might thereafter be installed in the city, without interference with the pavement on Main street; that the ordinance requiring the improvement was legally passed; that the same and the bids were legally advertised; that the city engineer's estimate of the cost of the improvement was on file with the city clerk before the bids were advertised for; that the contract for the work was regularly awarded and executed; that the pavement of the street was demanded by the people, and the improvement constituted a special benefit to all the real estate within the city. It is further alleged that, after the refusal of the court, in the first instance, to grant a restraining order prohibiting the council from opening the bids and letting the contract, the bids were opened and the contract awarded to Ford, who was the lowest responsible bidder, and soon thereafter, on September 28, 1909, plaintiffs filed their amended and

supplemental petition, setting up said facts, alleging the invalidity of the contract, and again asking for an injunction, but that they did not call the matter to the attention of the court, nor seek any action thereon until the month of January, 1910, although during the interim the contractor had been at work, torn up Main street, the principal thoroughfare of the city, and rendered it impassable for its entire length, about one mile, and the width of said improvement, had laid the concrete on the east half of the street for the entire distance, and for from one-fourth to one-third of the distance on the west side thereof, the material for both the concrete and brick work, sufficient to complete the entire improvement, delivered on the ground at an expense of nearly $40,000; that during all that time plaintiffs were present in Florence, knew of the progress of the work, and are now thereby estopped to deny or question the invalidity of the contract or the proceedings in the performance thereof. It is further alleged, in substance, that the Omaha & Council Bluffs Street Railway Company had a single track along said street, which between its rails and for one foot on each side thereof measured seven feet; that there was no provision of law whereby the city could require or compel the paving of a greater width, nor to construct a double track in and along said street and pay for the paving thereon; that the said company refused to lay a double track, unless the city waive the provision of the statute whereby the company could be required to pave between its rails; and, to induce the construction of the double track, which could not be enforced by the city, the city, for the betterment of the public service on said street, and the advantage of the city generally, yielded its right to have the paving paid by the street railway company, and adopted a resolution by which it waived the "statutory requirement in so far only as it provides for the street railway company to pave between its tracks and one foot beyond the outer rails;" that, in pursuance of said resolution, the street railway company removed the old single

track rails and constructed a new and heavy rail double track, and, at its own expense of about $35,000, paved the entire space between the rails with vitrified brick paving blocks, and that the whole improvement had been completed; that the defendant city has paid for the engineering and inspection services on said work in excess of any assessment that will be made on the city property, and no appropriation is necessary for that purpose.

A joint answer was filed by Ford and Jackson, containing admissions similar to those contained in the answer of the city officers, and alleging that the city purposes paying for the pavement outside the outer rails of said tracks and between the double track, and the contractor charge the expense thereof to the city; that the contractor is proceeding with the work; that the proceedings from the inception thereof, to and including the advertisement for bids, the bid of Ford, and the letting of the contract to him, were regular and in accordance with law and the ordinance of the city; that the city and school district own property in the city as alleged. It is alleged that the contract has been fully completed and performed by Ford, and the same has been duly accepted by the city. Other averments of the petition are denied. It is further alleged that prior to August 9, 1909, plaintiffs had knowledge that the city contemplated the improvements of Main street in the manner provided for, and of the passage of the ordinance of August 2 of that year; that bids were to be called for and opened by the council in open session; that action on the bids were deferred for investigation; that on the 20th of August, 1909, plaintiffs instituted this suit, alleging the invalidity of the proceedings and proposed contract, and seeking an injunction against the same; that a restraining order was issued, but which, upon a full hearing, was subsequently set aside, and an injunction was refused; that the bid of Ford was subsequently accepted, the contract awarded and entered into, by which defendant was required to begin the performance thereof within ten days after the signing and delivery

thereof, and to complete the work on or before December 31, 1909, of all of which plaintiffs had knowledge; that Main street is and was the principal thoroughfare and only business street in the city, and on the line of road leading from Washington county and the north part of Douglas county into the city of Omaha; that the contract required the tearing up of the street and laying the pavement thereon for the distance of one mile and the full width of the street, and necessitated the removal of a large plant and equipment to the place of work, the making of contracts of purchase of paving brick at Galesburg, Illinois, and Buffalo, Kansas, and other supplies, at great cost and expense, which defendant proceeded to do, to and in which plaintiffs acquiesced, and in no manner opposed the same, taking no action thereon until September 28, 1909, when they filed their amended and supplemental petition, in which they repeated the averments of their original petition, and, in addition thereto, alleged the invalidity of the contract, but did not bring the matter thereof to the attention of the court for action thereon, during all of which time the defendant was proceeding and had proceeded with his contract, as he was bound to do by the terms thereof, and in the meantime Main street was torn up, rendering it impassable, the concrete laid for the entire distance on the east half and for about one-fourth to one-third of the distance on the west half, the material for the concrete and brick work delivered on and along the street at an actual cost of nearly $40,000, when the inclement conditions of the weather prevented the further prosecution of the work until the next spring, when he prosecuted the same to full completion in the month of May, 1910; that plaintiffs took no action in the prosecution of their suit until January, 1910, when they filed another supplemental petition, the only purpose of which was to prevent the city from issuing its bonds. An estoppel is pleaded against plaintiffs by reason of their inaction in asserting objections to the improvement within proper time.

Plaintiffs replied to the answer of defendants by a general denial, and admission that the city council pretended to pass a resolution concerning the double tracking of the street railway line, denying that the street railway company refused to construct a double track along Main street, alleging that the mayor, city council and city attorney informed the taxpayers, before the letting of the contract, that the street railway would double track its line within the city and pave the street between the tracks and for one foot outside thereof, and that the street railway had passed resolutions to that effect; that the said street railway company did not comply with the resolution, and did not complete said double track until long after January, 1910, and that the work between the tracks and for one foot outside the outer rails thereof was not commenced or done until the month of March, 1910.

Upon a trial being had in the district court, a finding and decree were entered substantially as follows: A general finding in favor of plaintiffs and against the defendants upon the allegations touching the issue of bonds; that the plaintiffs are entitled to an injunction as prayed; a perpetual injunction against the city of Florence, its officers and agents, restraining them from issuing the bonds of the city in payment of the improvement referred to; that Jackson and Ford are restrained from receiving or accepting any bonds of the city therefor. Costs expended by plaintiffs in all matters relating to the proposed issue of the bonds are taxed to defendants. Upon the other issues involved, the finding and decree are in favor of defendants, and the suit is dismissed at plaintiffs' costs in so far as said issues are concerned. Plaintiffs appeal.

As the decree of the district court upon the question of the right of the city to issue its bonds for the purpose of providing funds with which to pay the contractor for paving the street was in favor of plaintiffs, and no cross-appeal having been taken by defendants, that part of the decree must be taken to be a final adjudication of the question, with which we have nothing to do, and no further

reference need be made to it. The decree as to the other issues is quite general, the finding and decree being specific in nothing, except the dismissal of the petition, and we have found it very difficult, owing to the condition of the record, to discuss and determine the exact contentions of the parties, notwithstanding the very able and exhaustive brief and argument presented by plaintiffs' counsel. There seems to be no doubt that the paving of the street has been fully completed by the contractor, and the work approved and accepted by the city officers. While it is true that the proceedings of the council in letting the contract were irregular, and, in some respects, probably censurable, yet we find nothing in the evidence showing that the contractor should be deprived of his compensation for doing the work, if there is any method by which provision may be legally made for his payment. It is true that this action was commenced soon after the letting of the contract, by which it was sought to restrain its execution, and a restraining order was issued, but was dissolved upon the preliminary hearing for a temporary injunction, and the injunction was refused. This did not have the effect of releasing the contractor from a compliance with his contract with the city. Amended and supplemental petitions were filed as the work progressed under the contract, but no injunctions were applied for by procuring action thereon by the courts, and the work was finally completed and accepted by the city officers. The street is now paved, and, with the exception of one contention hereinafter noticed, we are unable to detect any claim of a failure to comply with all the provisions of the contract so far as the construction work is concerned.

There is some objection to the manner in which the publication of the ordinance and other matters in which notice of the proceedings were made. The evidence tends to show that no paper was printed in the city of Florence at the time the publication was made; that there were papers issued and sent out from offices maintained in the city, but the mechanical work of printing was done in

Omaha, adjacent to the city, and sent in bulk to the office, which was maintained in Florence, and from that office distributed to the subscribers. The statute (Comp. St. 1909, ch. 14, art. I, sec. 59) does not require that the newspaper in which the ordinance is published shall be printed in the city, but that the publication shall be made "in some newspaper published in said city or village." The evidence shows a sufficient compliance with the statute.

It is next contended that the bid of Mr. Ford, to whom the contract was awarded, exceeded the city engineer's estimate. It appears that the items which exceed the engineer's estimate were of little importance, and when the contract was finally entered into those items were brought within the estimate, and the contract was not for an excessive amount. The slight error in the bid could not render the contract void.

Ordinance No. 254, passed by the mayor and council of defendant city of Florence on the 2d day of August, 1909, by which the grading and paving of Main street were ordered, provided for the payment of the cost of the improvement by the city, "except such portion thereof as must be paved by the Omaha & Council Bluffs Street Railway Company." By this language the cost of paving the street excepted that expense from that assumed by the city, and clearly indicated the purpose of requiring the street railway company to pay the expense of grading and paving along its tracks, then upon the streets, as provided and permitted by the charter of the city. The ordinance as published contained the same provisions. The published notice to contractors contained the recital that there would be 31,841 yards of paving to be constructed, "and that, in the event of the Omaha & Council Bluffs Street Railway Company laying double tracks on said part of said street, there will be 23,451 yards of paving, the cost of which will be taxed to the real estate within said district, and 8,390 yards of paving, the cost of which must be paid by the said railway company." The ordinance requiring the street to be paved was passed August

2, 1909. The engineer's estimate of the cost of the improvement was filed the 4th of the same month, in which it is estimated that there will be 31,841 square yards of pavement, and that, "in the event of the Omaha & Council Bluffs Street Railway Company laying double tracks on said part of said street, there will be 23,451 square yards of paving, the cost of which will be taxed to the real estate within said district, and 8,390 square yards of paving, the cost of which must be paid by the said street railway company." All the proposals and bids were based upon the ordinance, the estimate and the publication constituting the foundation of what should follow in the contracts and work.

The charter of the city (section 69, subd. IV) provides: "Any street or other railway company occupying with any track any street, avenue or alley or portion thereof which may be ordered paved, repaved, or macadamized may be charged with the expense of such improvement of said portion of such street, avenue or alley so occupied by it between its rails and for one foot beyond the outer rails, and the cost thereof may be collected and enforced against such company, in such manner as may be provided by ordinance, or the mayor and council or board of trustees may by ordinance require such company to pave, repave, or macadamize such portion of such street, avenue or alley occupied by said tracks, and for one foot beyond its outside rails." At the time of the commencement of the proceedings to secure the pavement of the street, the street railway company maintained a line of railway thereon, consisting of a single track, on which it was operating its cars. On the 25th of September, 1909, the mayor and council adopted a resolution waiving "the provision in chapter 14, article I, of the Compiled Statutes of the State of Nebraska 1909, which requires the street railway company, in the event of street paving in cities like Florence, to pave or pay the cost of paving between its rails and to a distance of one foot on the outer sides thereof." It is then resolved that, in consideration of the

construction, without delay, of the double tracks, "the city of Florence agrees to and does hereby waive said statutory requirement in so far only as it provides for the street railway company to pave between its tracks and one foot beyond the outer rails." The street railway company constructed the double track. While the use of the word "may" in the charter might be construed to create an option on the part of the city as to whether the cost of the paving should be borne by the street railway company or city, it is the opinion of the writer that that question cannot arise here, as the whole of the proceedings, including the ordinance, estimates, publications, bids and contract, show that all persons, including the citizens and taxpayers, were given to understand that the cost of the part of the paving referred to was to be borne by the street railway company, and I am unable to see that the mayor and council had any power or authority, at the late date of the passage of the resolution of waiver, to change the line of conduct formerly publicly adopted. The construction of the double track was in the first instance a matter for the consideration of the street railway company, and for its own benefit. It was its duty to provide accommodation for the public in accordance with its franchise and the use of the street. It owed a duty to the public, growing out of the advantages given by its franchise, and, as long as it fully discharged that duty in all respects, the public had no further demand, and I am totally unable to see how the mayor and council could by passing the resolution exonerate or release the company from paying the cost of the paving, with which it is charged by law, and impose the burden upon the general taxpaying public of the city, but in this view I am not supported by the majority of the court. It is the opinion of my associates that, as the contractor has paved the portion of the street in question in good faith, and with a large outlay of money, depending upon the faith and credit of the city, he should not be deprived of his compensation for the work performed, and, since he was not

restrained by injunction, or other process, from constructing the pavement, and his contract required him to push the work, he should not now be required to lose the money expended under his contract at the suit of these plaintiffs, who took no decisive action, before the full completion of the work, that would justify the contractor in delaying to perform his contract with the city.

The judgment of the district court is therefore

AFFIRMED.

CAROLINE KNAUF ET AL., APPELLANTS, V. ANNA J. MACK ET AL., APPELLEES.

FILED APRIL 17, 1913. No. 17,147.

1. **Wills: CONSTRUCTION: DEVISE: PARTITION: REPAIRS: DESTRUCTION OF HEDGES: DISTRIBUTION.** A testator, the owner of real estate, devised his land to his sister for life, remainder in fee to her son, upon condition that he outlived his mother, the life tenant. In case of his death before her decease, the land should be sold after her death, and the proceeds divided between a daughter of his sister and certain collateral relatives in Germany, the niece taking one-half, the other half to be equally divided between the foreign legatees. The will also provided that neither the niece nor her husband should have any interest in testator's property. The will was admitted to probate, and the life tenant retained possession of the land until her death, which occurred nine years after the death of the testator. Her son, the conditional devisee of the remainder, died during her lifetime. During her lifetime her daughter and her husband occupied the farm with her, paying her rent therefor. During her life, and the tenancy of the daughter, certain repairs were made upon the land by the daughter. During the same period certain hedges growing upon the land were cut down. At the time of the decease of the testator there was a valid mortgage on the whole of the land, and which became due thereafter. *Held*, First, that neither the daughter of the life tenant, nor the foreign legatees, had any interest in the land, and neither was entitled to partition thereof. Second, that the daughter of the life tenant was not entitled, as against the other legatees, to compensation for repairs upon the land during the lifetime of the life tenant in possession. Third, that she was not chargeable for damages to the realty caused by cutting the hedges

during the life and possession of the life tenant. Fourth, that the only interest she had in the estate was her distributive share of the proceeds of the sale, after the payment of the costs and the indebtedness of the testator.

2. **Partition**: CROSS-PETITION: ISSUES: REVIEW. The owner of the mortgage, executed by the testator, was made a party to the suit of the foreign legatees, and he appeared, set up his mortgage, and asked a foreclosure thereof, to which no objection was made, and a decree was entered foreclosing his mortgage. Whether the proceeding was or was not regular, the issue was tried, and no objection can now be made to it. *Carson v. Broady*, 56 Neb. 648.

3. ———: ———: SALE: REVIEW. Since the will gave no direction as to who should sell the land, and conferred no specific authority upon any one to make the conveyance, it was not prejudicial error for the district court to direct the sale in the foreclosure proceeding; the surplus, if any, to be paid into court for distribution according to the provisions of the will. The court having acquired full jurisdiction over the subject matter and all the parties interested, it was proper to retain such jurisdiction and finally close the litigation.

4. *Carson v. Broady*, 56 Neb. 648, distinguished.

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

S. L. Geisthardt, for appellants.

Reavis & Reavis, contra.

REESE, C. J.

It appears from the record in this cause that Karl (sometimes written Charles) Becker, a resident and citizen of Richardson county, died on the 3d day of October, 1900, seized in fee of the south half of the southwest quarter of section 25, township 3, range 16, in said county. He died leaving a last will and testament, which was subsequently admitted to probate in the county court of said county. We are unable to find a complete copy of the will in the record, but the part set out, upon which this controversy arises, is copied and apparently agreed

upon as all that is necessary to be considered, and it will be so treated. He was unmarried. His sister, Elizabeth Heuser, survived him. The clause of the will out of which the dispute arises is as follows: "My sister Elizabeth Heuser *nee* Becker, shall up to the time of her death, have unlimited control over my farm. After the death of my sister Elizabeth Heuser *nee* Becker neither Anna Johanna Mack *nee* Heuser nor her husband Jacob Friedrich Mack shall have any claim or right to any of my former property; but it shall belong to the son of my sister Heinrich Julius Martin Heuser. Should the son of my sister Heinrich Julius Martin Heuser die before his mother Elizabeth Heuser *nee* Becker, then and in that case my former property shall be sold to the highest bidder, and the amount realized from said sale, shall be divided in two equal parts. The first one-half my sister's daughter Anna Johanna Mack *nee* Heuser, shall receive; the second half shall be divided in equal shares between the children of my brothers and sisters in Germany, who are still alive at that time."

Mrs. Heuser died about the 1st day of October, 1909. Prior to her decease her son, Heinrich Julius Martin Heuser, departed this life, so at the time of her death there was no one in whom the fee in remainder could, by virtue of the will, vest. After the death of the testator, the property was occupied by the life tenant to the time of her death. With her the said Anna Johanna Mack, her daughter, and Jacob Friedrich Mack, husband of Anna Johanna Mack, resided on and cultivated the farm. After her decease they continued their occupancy to the time of the trial. The estate was closed by the administrator, with the exception of disposing of the land, and he sought the direction of the court as to his duties under the will. The children of the testator's brothers and sisters, all of whom lived in Germany, brought suit to have the land sold and the proceeds of the sale divided as directed in the will, making the Macks, Jussen, the administrator, William Becker, Jr., August B. Becker, John W. Powell

and Peter Frederick, Sr., the four latter mortgagees of record, defendants.

The Macks answered, setting up the clause of the will, claiming that, as Anna Johanna was to have one-half of the estate, they were the owners of one-half of the real estate, and on which they had made improvements, and that they were entitled to the 40 acres on which they resided, and therefore that the land should be partitioned, allowing them the designated 40 acres on which they lived, and praying for partition accordingly. August B. Becker filed his answer and cross-petition, alleging the ownership of a mortgage by assignment for $1,200, executed by the testator in his lifetime, which was unpaid, and seeking a foreclosure of the mortgage. Jussen, the administrator, answered, asking instructions as to his duties under the will. Replies were filed forming issues on the answers and cross-petition. The cause was tried to the court, resulting in a decree foreclosing the mortgage in favor of August B. Becker, in default of payment ordering the land all sold to satisfy the same, and that Anna Johanna Mack was entitled to partition.

It will be noted that the will provides that neither Anna Johanna Mack nor Jacob Friedrich Mack "shall have any claim or right to any of my former property," but that, after the termination of the life estate of Elizabeth Heuser, the land should vest in fee in her son, but if he die before his mother, the property "shall be sold to the highest bidder, and the amount realized from said sale shall be divided in two equal parts," one-half to Anna Johanna Mack, the other half to the designated legatees in Germany, thus clearly indicating the intention of the testator that Anna Johanna Mack shall not receive any part of the land, but that what she should receive would be in money. Therefore, we find no authority for the partition of the land as demanded by her. It is to be further noted that the copy of the part of the will before us gives no direction as to by whom the land is to be sold, the provision being that it "shall be sold to the highest bidder."

There is some objection to the foreclosure of the mortgage in this action. If we concede that the proceeding is somewhat irregular, although we do not so decide, yet, as the issue was presented by the pleadings without any attack, and the court given jurisdiction of the whole matter, we are unable to see who could be prejudiced thereby. If the land is "sold" under the foreclosure proceeding, it would avoid the necessity of a sale by any other person. If then the surplus, if any, is divided in accordance with the provisions of the will, those provisions will have been carried out in all essential particulars. We see no prejudicial error in the order directing the land to be sold under the foreclosure proceedings.

A claim was presented against the Macks for the rents and profits of the land for the years 1909 and 1910. The life tenant died in October, 1909. The court properly refused to charge them with the rents and profits of 1909, but charged them with the rent for 1910 in the sum of $320. It was further sought to charge them with the value of certain hedges on the farm alleged to have been destroyed during their possession of the land; but, as the evidence tends to show that whatever injury was done to the hedges was done during the lifetime and possession of the life tenant, it should not be charged to Mrs. Mack. Mrs. Mack presented a claim of about $700 for repairs and betterments placed upon the land. She testified that none of them had been made since the death of her mother, the life tenant. There was therefore no error in refusing to allow her anything in that behalf. This case is therefore clearly distinguished from *Carson v. Broady*, 56 Neb. 648.

The decree of the district court wherein it orders a partition of the land is reversed and partition is refused. That part of the decree ordering the foreclosure of the mortgage and sale of the property thereunder is affirmed. If it shall appear that any party to the suit has paid off the mortgage debt as permitted by the decree, either by redemption or assignment, such party will be entitled,

after the payment of the costs, to the reimbursement of the amount so paid, with interest, before a division of the proceeds of sale is made. Of the surplus, if any remains, Anna Johanna Mack will be entitled to one-half, and the legatees in Germany the other half, as directed by the will.

The cause is remanded to the district court, with directions to proceed as indicated in this opinion.

JUDGMENT ACCORDINGLY.

BARNES, LETTON and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

ALLEN G. FISHER, APPELLEE, V. DELIA O'HANLON ET AL.; JAMES ROWAN, APPELLANT.

FILED APRIL 17, 1913. No. 17,153.

1. **Bills and Notes:** NEGOTIABILITY: CONDITIONS IN MORTGAGE. Where a promissory note, negotiable in form, by which the maker promises to pay a certain sum in money, at a certain specified time, is made, and the note is secured by a mortgage, the reservation in the mortgage of an option on the part of the mortgagor to pay a part of the amount due at any time he may elect before maturity does not destroy the negotiability of the note secured by the mortgage.

2. ———: BONA FIDE HOLDER. A holder of a negotiable promissory note "in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Comp. St. 1911, ch. 41, sec. 52.

3. **Attachment, Property Subject to:** PROMISSORY NOTES. "The indebtedness of the maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not

to the payee named in the note, but to the holder, whoever he may be." *Gregory v. Higgins*, 10 Cal. 339. See, also, *Clough v. Buck*, 6 Neb. 343.

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

Albert W. Crites, for appellant.

Allen G. Fisher, Andrew M. Morrissey, William P. Rooney and *William D. Elmer*, *contra.*

REESE, C. J.

On the 9th day of November, 1908, Henry Hern and Maria Hern executed their promissory note to Delia O'Hanlon for the sum of $500, due five years after date, with interest from date at the rate of 6 per cent. per annum. The note is negotiable in form, and, so far as the note itself upon its face is concerned, it is conceded to be negotiable. However, it was secured by a mortgage, which contains this stipulation: "The said Henry Hern and Maria Hern to have the privilege of paying the sum of $25 or $50 at any time during the five years on account of said principal sum." Otherwise the reference to the note is in the usual form. The note, as appears upon its face, matures November 9, 1913. Some time prior to the 12th day of November, 1908, plaintiff commenced suit against Mrs. Delia O'Hanlon in the county court of Dawes county. On the 7th day of December, 1908, the sheriff of the county made a return to the county court of summons and writ of attachment and garnishment, "from which the court finds that due and legal service of each of said writs has been made on November 23, 1908, by delivery to defendant in person in said county of true and certified copy of each writ, together with all indorsements thereon," and on said date Henry Hern and various banks "have each been attached as garnishee and their fees paid, and that thereby there was attached on said date a certain note and mortgage dated November 9, 1908, payable five

years after date, from Henry Hern to defendant," the same being the note and mortgage above herein referred to. The answer of the garnishee was taken, and, upon the request of plaintiff, the cause was set down for trial upon the calendar for December 12, 1908, at 9 o'clock A. M., to which date the cause was continued. On that day the cause was tried in the absence of an appearance by defendant. The court found due and legal service of summons and writ of attachment had been made, and rendered judgment against defendant in favor of plaintiff for $750. Hern was ordered to pay the money due upon the note into court as it matured. The defendant was ordered to surrender the note and mortgage to the sheriff or the court, with order of sale of the attached property. The defendant was "forbidden to receive, receipt for, or collect" any of the money due thereon, and the garnishee "forbidden to pay any portion of the debt" to "any person except into court or its officer." The above reference to the proceedings is taken from a partial transcript of the proceedings filed in the office of the county clerk of Dawes county, which was offered in evidence on the trial of this cause in the district court. No formal transcript of the judgment was offered. The possession of neither the note nor mortgage was ever obtained under the garnishment proceedings, nor was either sold under any order of sale. Plaintiff brought this suit in the district court to foreclose the mortgage, alleging substantially the foregoing facts, and making Henry Hern, Maria Hern, Mrs. O'Hanlon, Mrs. Jackson, and James Rowan defendants. Rowan filed his answer, with a cross-petition alleging his ownership of the note and mortgage, their transfer to him in due course of trade before maturity, the failure to pay interest due, and seeking a foreclosure thereof. Mrs. O'Hanlon and Mrs. Jackson failed to answer. A decree was entered, with findings in favor of plaintiff, declaring the note due by reason of the failure to pay interest, and ordering the foreclosure in favor of plaintiff. Defendant Rowan appeals.

It appears that Mrs. O'Hanlon and Mrs. Jackson are sisters, both well along in years, and neither familiar with the customs of trade and commerce. Mrs. Jackson was possessed of some means. Mrs. O'Hanlon was practically destitute, with the exception of the 160 acres of land in Dawes county, which had come to her by inheritance. It had been necessary for her to make a number of trips from her home in Chicago, Illinois, to Chadron, and, in order to do so, she borrowed the necessary money to pay her expenses from Mrs. Jackson, until the indebtedness amounted to $525. Soon after receiving the note and mortgage from Hern, and on the 25th day of November, 1908, she executed an assignment of the note and mortgage to Mrs. Jackson, and caused them to be sent to her by mail to Beaver Dam, Wisconsin, where Mrs. Jackson resided. Soon thereafter they met, and Mrs. O'Hanlon paid Mrs. Jackson the $25 remaining due, thus satisfying her obligation to Mrs. Jackson. At a later date, alleged to be on or about the 22d day of October, 1909, Rowan purchased the note and mortgage from Mrs. Jackson, the evidence showing that he paid the sum of $500 in money therefor. The deposition of Mrs. O'Hanlon, Mrs. Jackson and Mr. Rowan were taken at Chicago. Mrs. O'Hanlon testified to the transfer of the note and mortgage to Mrs. Jackson, the time and consideration, the indebtedness to Mrs. Jackson, and the subsequent payment of the $25 remaining due. These facts were testified to by Mrs. Jackson, and that the note and mortgage were received by mail and accepted by her as payment on the $525 debt due from Mrs. O'Hanlon, and that at the time of the acceptance of the note and mortgage, and the final satisfaction of the balance due her and cancelation of the indebtedness, she had no knowledge or information that any effort had been made by plaintiff to reach the debt and the note and mortgage by attachment or other process. She also testified to their sale to Rowan, and the receipt of the sum of $500 in money therefor. Mr. Rowan testified to the payment of the money and the receipt of

the note and mortgage, indorsed by Mrs. O'Hanlon and Mrs. Jackson, without any knowledge or information of the attachment proceedings,

As the note is not yet due, according to its terms, there is no doubt that what was done in the way of its transfer was before maturity. But it is contended by plaintiff that the clause in the mortgage giving the makers of the note the option of paying sums of $25 and $50 on the debt, at any time they might desire to do so, destroyed the negotiability of the note and rendered it nonnegotiable under the rule that the note and mortgage considered together constituted the contract. If the provision in the mortgage rendered the note nonnegotiable, it may be conceded that, so long as it remained in the hands of the attachment defendant, the debt was liable to attachment process. If the note was negotiable and passed into the hands of innocent purchasers for value, before maturity, the purchaser would be protected. We are not aware that this identical question has been decided by this court. We are therefore required to consult the decisions of other courts of last resort, for we find nothing in the statute of this state settling the question.

In *Bowie v. Hume,* 13 App. D. C. 286, a negotiable promissory note was executed by the makers, and at the foot of the instrument, and below the signatures, were the words, "with privilege of paying all or any portion any time before maturity," signed by the makers. It was held that this did not affect the negotiability of the note. See, also, *Louisville Banking Co. v. Gray,* 123 Ala. 251, where the same rule, in principle, is applied, and *Louisville Banking Co. v. Howard & Kornegay,* 123 Ala. 380. In *Ackley School District v. Hall,* 113 U. S. 135, the school district had issued its negotiable bond under the provision of a statute which declared that the instrument should be "payable at the pleasure of the district at any time before due," and it was held that this did not destroy the negotiability of the bond; that it created only an option of the maker to pay before maturity, but that

the holder could not exact payment until the day of maturity had passed. In *Mattison v. Marks,* 31 Mich. 421, it was held that a promissory note, by which the maker agreed to pay a certain sum "on or before" a day named, was a negotiable instrument; that the words "on or before" only gave the maker the option before the date of maturity, but conferred upon the holder no right to enforce payment before that time. See, also, section 4, ch. 41, Comp. St. 1911. In *Cunningham v. McDonald,* 98 Tex. 316, it was held that "a promissory note is not rendered nonnegotiable by the fact that the maker, promising to pay by a day certain, reserves to himself by its terms the right to pay sooner." In *Leader v. Plante,* 95 Me. 339, a promissory note was made payable "within one year after date," and it was held to be negotiable; that the option to pay did not destroy its negotiability.

The authorities are not entirely harmonious upon the question of what recitals in a note render it nonnegotiable. But we have found no case where it is directly held that the reservation of a mere option on the part of the maker of an otherwise negotiable note or bond to pay a part of the debt before maturity, the exact time for maturity being fixed, destroys the negotiability of the note. In so far as the time when the payee may demand and enforce payment, this note, even with the stipulation of the mortgage included as a part of it, complies strictly with the requirements of section 1, ch. 41, Comp. St. 1911, known as the "Negotiable Instruments Law."

The case of *Campbell v. Nesbitt,* 7 Neb. 300, is relied upon by plaintiff as sustaining his view of the right to attach the debt in question, but it gives us no real light upon the question, as the note in that case became due on the 10th day of March, 1872, and was attached in 1874, long after its maturity, and while yet in the hands of the payee, who did not transfer it until in November, 1874, and after judgment had been rendered against the garnishee. The note was clearly dishonored and had lost its negotiable quality at the time of its transfer to plain-

tiff Campbell. Without pursuing this subject further, we hold that the reservation of the option in the mortgage did not destroy the negotiability of the note.

As to the defendant Rowan being a *bona fide* holder for value before maturity, the evidence is all one way. Whether true or false, he testified that he made the purchase without any knowledge of the attachment proceedings, in good faith, and paid the sum of $500, the face of the note, in money. He is supported in this by Mrs. Jackson, who testified that he paid her the money, and that she indorsed and delivered the note to him. It is provided by section 52, ch. 41, Comp. St. 1911, that a holder in due course is one who has taken the instrument under the conditions that it is complete and regular upon its face; that he became the holder before it was overdue, and without notice of any previous dishonor, if such was the fact; that he took it in good faith and for value, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it. So far as is shown by the evidence, he appears to have come within the provisions of this section. It is true that he had never seen the land and knew little or nothing about its quality or the condition of the title, except what information he had obtained from the indorsers, with whom he had been acquainted for many years, and it would be quite natural for one of his want of experience in commercial affairs to rely upon their fairness and to presume that 160 acres of Nebraska land would be sufficient security for $500.

The note being negotiable, and its possession and custody not having been obtained under the attachment and garnishment proceedings, the question arises as to what rights, if any, plaintiff acquired by his action. In *Gregory v. Higgins*, 10 Cal. 339, in an opinion by Judge Field, it is said: "The indebtedness of the garnishee was upon a promissory note, which did not mature for several months thereafter. From the very nature of a promissory note, it is evident that, before its maturity, the indebtedness of the maker thereon cannot be the subject of

attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. From its negotiability, it may often pass into the possession of parties entire strangers to the maker, and, even if held by the defendant at the time of garnishment, it does not follow that it would be in his hands at its maturity, and, if transferred before maturity to a *bona fide* holder, it could be enforced, even if paid upon the attachment. *McMillan v. Richards,* 9 Cal. 365, 418; *Sheets & Grover v. Culver,* 14 La. 449. It follows that the notice served upon Marshall, previous to the maturity of his note, did not operate as a garnishment of the amount in his hands. Nor would the notice, served subsequent to the maturity, have any greater effect, unless the note was, at the time, in the possession of the defendant, from whom its delivery could be enforced on its payment upon the attachment." In *Clough v. Buck,* 6 Neb. 343, Judge GANTT, in writing the opinion of the court, said: "It seems to be a general rule that a negotiable note or bill is not, before maturity, subject to attachment. The reason of the rule is well stated in *Gregory v. Higgins,* 10 Cal. 339"—and quite a lengthy excerpt is copied from the opinion with approval. In 2 Wade, Attachment, sec. 458, it is said: "Whatever be the form of commercial paper that evidences the original liability of the party summoned, as a general rule, he cannot be charged as the debtor of the payee, if the paper was negotiable when issued, and still retains its negotiability" —citing a number of cases, and stating the reasons for the rule in the text with considerable elaboration. In 1 Daniel, Negotiable Instruments (5th ed.) sec. 800*a*, it is said: "The purchaser of a bill, note, or other negotiable instrument for value and before maturity, is not, as a general rule, affected by any litigation to which he is not a party, which may then be pending, and in which the instrument is involved, nor will a decree or judgment, when rendered in such litigation, affect him, the doctrine of *lis pendens* having no application to negotiable instruments." See, also, Drake, Attachment (7th ed.) sec. 582 *et seq.*

Some questions involving the procedure are presented, but they need not be noticed. After a patient and careful investigation of the subject, we are led to the conclusion that plaintiff acquired no rights by his garnishee process, and that the decree of the district court foreclosing the mortgage in his favor cannot be sustained; that, as Rowan was made a defendant and presented his mortgage asking a foreclosure thereof, the court should retain the case and make a final disposition of it. Henry Hern, the maker of the note, sold the mortgaged premises to William Hern, who assumed the payment of the mortgage debt, and who is made a party defendant herein, and subsequent to such sale, and during the pendency of this suit, the said Henry Hern died, but no serious question arises from these facts, the said William Hern being a party defendant.

The decree of the district court foreclosing the mortgage in favor of plaintiff and dismissing Rowan's cross-petition as a first lien is reversed, and the cause is remanded to the district court, with directions to dismiss plaintiff's suit, and to enter a decree in favor of Rowan foreclosing the mortgage.

REVERSED.

BARNES, LETTON and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

JENNIE BELLE ADAMS, APPELLEE, V. WALTER SCOTT, APPELLANT.

FILED APRIL 17, 1913. No. 17,150.

1. **Marriage: ANNULMENT: INSANITY.** This state has adopted the prevailing rule that while absolute inability to contract, insanity or idiocy, will avoid a marriage, mere weakness of mind will not, unless it extends so far as to produce the derangement that avoids all contracts by doing away with the power to consent. *Aldrich v. Steen*, 71 Neb. 33.

2. ———: ———: ———. The courts of this state are not authorized

to decree a marriage contract void on the ground of insanity or idiocy of one of the parties, except for such want of understanding in such party as to render him or her incapable of assenting thereto.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

John E. Lowe and *George W. Miller,* for appellant.

G. E. Hager, F. C. Foster and *F. A. Boehmer, contra.*

BARNES, J.

Action to annul a marriage for the alleged incapacity of one of the parties to the contract. The action was brought in the district court for Lancaster county by one Dora Doyle, as the next friend of Jennie Belle Adams, against Walter Scott, to whom Jennie was married on the 2d day of October, 1910, alleging that she was insane or an idiot at the time of her marriage.

It appears, without dispute, that Jennie was left by her mother at an institution called the "Tabitha Home," located in the suburbs of the city of Lincoln, when she was ten years of age; that at the time of her marriage she had been in that institution for 16 years; that during all of that time she had been required to perform menial labor in the nature of washing, scrubbing and other domestic service, without remuneration; that she had been compelled to wear cast-off clothing and coarse shoes, much too large for her; that she had been given very little schooling; that for a short time there was a German teacher at the Home, from whom Mrs. Scott learned to speak German and count in that language. This was the extent of her education. During the 16 years she was at the Home she had been but three times to the city of Lincoln, and once to the state fair. She was industrious and faithful and performed her tasks well. For some 10 years prior to the marriage Walter Scott, the defendant, had been the bookkeeper at the Home, and had thus become acquainted with her. He had noticed her condition,

and had purchased her some articles of clothing, among which was a pair of shoes which were small enough to fit her, and with which she was greatly pleased. A short time before her marriage defendant left the Home and obtained remunerative employment in the city. He had promised Jennie that he would procure a suitable home for her, and would take her away from the institution. According to his promise, on the 2d day of October, 1910, he appeared at the Home and informed Jennie that he was ready to take her away. He gave her suitable wearing apparel, and told her to dress herself up nicely and they would go and be married. She dressed herself suitably, came out, got into the buggy, and went with him to the city, where they procured a license, and went before Justice Stevens and were married. When they failed promptly to return to the Home, and the authorities there had ascertained the fact of the marriage, they came to Lincoln, and caused Scott and his wife to be arrested and confined in the city jail. Mrs. Doyle took her back to the Home, and the defendant Scott was discharged. After a time Scott sued out a writ of habeas corpus to obtain the release of his wife from the custody of those in charge of the Home, and thereupon Mrs. Doyle commenced this suit, as the next friend of Mrs. Scott, to annul the marriage. A trial resulted in a decree for plaintiff, from which this appeal is taken.

Appellant contends, among other assignments of error, that the decree is not sustained by the evidence, and is contrary to law. As we view the record, the case may be disposed of by a determination of this question.

The petition alleges, and the answer admits, the securing of a license and the marriage in question, in due conformity to law. In such a case every presumption of law is in favor of the validity of the marriage until it is rebutted, and the burden of proof was on the plaintiff to rebut this presumption. *Ward v. Dulaney*, 23 Miss. 410; *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634; *Anonymous*, 4 Pick. (Mass.) 32.

To maintain this issue, plaintiff produced the evidence of Mrs. Doyle, who testified, in substance, that she had been acquainted with Jennie Belle Adams since about two hours after her marriage; that she talked with her at the time, and asked her if she knew what it meant to be married, and put it in very plain words. She told her what her husband would expect of her, and Jennie said: "I will never do it." Jennie said her husband had rented a room for her, and that she was going to live in that room and do light housekeeping. The witness did not ask her whether she could do anything in the way of work, or keep house. She told Jennie to dress herself so she could take her out to the Home, and Jennie said: "You will have to put in my combs." The rest of her clothes were on, she having slept that way all night; that she did not know Jennie until the morning after she had been put in jail; that Jennie's mind was that of an overgrown child. She stated that her conclusions were based on general observations; that she did not examine Jennie as a doctor would.

One Doctor Miller testified that he had been called to the Tabitha Home as a physician, and has acted four years at that Home; that he occasionally visited and examined the inmates there; that he had examined Jennie about two and a half or three years ago; that she could not do the ordinary work of a person of her age and size; that she did not know the difference between right and wrong; that she could not take care of herself; that he had discovered defects by her conversation and general appearance, which was a result of lack of mental growth; that she could not learn to take care of herself; that she had the mental capacity of a child 15 or 16 years of age in some ways; that she had not much unity of thought or continual line of reasoning; that in his opinion she was born with a normal brain that would develop or could be developed normally; that she would smile when he spoke to her. He also testified that he did not know that Jennie had learned to speak German; that the food she got at

the institution would make a difference in her mental development; that he had seen Jennie use what they called a "mop"; that he had nothing to do with the people working there at that class of work; that Jennie would not work, even if she was paid for it, and would not understand what you meant if you offered to give her a present.

Anna Osthoff testified that she lived at the county jail; that she had charge of the woman; that Jennie told her she had been put in the Home when she was 10 years of age; that her mother never came to see her, and she cried about that; that Jennie stated that she was married, and wanted to live with Mr. Scott; that she was his wife, and that she was married to him. On redirect examination she stated that, when the girl was first brought to the jail, she thought she was a crazy woman; that, after she found out the circumstances, she thought she could not expect anything else; but, after she was with her several days, she saw she was not crazy; that Jennie showed a lack of education, but knew how to work, and did it right; that she did what she was asked to do, and did it well.

Want of space forbids any further statement of the evidence produced by plaintiff. We deem it sufficient to say that like testimony was given by some other witnesses. It must be observed, however, that no witness for the plaintiff testified that Jennie was either insane or an idiot.

A. A. H. Mayer, for the defendant, testified, in substance, that he had lived in Lincoln for 7 years; that he was manager of the Tabitha Home from 1903 to 1905; that he became acquainted with Mr. Scott and Jennie Belle Adams at the Home; that Jennie did not have much education, but was a good and willing worker; that she scrubbed, helped in the laundry, washed dishes in the kitchen, and turned the washing machine, putting in from 10 to 12 hours a day at that work; that they had a German school teacher out there, and Jennie had learned to read and write German; when he came there Jennie was 19 years old; she wore shoes actually big enough for himself, and her clothes were the same way; that she was required

to wear just what was donated to the Home. He had noticed that she always kept herself clean. He said Jennie had been in his charge for 12 days at his home, and he had taken particular notice of her after Judge Cornish had placed her in his charge; that he had taken particular notice of her for the reason that his wife had been "in the same shoes as what Jennie Belle Adams is today." He stated that Jennie had taken his baby out in her arms, and had been around his babies; that she offered to work at his home without being asked; that she had done her work faithfully and honestly; that she did not act insane or feeble-minded at his home; that he had talked to Jennie about her marriage on the second night she was there. She said she had married Mr. Scott to get a happy home; that she had been a slave at the Home, and had not received any money since he left; that, although Mr. Scott was a little older than she was, he had promised to give her a home; that she would be true and faithful to him if they lived together.

Justice Stevens testified that he had met Mrs. Scott, and performed the marriage ceremony; that he had had experience in performing marriage ceremonies, and looking into the faces of people and judging as to their competency; that he did not notice anything peculiar about Jennie, and was surprised when there was any objection to the ceremony; that she seemed reticent, but took part in the conversation to some extent; that he thought she appreciated what was going on; that she seemed pleased, and seemed to be able to appreciate the remark made by him as to the simplicity of their wedding arrangement; that she had no prompting as to how she should answer at the marriage ceremony, and answered the questions as propounded to her intelligently; and there was nothing whatever that would cause him to suspect that there was anything wrong.

Reverend Henry Heiner testified that he had lived in Lincoln about 28 years; that he had been connected with the Tabitha Home from 1887 to 1895; that he was ac-

quainted with Jennie Belle Adams; that she understood a simple contract; that when something was promised her in the way of clothing she did her work most cheerfully; that she always remembered and expected the things promised; that she had an opportunity to learn German and English, and that she had learned both; that she had some musical ability, and could sing songs.

Doctor John T. Hay, whose competency as a specialist in mental and nervous diseases is beyond question, testified that he had made an investigation in this case as to the idiocy of Jennie Belle Adams. The physical signs of idiocy may be an abnormally large head or abnormally small head, and a lack of symmetry in the features; peculiar form of the bones, especially the palate and the teeth; and lack of expression in the face; that he had applied those tests to Jennie Belle Adams to a certain extent, and physically found no marked defect, except that she was a little short of stature compared to her breadth; she was somewhat awkward in her movements, but her features were fairly formed and symmetrical; and he could discover no abnormality in the shape and size of her head; that he questioned her, and she answered his questions readily and correctly; that she impressed him as being a very ignorant person. She gave her name, and told him she was born in Omaha, but could not tell where in Omaha. She gave her age as 26; said that she had been to German school for a certain length of time, and had learned to speak some German. She could count both in German and English; she could write her name, make letters and make figures; she knows the name of the city; she knows where she lives; she knows the street on which the Home is situated; and was rational as far as he knew; that she was a rational person, and was not insane or an idiot; that she was in a normal condition, was not deranged, and he could not say in law that she was feeble-minded, but that from a medical sense he saw that she was not, and that she was not insane; she was not deranged, she could classify forms, and understand what

was going on around her in matters pertaining to her own welfare; that she knows she is married, and is willing to live with her husband, and is very decided about not going back to the Home; that she seems to appreciate her condition and situation at this time; and that she is not deranged on any subject, according to his understanding of the word.

Jennie was called as a witness, and testified, in substance, that she had never been in court before; that she was married to Mr. Scott; that she wanted to marry him; that she did not know what the action was brought against her for; did not know anything about court proceedings; that she had been up town once since she had been at the Home; that she did not want to go back; that she liked Mr. Scott; that she loved him; that she expected to cook for him, expected to keep house for him and sweep and scrub for him. She stated that when she married Mr. Scott she had promised to be faithful to him; that she would do whatever he wanted her to do; and that she would keep house for him; that she understood what she was to do as a wife; and that Mr. Scott as a husband was supposed to work and bring in the money to keep her on; that she understood that she was being married; that they stood up while being married. She stated that the judge asked her if she would love, honor and obey her husband, and she said she would; that Mr. Scott had said he would protect, cherish and be faithful to her, and that she understood.

The testimony of defendant Scott corroborated the evidence of his other witnesses.

To avoid extending this opinion to an unreasonable length, we have been compelled to omit some of the testimony. We are satisfied, however, that the evidence fails to sustain the plaintiff's allegation that at the time of her marriage Jennie Belle Adams was either insane or an idiot. At most, the record only shows that her mind was to some extent weak and undeveloped. But it seems clear that she understood the nature of the marriage contract,

and much of what was expected of her as a wife. In such a case the courts are not authorized to annul the marriage.

This state seems clearly to have adopted the prevailing rule that, while absolute inability to contract, insanity or idiocy, will avoid a marriage, mere weakness will not, unless it extends so far as to produce the derangement that avoids all contracts by doing away with the power to consent. *Aldrich v. Steen,* 71 Neb. 33; 1 Bishop, Marriage and Divorce (6th ed.) sec. 127; *Ward v. Dulaney,* 23 Miss. 410; *Foster, Adm'x, v. Means,* 42 Am. Dec. (S. Car.) 332; *Anonymous,* 4 Pick. (Mass.) 32; *Nonnemacher v. Nonnemacher,* 159 Pa. St. 634; *Lewis v. Lewis,* 44 Minn. 124, 9 L. R. A. 505. Mere weakness of mind is not a sufficient ground for the annulment of a marriage, unless it amounts to idiocy or insanity. *Svanda v. Svanda, ante,* p. 404. The statutes of this state contain no rule defining the amount of mental weakness required to annul a marriage contract, and we are therefore constrained to follow the rule of the common law as announced by the foregoing authorities.

It may be said that the marriage of Jennie Belle Adams, when considered as a question of eugenics, should have been prevented. However desirable it may be to prevent such marriages, as the law now stands they are valid, and the courts have no power to annul them.

The judgment of the district court is therefore reversed, and the action is dismissed.

REVERSED AND DISMISSED.

REESE, C. J., LETTON and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

APPALONIA GERGENS, APPELLEE, V. WILLIAM F. GERGENS, APPELLANT.

FILED APRIL 17, 1913. No. 17,159.

Pleading: ANSWER: SUFFICIENCY. In an action for the recovery of money, an answer which clearly shows that the money sought to be recovered was not due and payable at the time the action was commenced is not vulnerable to a general demurrer.

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

Reavis & Reavis, for appellant.

Edwin Falloon, S. P. Davidson and *Roscoe Anderson, contra.*

BARNES, J.

Action to recover the purchase price of certain lots in the city of Humboldt, alleged to have been sold by plaintiff to the defendant. From a judgment in plaintiff's favor, the defendant has appealed.

The plaintiff, by her petition in the district court, alleged, in substance, that on or about the 12th day of September, 1906, she sold and conveyed to the defendant, at his request, and to that end made, executed and delivered to the defendant a warranty deed to lots 3 and 4, in block 19, in Tinker's and King's addition to the city of Humboldt, Richardson county, state of Nebraska, for and in consideration of $500, no part of which has been paid; that there is now due from the defendant to plaintiff on said purchase price of the property above described the sum of $500, for which, with interest from the 12th day of September, 1906, at the legal rate, she prayed judgment, together with the costs of this action. To this petition the defendant filed the following answer:

"Comes now the defendant, and for answer to the petition of plaintiff denies each and every allegation of fact

therein contained, except as hereinafter specifically admitted. Defendant admits that plaintiff sold and conveyed to this defendant the land described in the petition of the plaintiff. Defendant further alleges the fact to be that he took said land and accepted the deed thereto at the special instance and request of said plaintiff for the consideration of $500, but alleges the fact to be that, by virtue of an oral contract entered into between the parties for the sale of said land, the said $500 was to be considered as an advancement to the defendant, who is a son of the plaintiff, out of her said estate, and that said $500 was to be deducted from his share of said estate, without interest, upon the death of said plaintiff and the settlement of said estate. The defendant denies that under and by virtue of said contract there is anything due to plaintiff on her action, and prays that he may be dismissed with his costs."

To this answer the plaintiff demurred upon the following grounds: First, a verbal agreement is incompetent and insufficient to establish an advancement. Second, the facts stated in the answer are insufficient to constitute a defense in this cause. The trial court sustained the demurrer upon the second ground, and rendered a judgment for the plaintiff for the amount claimed by her petition.

Appellant contends, among other things, that the court erred in sustaining the demurrer to his answer. It is argued that the plaintiff's petition did not state facts sufficient to constitute a cause of action, and, under the rule that a demurrer searches the entire record, it was the duty of the district court to dismiss the plaintiff's action for the insufficiency of her petition. Counsel for the plaintiff admit the existence of the rule above stated, but insist that the petition was sufficient to resist a demurrer. We deem it unnecessary to determine that question; for, as we view the record, the appeal should be disposed of upon defendant's contention that the answer was sufficient to constitute a defense to plaintiff's action. It is argued by counsel for the plaintiff that the facts alleged in the an-

swer were not sufficient in law to constitute an advancement of the consideration for the conveyance of the lots in question, and that she was entitled to recover the consideration in this action. We think it unnecessary to determine that question; for, as we view the answer, it stated facts sufficient to show that there was nothing due the plaintiff at the time this action was commenced. By her demurrer she admitted that the consideration for the lots in question was not to be paid until after her death and the settlement of her estate. Therefore, it was apparent that no action could be maintained to cover the purchase price of the lots, even if it be not considered as an advancement made to her son out of her estate, until after her death, and therefore the purchase price thereof would not be due either her or her estate until after her death; and, it having been shown by the pleading that she was alive at the time of the commencement of this action, we are unable to see how it can be said that the answer did not state a defense.

As we view the record, the district court erred in sustaining the demurrer to the defendant's answer. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., LETTON and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

GEORGE LINDEMAN, APPELLEE, V. GRANT CORSON ET AL., APPELLANTS.

FILED APRIL 17, 1913. No. 17,165.

1. **Schools and School Districts: REMOVAL OF SCHOOLHOUSE: INJUNCTION.** In an action by injunction brought to restrain officers of a school district from removing a schoolhouse situated in the district to another location, the right of plaintiff to maintain the action is established, if it appears that he is a resident taxpayer

of the district, and the proposed removal, if unauthorized, would involve a waste and unwarrantable expenditure of public funds; and no other or greater interest need be shown. *McLain v. Maricle*, 60 Neb. 353.

2. ———: ———: ———: PLEADING: SUFFICIENCY. In such a case an allegation in the petition that the schoolhouse was built and is supported by taxes levied upon the taxable property of the school district sufficiently avers the ownership of the district.

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

Wilbur F. Bryant and *R. J. Millard,* for appellants.

B. Ready and *P. F. O'Gara, contra.*

BARNES, J.

Action in the district court for Cedar county, brought by a taxpayer, a resident of the school district, to restrain the members of the school board from removing the schoolhouse situated in the district to another location. A restraining order was granted by the county judge, and the defendants filed a motion asking the district court to set aside that order. The motion was overruled, and the defendants excepted. The cause was then tried on its merits. The plaintiff had the decree, and the defendants have appealed.

Appellants contend that the court erred in overruling their motion to dissolve the restraining order, and argue, in support of their contention, that the amended petition was insufficient to state a cause of action, in that it did not show that plaintiff had no adequate remedy at law; that it was not alleged that the defendants were insolvent and not able to respond in an action for damages, or that the bond of the treasurer of the district was insufficient. A like question was before this court in *Solomon v. Fleming,* 34 Neb. 40. It was there said: "A court of equity will, on the application of resident taxpayers, restrain public officers from doing an illegal act, where the effect of such act, if consummated, would be a waste of public

funds raised by taxation." *McLain v. Maricle*, 60 Neb. 353, is a case directly in point. There it was attempted to remove the schoolhouse in a certain district to another location. An injunction was sought, and on appeal to this court it was said: "In an action by injunction, brought to restrain officers of a school district from removing to another location a schoolhouse situated in said district, the right of plaintiffs to maintain the action is established, if it appears that they are resident taxpayers of the district, and the proposed removal, if unauthorized, would involve a waste and an unwarranted expenditure of public funds; and no other or greater interest need be shown." The allegations of the petition in the instant case are sufficient to bring it within the rule above stated.

It is further contended that it was not alleged that the schoolhouse was the property of the district, and that, for all that appears upon the face of the petition, it might have been private property. From an examination of the petition we find that it was alleged that the schoolhouse (describing it) was built and is supported by taxes levied on the taxable property in said district; that the schoolhouse existed and has been standing for more than 20 years on its present site. It is argued that those allegations were not sufficient to establish, even *prima facie*, the ownership of the school district. An allegation that the schoolhouse was built and supported by taxes levied on the taxable property in the school district clearly shows that the district owned the schoolhouse at the time it was built, and it will be presumed that it remained the property of the school district until the contrary appears. Upon this point the petition should be held sufficient, and especially so when it is assailed after judgment.

It was stated on the argument that the case at this time presents a moot question, because, since the action was commenced, the schoolhouse has been removed to another site in compliance with a vote of the majority of the electors of the district. We have concluded, however, to determine the questions presented, for the reason that there remains the question of costs.

As we view the record, the judgment of the district court was right, and it is therefore

AFFIRMED.

REESE, C. J., LETTON and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

IN RE ESTATE OF HARM HINRICHS.

D. VETTE, APPELLANT, V. ESTATE OF HARM HINRICHS, APPELLEE.

FILED APRIL 17, 1913. No. 17,166.

1. **Limitation of Actions:** CLAIM AGAINST ESTATE. In the fall of 1883 V. verbally assigned his crop of standing corn to H., who agreed to gather and market it, and out of the proceeds to pay certain of V.'s debts, the remainder thereof, if any, to be paid to V. H. gathered the corn, sold it in March, 1884, and paid the debts of V. specified in the agreement. V. made no demand for a settlement, and no claim that there was any balance due him from H. on account of the transaction, for more than 25 years. After the death of H., V. filed a claim against his estate for $7,095. *Held*, That the claim was barred by the statute of limitations.

2. **Executors and Administrators:** REJECTION OF CLAIM: EVIDENCE. Evidence examined, and *held* that, on its merits, the claim was properly rejected.

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

Andrew P. Moran, for appellant.

Paul Jessen, contra.

BARNES, J.

Appeal from a judgment of the district court for Otoe county disallowing a claim of the plaintiff against the estate of one Harm Hinrichs, deceased. It appears that the deceased departed this life in the year 1909, and on

the 24th day of September of that year the appellant filed a claim against his estate in the county court of Otoe county for $7,095. The claim was disallowed, and plaintiff appealed to the district court for that county, where the cause was tried and the claim was again rejected.

The appellant, as a basis of his claim, alleged that in the fall of 1883 he turned over to the deceased a certain crop of corn which he had raised that season, under an agreement with the deceased to husk and gather the corn and market it, and out of the proceeds to pay certain of appellant's debts, and to account to him for the remainder; that the deceased had failed to comply with the terms of his agreement; and that there was due appellant from his estate the sum above mentioned.

The defenses interposed were: First, the statute of limitations; and, second, that after applying the proceeds of the crops to the payment of appellant's debts there was nothing due to him from the deceased.

The record shows that the deceased sold the corn in question in February or March, 1884, and seasonably paid the appellant's debts as specified in the agreement. It follows that, if there was any surplus remaining in his hands, the appellant was then entitled to demand it; and, if payment was refused, he could have recovered a judgment therefor in an action at law for that purpose. It is not claimed that appellant ever made any demand for a settlement; that deceased ever acknowledged the indebtedness, or has at any time made any payment to be credited thereon. It follows that for more than 26 years before Hinrichs' death appellant could have maintained an action against him to recover any balance due on account of the transaction which is the basis of this claim. Therefore, the district court properly held that appellant's claim was barred by the statute of limitations.

Appellant contends that the agreement in question created a trust relation between himself and the deceased, and in such case the statute of limitations does not run in favor of the trustee. We think this contention is be-

side the mark. By selling the appellant's corn and paying his debts, deceased executed the trust, if any such relation was created, and he was thereafter appellant's debtor to the amount of the proceeds, if any, still in his hands. To recover this sum appellant could have maintained an action against the deceased at any time for more than 25 years before his death.

Again, as we view the record, it clearly shows that the deceased obtained, in all, about 2,400 bushels of corn under the agreement in question. Of this, 800 bushels belonged to the owners of the land on which it was raised. This left about 1,600 bushels available for the payment of appellant's debts. It is conceded that it cost 6 cents a bushel to husk and market it, and it was sold for 26 cents a bushel, leaving the net price 20 cents a bushel. Therefore, the amount realized by the deceased was $312. Of this amount appellant admits there was paid on his debts $296, leaving a balance due, according to his own statement, of only $24 from the deceased on account of the transaction. It appears that other debts were paid; that, in addition thereto, deceased was compelled to pay for husking the landlord's share of the corn; and that at the same time he held appellant's notes in his favor amounting to more than $500.

Considering the foregoing, and the further fact that appellant at no time during the life of the deceased made any claim against him on account of the transaction in question, we conclude that on the merits the appellant was not entitled to recover.

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

AFFIRMED.

REESE, C. J., LETTON and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

LOUIS C. ROGERS V. STATE OF NEBRASKA.

FILED APRIL 17, 1913. No. 17,631.

1. **Homicide:** EVIDENCE. The substance of the evidence stated in the opinion, and *held* sufficient to sustain the verdict.
2. **Criminal Law:** MISCONDUCT OF OFFICERS: NEW TRIAL. Alleged misconduct of the prosecuting attorney and the sheriff, in furnishing statements to newspaper reporters relating to the crime alleged to have been committed by the defendant, is not available as a ground for a new trial, unless it is shown that the news items published and complained of were read by or brought to the notice of some of the jurors before whom the defendant was tried, or that such publications resulted in some way to prevent him from having a fair trial.
3. ———: INSTRUCTIONS. If the record in a prosecution for murder contains no evidence which would justify a conviction for the lesser degree of manslaughter, the giving of an instruction by which that crime is not completely defined is not a sufficient ground for reversing a judgment of conviction for murder in the second degree.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

F. Dolezal and *F. W. Button,* for plaintiff in error.

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

BARNES, J.

Louis C. Rogers, hereafter called the defendant, was tried in the district court for Dodge county on an information in which he and one Caroline Richter were charged with the murder of her infant child. Defendant had a separate trial, and the jury found him guilty of murder in the second degree. His motion for a new trial was overruled. He was sentenced to serve a term of 12 years in the state penitentiary, and has brought the case to this court by a petition in error.

Defendant contends, among other assignments of error, that the evidence is not sufficient to sustain the verdict for the following reasons: First, the venue was not established by sufficient evidence. Second, the *corpus delicti* was not established. Third, the defendant is not shown to have been connected with the commission of the crime. These questions will be considered and determined in the order above stated.

It appears from the record that Caroline Richter was the mother of seven children prior to the birth of the child in question. For some considerable time she had not been living with her husband, but had been traveling and cohabiting with the defendant since about the month of March, 1910. He was engaged in the theatrical business. Traveling with them was Gertrude, the 16-year-old daughter of Mrs. Richter. It appears that for several months during the year 1910 the defendant and Mrs. Richter lived in a flat conducted by a Mrs. Radier, at No. 45 Broadway street, in Detroit, Michigan. About the month of January, 1911, Mrs. Richter became aware that she was pregnant. The defendant insisted that she was not fit to raise a child for him, and he did not want her to have it. On August 1, 1911, Mrs. Richter and her three children left the defendant at Boone, Iowa, and started for the city of Omaha. They reached Omaha on that day, and after staying there two nights they went to Fremont, Nebraska, where they were joined by the defendant. The defendant and Mrs. Richter occupied the same room at the Albany hotel in Fremont, Dodge county, Nebraska, on Saturday night, the 5th day of August, 1911, and her children occupied another room in the hotel some distance therefrom. It appears that Mrs. Richter left her room and went to a drug store for whiskey and bromide at 2 o'clock on Saturday afternoon. She then returned to her room, which she occupied with the defendant, and did not leave it until the following day. She testified that she was pregnant when she came to Fremont; that she was sick that night, and was unconscious during her sick-

ness; that when she awoke Sunday morning she found she had given birth to a child during the night. The defendant was in the room when she awoke. She cried, and asked him where her baby was, and he replied: "The baby is better off, and so are you." Without further comment, we think it sufficient to say that the testimony of Mrs. Richter and her 16-year-old daughter, with that of several disinterested witnesses, fully warranted the jury in finding, beyond a reasonable doubt, that the child was born at the time and place alleged in the information. There was some conflict in the evidence; but, the question of the venue having been submitted to the jury under instructions by which the rights of the defendant were carefully guarded, we find no warrant for setting aside the verdict so far as it relates to that question.

It is further contended that the evidence is not sufficient to establish the fact that the child in question was born alive; or ever had other than fœtal life. When the body of the dead child was found in the box-car at Colon, there was a towel knotted so tightly about its throat that its neck was reduced to half the size of that of a normal infant. The body of the child was carefully examined by Doctor John Smith, a physician of learning and experience. His competency as an expert witness is not questioned. He testified that, in his opinion, the child had independent life before it died; that he made every examination possible, without performing an autopsy; that it was a full-time child, and every appearance of the body indicated death by strangulation, such as the protruding of the eyes, the swollen and distended tongue, the color of the child's face where the blood had stagnated, the arched chest, and all other signs spoke clearly of murder.

It is true that Doctors Haslum and Leak, as witnesses, testified for the defendant that, in their opinion, a conclusive judgment could not be reached on that question without an autopsy. But they admitted, however, that all of the indications as described by Doctor Smith were that the child had met with a violent death. The body of

the child, as it was found in the box-car, was fully described by the coroner of Saunders county, and by Doctor Smith. No objections were made to the charge given by the court upon this particular question, which was fully and carefully presented to the jury. It was within their power to decide whether or not the child was born alive and then murdered. That was a fact to be determined by the jury in view of all of the circumstances of the case. Wharton, Homicide (3d ed.) sec. 374; *Hubbard v. State*, 72 Ala. 164. The question having thus been left to the jury under proper instructions, and they having resolved adversely to the defendant's contention, a court of review should not set aside the verdict.

It is further contended that the evidence was not sufficient to connect the defendant with the commission of the crime. The fact that the defendant was the father of the child is not disputed. It is admitted that he had cohabited with Mrs. Richter for a year and a half previous to its death. They had traveled about the country together, and she testified that when she became aware of her condition she talked with the defendant at different times about the coming of the child. She further testified that he said to her that he did not want a baby; she was not fit to raise a child for him, and he did not want her to have it. The defendant himself stated to the officer before his trial that Mrs. Richter was anxious to have the child and raise it.

There is nothing else in the record which indicates in any way that either of the parties desired or sought to procure an abortion. As above stated, the evidence shows that the child was not born prior to the time of their arrival in Fremont; and, when her actions are considered, the only conclusion that can be drawn is that the child was born in the room she occupied in the Albany hotel, on Saturday night, August 5, 1911. It is conceded that the defendant was with her in the room at the time. Again, the towel, which was tightly knotted about the neck of the child, had a laundry mark, to wit, "45 R." This

towel was fully identified by Mrs. Radier, who was the proprietress of the rooming house at 45 Broadway street, Detroit, Michigan. She testified that she had known the defendant for two years; that he and Mrs. Richter stayed at her house in Detroit from five to seven weeks. Her laundry mark for years had been "45 R." She stated positively that the defendant and Mrs. Richter carried away one of her towels, thus marked; that she saw one of them in their suitcase before they left. She examined the towel that had been taken from the child's neck, and positively identified it as one of her towels.

It will be remembered that Mrs. Richter testified that, when she was awakened on Sunday morning, she discovered the loss of her baby, and asked for it. Defendant's reply was: "The baby is better off, and so are you." The testimony also shows that the defendant and Mrs. Richter were both at the depot on Sunday morning, August 6, 1911; that she and her little daughter secured, in the express office at Fremont, the brown wrapping paper and the string which were about the child when it was found. The testimony of the railroad men in charge of the cars in the Fremont yards shows that the car in which the child was discovered at Colon came to Fremont on the night of August 3 or the morning of August 4. It was unloaded on that day. After it was unloaded it was left standing just east of the Union station, about three blocks. The car left Fremont on what was called "train 41," between 12 and 1 o'clock, August 7, 1911. Between 2:30 and 2:40 o'clock that afternoon the bundle wrapped in brown paper was discovered in the car by an employee of an elevator firm at Colon, Nebraska. Other witnesses testified that on Sunday morning a package wrapped in brown paper was noticed in the waitingroom of the Fremont station. Mrs. Richter testified that the defendant was at the depot at the same time she was, but was not with her all of the time; that when she went to secure clean clothes for the children she saw the defendant on the north side of the depot, and he asked her why she did not wait in there.

The testimony shows that the mother had expressed a desire to have the child and raise it; that it was a great sorrow to her when she learned that the baby was gone. Defendant was the only person who had a motive for getting rid of the child. He did not want to be bothered with it in the first place. He stated that the woman was not good enough to be the mother of his child. Of course, there is no direct evidence that the defendant tied the towel about the neck of the child and strangled it, but the circumstances are such that the jury could hardly reach any other conclusion. Every reasonable hypothesis, except that of his guilt, seems to have been eliminated by the evidence, and, as we view the record, the jury were justified in finding that the child was born alive, in Fremont, and the crime with which the defendant was charged was committed by him at the time and place as alleged in the information.

It is also contended that the prosecution was guilty of such misconduct as entitles the defendant to a new trial. To support this contention the attorneys for the defendant have attached to the bill of exceptions news items published in Fremont papers after defendant's arrest. It is claimed that the items in question were furnished to the newspaper reporters by the county attorney and the sheriff of Dodge county. We find no showing in the record that any member of the jury ever read the articles of which complaint is made, or that they in any manner influenced the jury in arriving at their verdict. The record merely shows that the newspaper reporters were alert and successful in obtaining some of the facts relating to the transaction which was the foundation for the charge on which the defendant was prosecuted.

The defendant also contends that there was error in the sixth paragraph of the instructions given by the court upon his own motion. That paragraph defined the crime of manslaughter as follows: "If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer in the com-

mission of some unlawful act, every such person shall be deemed guilty of manslaughter." It will be observed that the defendant's criticism is directed to the omission of the verb "is." It may be conceded that the verb should have been inserted immediately after the word "slayer" in the third line of the instruction. This accidental omission, however, is not of sufficient importance to require us to set aside the verdict and grant the defendant a new trial. No person of common sense, possessed with a common understanding of our language, could be misled by this omission.

Finally, it is contended that the court erred in omitting the words, "while the slayer is in the commission of some unlawful act," in the fourteenth paragraph of the instructions, and it is argued that if this omission had not occurred the jury might have found the defendant guilty of the crime of manslaughter, instead of murder in the second degree. It appears that in other instructions the crime of manslaughter had been correctly defined, and we are unable to see how the jury could have been misled or confused by the omission in question, and from a careful reading of the record we are satisfied that such was not the result. The jury having found the defendant guilty of murder in the second degree, it is apparent that they thoroughly understood the instructions as applied to the evidence. In fact, we are unable to see how the jury could have convicted the defendant, if at all, of any less crime than that of murder in the second degree. It appears beyond question that whoever knotted the towel about the neck of Caroline Richter's child did not perform that act unintentionally. It must have been intentionally and maliciously done. As we view the evidence, it contains no element of manslaughter, and the giving of the instruction, if erroneous, was error without prejudice.

After a careful examination of the record, we find that it contains no reversible error; that the evidence was sufficient to sustain the verdict; and the judgment of the district court is

AFFIRMED.

ALLNORA ISABELLA JONES, APPELLANT, V. ARTIE A. HUDSON ET AL., APPELLEES.

FILED APRIL 17, 1913. No. 17,118.

1. Appeal: SUBMISSION: SUBSEQUENT STIPULATION. On appeal, after a cause has been fully argued and regularly submitted on its merits, the reviewing court may for good and sufficient reasons decline to render a decree conforming to a subsequent stipulation of the parties, where the effect will be to reverse the judgment of the district court.

2. Attorney and Client: DISCHARGE OF ATTORNEY: ACTS AS AMICUS CURIÆ. After an attorney for a party to a pending action has been discharged by his client, and after the latter has stipulated with his adversary for a decree disregarding the rights of minors who are not parties to the suit, the attorney, as a friend of the court, may properly suggest facts necessary to the protection of the minors.

3. Infants: PROTECTION OF RIGHTS: EQUITY. A court of equity, if cognizant of the necessary facts, should, on its own motion, protect the rights of minors, when involved in litigation to which they are not parties.

4. Wills: CONSTRUCTION. In ascertaining the intention of a testator, the entire will should be examined.

5. ———: ———: DISPOSITION OF ESTATE. In construing a will, it will be presumed that the testator intended to dispose of his entire estate, unless the contrary is apparent.

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

L. S. Hastings, for appellant.

C. M. Skiles and *F. H. Mizera, contra.*

R. C. Roper, guardian *ad litem* for minors.

ROSE, J.

Construction of the will of William T. Hudson of Dade county, Missouri, was the purpose of this suit. The will was dated June 29, 1906. Testator died June 25, 1907. At the time of his death he owned lands in Dade county,

Missouri, and in Butler county, Nebraska. His will was probated in both counties. The devisees named in his will were his daughter, Allnora Isabella Hudson Jones, plaintiff, his widow Charlotte E. Hudson, his sons Artie A. Hudson and Allen P. Hudson, his granddaughter, Zelphia Golden Hudson, and grandson, Charles Dewey Hudson, defendants. The grandchildren named are minors. Their father was a deceased son of testator. R. C. Roper is their guardian *ad litem*. The will provides:

"I will that, should I die before my wife, Charlotte E. Hudson, that after paying all my just debts, medical attendance of my last illness and funeral expenses, and the expenses of settling up my estate in accordance with the provisions of this will, that the residue of my estate, real, personal and mixed, be disposed of as follows: The personal property to be vested absolutely in my said wife, Charlotte E. Hudson, for her to use and dispose of and the same to be hers absolutely in her own right, hereby vesting title to the same in her. All the real property of which I may die seized to go to my said wife, Charlotte E. Hudson, in trust for her use and benefit, she to have control of and the benefit and profits derived therefrom.

"All the provisions hereinbefore set out are to be in force so long as my said wife, Charlotte E. Hudson, shall live or remain my widow. In case she should marry after my death, then she shall take of my estate, real, personal and mixed, that only which the laws of the state of Missouri provide she shall take as my widow, and no more. Should my wife, Charlotte E. Hudson, die before me, then at my death I will that all my debts be paid, the medical attendance of my last illness, my funeral expenses, including a granite tombstone to the grave of my said wife, Charlotte E. Hudson, and myself, which are not to cost more than seventy-five dollars each; also each of our said graves to be made with a brick and cement vault. Then after the fulfilment of the foregoing provisions and settlements, I will:

"First. That any goods or money or anything of value

that I have heretofore given to any person or persons who are beneficiaries of this will shall not be accounted as an advancement by me to such person or persons, and they are not to be charged therewith as such.

"Second. I will and direct that should any person or persons, their heirs, administrators, lawful guardians, executors or assigns, undertake or attempt to set aside or defeat the provisions of this will, instituting any suit therefor, should they be beneficiaries under this will, then in that event, such persons or person to have five dollars each, and no more, out of my estate either real or personal."

Third. Under the clause, "I will and bequeath to my oldest son, Allen P. Hudson, his heirs or assigns, the following described real estate," testator disposed of several tracts of land. He also bequeathed to the same devisee $5.

Fourth. After the clause, "I will and bequeath to my only daughter, Allnora Isabella Hudson Jones, and her heirs all of the following described real estate," several tracts of land were described. The sum of $1,000 was bequeathed to the same devisee.

Fifth. Under the clause, "I will and bequeath to them jointly their heirs or assigns, the following described real estate," several tracts of land were devised to Zelphia Golden Hudson and Charles Dewey Hudson. They were also willed $10. The widow of testator's deceased son was willed $1.

Sixth. Under the clause, "I will and bequeath the following described land," several tracts were devised to Artie A. Hudson.

The will then proceeds: "And in addition to the above described land I will and bequeath to my said son Artie A. Hudson, five dollars in money. I also will and bequeath to my sons Allen P. Hudson and Artie A. Hudson, their heirs and assigns jointly the following described real estate, to wit: * * * I also will and bequeath to Allen P. Hudson and Allnora Isabella Hudson Jones and Artie A. Hudson and Zelphia Golden Hudson and Charles

Dewey Hudson, or their bodily heirs, the residue of all my property I may die seized of, including real, personal and mixed, share and share alike, except Zelphia Golden Hudson and Charles Dewey Hudson shall be entitled to a share jointly both of which shall make one share. I also will that at my death my said beneficiaries under this will divide equally among themselves all the household and kitchen furniture, any goods, beds, bedding, dishes, books and all things forming a part of the household furnishings and fixtures or belongings, useful and ornamental, except that such articles as may have on them a name or mark which may be put there by me or my said wife, Charlotte E. Hudson; such articles so marked to go to the persons so designated by such mark or name so attached to such article.

"I will that the personal property of which I may die seized that remains undisposed of at the death of my wife Charlotte E. Hudson shall be disposed of as follows: My said children shall divide the household goods among themselves, and all the remainder of the personal property to be sold and the proceeds thereof divided equally among my said children after the payments of the legacies and bequests hereinbefore made. And if there be not sufficient money to pay the legacies and bequests hereinbefore made, then in such event the legacies to be paid *pro rata* on each dollar so bequeathed.

"Lastly, I appoint G. W. Wilson and my wife Charlotte E. Hudson executors of this my last will and testament, and they not to be required to give bond. In case of the death of either then the survivor to be executor; and in case both of the said executors above mentioned be dead then in that event I appoint B. F. Johnson as executor of this my last will and testament."

A codicil dated June 29, 1906, provides:

"First. I give and bequeath to my oldest son Allen P. Hudson, and his bodily heirs at his death and if he at the time of his death has no bodily heirs I bequeath to him the said Allen P. Hudson his lifetime and at his death

to Artie A. Hudson, the following described land in the county of Butler and in the state of Nebraska, as follows, to wit: * * * This same land above described in this codicil was bequeathed in my last will and testament to Allen P. Hudson in fee simple, but by this codicil I have entailed it as herein in this codicil above set forth.

"Second. I will and bequeath to my only daughter Allnora Isabella Hudson Jones and at her death her bodily heirs the following described real estate to wit: * * * The land above described in this codicil which I have and do hereby bequeath and give to my daughter Allnora Isabella Hudson Jones her lifetime and at her death to her bodily heirs was by me in my last will and testament of June 29, 1906, bequeathed in fee simple to Allnora Isabella Hudson Jones but by the will I have entailed it as herein in this codicil above set forth, and all said land being in Dade county, Missouri.

"Third. To my youngest son Artie A. Hudson I will and bequeath the following described real estate situated in Butler county, Nebraska, to wit: * * * This said land of one hundred acres above described which I bequeathed to Artie A. Hudson, I do hereby bequeath the same to Artie A. Hudson his lifetime and at his death to go to his bodily heirs. This land so bequeathed in this codicil to Artie A. Hudson his lifetime and at his death to go to his bodily heirs I did bequeath by my last will and testament of the date of June 29, 1906, to Artie A. Hudson in fee simple but by this codicil I have entailed it as herein in this codicil above set forth.

"This codicil to not change, alter or affect any other bequests made in my last will and testament of June 29, 1906, made to the beneficiaries named in this codicil, other than the real estate in this codicil described."

Plaintiff and the grandchildren, if correctly understood, took the position that testator gave the real estate to his widow for life, if she remained single; that the other devises of real estate were contingent upon testator surviving his wife, and were for that reason inoperative,

since he died first; that by the law of descent each of testator's children was entitled to one-fourth of the real estate, and the two children of the deceased son to the same share, upon the termination of the widow's life estate. The trial court rejected this construction of the will, and, as modified by the codicil, directed the enforcement of the specific devises of real estate to the three children and to the two minors named. Plaintiff and the minor defendants appeal.

After the cause was regularly argued here on its merits and taken under advisement, but before an opinion had been prepared, plaintiff, the two sons of testator and the two minor defendants, by their guardian *ad litem*, filed a stipulation providing that plaintiff's construction of the will should be adopted, that testator's real estate should be distributed accordingly, and that the decree of the district court should be reversed. This course will not be adopted for the following reasons: After a cause has been fully argued and regularly submitted on its merits, the reviewing court may for good and sufficient reasons decline to render a decree conforming to a stipulation of the parties, where the effect will be to reverse a judgment of the district court. The stipulation was made without the consent of appellees' counsel, who, as a friend of the court, asserts that the devisee, Artie A. Hudson, has minor children for whom no guardian *ad litem* has been appointed. They are not parties to the suit. If the trial court properly construed the will, they will be entitled to a portion of testator's realty in fee upon the termination of the life estate of their grandmother and of their father. This remainder would not be protected by a decree conforming to the stipulation. A court of equity, if cognizant of the facts, should, on its own motion, protect the rights of minors, when involved in litigation to which they are not parties. The stipulation, therefore, will be disregarded in the determination of the appeal.

Is the construction of the trial court erroneous? Though the will is unreasonably long, somewhat ambigu-

ous, and in a few minor respects inconsistent, the construction for which plaintiff contends, when applied to the real estate, seems to diregard the familiar principles that the entire will should be examined to ascertain the intention of the testator, and that it will be presumed the testator intended to dispose of his entire estate, unless the contrary is apparent. When the entire will is considered, the clause, "should my wife, Charlotte E. Hudson, die before me," qualifies the provisions to which it is directly attached, and does not extend to the devises which follow it. This is not only the fair import of the context, but it is the construction adopted by testator himself in his codicil, where he recognizes his former devises in fee, without the contingency upon which plaintiff relies. If testator intended to give his widow a life estate, and if, upon the termination thereof, the fee should descend to his heirs under the intestate laws, the will as a whole does not indicate it. This is the view taken by the trial court, and the decree below is

AFFIRMED.

REESE, C. J., BARNES and FAWCETT, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

DRAINAGE DISTRICT NO. 1 OF OTOE AND JOHNSON COUNTIES, APPELLEE, V. MARTHA L. WILKINS ET AL., APPELLANTS.

FILED APRIL 17, 1913. No. 17,119.

1. **Drainage Districts:** ORGANIZATION: PLEADING. For the purpose of organizing a drainage district, properly verified articles, conforming to statutory requirements and containing a prayer for incorporation, and proper objections by interested landowners may take the place of formal pleadings in a summary proceeding under the drainage law of 1905. Comp. St. 1909, ch. 89, art. IV.

2. ———: ———. The existence of swamp or overflowed lands and a purpose to drain them by means of a feasible drainage system are necessary to the legal organization of a drainage district under the act of 1905. Comp. St. 1909, ch. 89, art. IV.

3. ———: ———: ARTICLES OF INCORPORATION: CORRECTION OF DEFECTS. In articles for the incorporation of a drainage district, defects in statements which the statute does not require to be inserted in such articles may be corrected by averments in objections filed in the summary proceeding authorized by the drainage act of 1905. Comp. St. 1909, ch. 89, art. IV.

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

S. P. Davidson, W. F. Moran and *D. P. West,* for appellants.

George H. Heinke, contra.

ROSE, J.

This is an application to the district court for Otoe county to find the facts necessary to the incorporation of a drainage district including lands in Otoe and Johnson counties. The proceeding was commenced January 29, 1910, under the drainage act of 1905 and the amendments thereof. Comp. St. 1909, ch. 89, art. IV. Articles of incorporation were filed in the office of the clerk of the district court, and interested landowners who did not sign them were served with summons in the manner required by statute. Some of those thus notified of the proceeding filed objections to the incorporation of the district and to the including of their lands therein. The district court excluded portions of the lands described in the proposed articles of incorporation, and overruled the objections made by the owners of other lands. With a few tracts of land excluded in the manner indicated, the drainage district was found to be a public corporation under the drainage law cited, and those who were unsuccessful in urging their objections have appealed.

Appellants insist that a formal petition or application was necessary to the organization of the drainage district, that no such pleading or application was filed in the office of the clerk of the district court, and that therefore the

findings below are unauthorized. This position is too technical and narrow to conform to either the spirit or the letter of the statute. Articles of incorporation, if properly drawn, may take the place of a petition or application. What they shall contain is pointed out by statute. Comp. St. 1909, ch. 89, art. IV, sec. 1. The articles contain the information required by the act. They are signed by the incorporators, and one of them makes oath that "the facts and allegations therein contained are true, as he verily believes." If a formal application is necessary, it is found in the prayer for incorporation. Each of the appellants appeared in response to a summons and filed objections under the terms of the statute. For the purpose of organizing a drainage district, properly verified articles, conforming to statutory requirements and containing a prayer for incorporation, and objections by interested landowners may take the place of formal pleadings in a summary proceeding under the drainage law of 1905. Comp. St. 1909, ch. 89, art. IV. "All such objections," says the act, "shall be heard by the court in a summary manner, without any unnecessary delay, and, in case such objections are overruled, the district court shall, by its order duly entered of record, duly declare said drainage district a public corporation of this state. The fact that said district shall contain 160 acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and shall be sufficient grounds for declaring said organization a public corporation of this state. And in case any owner of said real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in said district, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare the remainder a district as prayed for." Comp. St. 1909, ch. 89, art. IV, sec. 3. The rights of all of the parties to the proceeding were asserted by them and were considered by the trial court. In form, therefore, the articles, for the purposes

of incorporation and of a hearing on the objections, comply with the statute and are sufficient.

It is further asserted that there is no allegation in any pleading, nor in the articles of incorporation, that the lands sought to be included in the drainage district are swamp or overflowed lands, or that the purpose of the drainage district is to reclaim and protect such lands from the effects of water, and that therefore the decree is erroneous. It is true the drainage act is introduced by the following language: "A majority in interest of the owners in any contiguous body of swamp or overflowed lands in this state, situated in one or more counties in this state, may form a drainage district for the purpose of having such land reclaimed and protected from the effects of water, by drainage or otherwise." Comp. St. 1909, ch. 89, art. IV, sec. 1. The act as a whole makes it clear that the existence of swamp or overflowed lands and a purpose to drain them by means of a feasible drainage system are necessary to the legal organization of a drainage district. Comp. St. 1909, ch. 89, art. IV. The argument, however, is untenable for the following reasons: The drainage act is by construction a part of the articles. They contain the statements enumerated in the statute. They fairly show that the necessary amount of land within the district is subject to overflow, and a feasible system of drainage is proposed. The streams and lands in the course of drainage are described in articles declaring a purpose "to reclaim said lands from overflows and flood-waters from said streams;" but, if there is anything wanting in this respect, it is supplied by the objections. Issues involving the feasibility of the proposed drainage system, the overflowing of the lands of appellants, and the benefits to such lands were submitted to the trial court by the articles and the objections. On the issues thus raised several volumes of testimony are found in the bill of exceptions. The parties understood and tried those issues. The facts which the court must find necessary to the existence of a drainage district were raised in the manner

contemplated by statute. The result of the trial would have been the same, had pleadings conforming in every respect to the technical views of appellants been considered.

The sufficiency of the evidence to sustain the findings below is also urged as a ground of reversal, but, for the purpose of organization, the district court properly found that each appellant has an interest in overflowed land which may be benefited by the proposed drainage. In this and other respects the proofs meet the requirements of the statute. There is no error in the proceedings.

AFFIRMED.

REESE, C. J., BARNES and FAWCETT, JJ., concur.

SEDGWICK, LETTON and HAMER, JJ., not sitting.

W. L. E. GREEN, APPELLANT, V. H. G. HOOPS, APPELLEE.

FILED APRIL 17, 1913. No. 17,120.

1. **Appeal:** DOCKETING APPEAL: DUTY OF CLERK. It is the duty of the clerk of the district court, upon receiving in due time a proper transcript of the proceedings of the county court in an action determined therein, to file the transcript and docket the appeal.

2. ———: ———: JURISDICTION: FEES. Where the clerk of the district court in due time receives and retains without objection a proper transcript of the proceedings of the county court in an action determined therein, and files the same in his office, he cannot defeat the jurisdiction of the district court by refusing to docket the appeal, on the sole ground that part of the fees remains unpaid, no demand for the balance having been made.

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

Frank E. Beeman, for appellant.

H. A. Brubaker, contra.

ROSE, J.

The action was commenced in the county court of Buffalo county to recover a bill of $80.25 for rejected nursery goods. Plaintiff prevailed. Defendant appealed to the district court, where plaintiff moved to dismiss the appeal on the ground that it had not been docketed within the statutory period of 30 days after rendition of judgment. The motion was overruled. Plaintiff stood upon his motion, refused to plead further, and the district court dismissed his suit. From the judgment of dismissal, plaintiff has appealed.

Should the motion have been sustained? No other question is presented. The judgment of the county court was rendered May 10, 1910. The following is found among the appearance docket entries of the case in the office of the clerk of the district court: "Case not docketed until September 26, 1910, on account of appellant not paying fees." Notwithstanding this memorandum, it is shown without contradiction that the clerk received and retained the transcript, as well as the original papers, and $2.50 in fees June 8, 1910, and that he filed the transcript in his office the same day. There is nothing to show that he demanded more fees or that appellant knew of a purpose on his part to refuse to docket the case. His duties are prescribed by statute as follows: "The clerk, on receiving such transcript and other papers as aforesaid, shall file the same and docket the appeal." Code, sec. 1009. The clerk's duty to docket the appeal was the same as his duty to file the papers. By neglecting his duty and by making a docket entry to that effect, he did not prevent the district court from acquiring jurisdiction. Error does not appear in the record.

AFFIRMED.

REESE, C. J., BARNES and FAWCETT, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

LOUIS BRADFORD LUMBER COMPANY, APPELLEE, V. MINNIE C. CREEL, APPELLANT.

FILED APRIL 17, 1913. No. 17,124.

1. **Mechanics' Liens: FORECLOSURE: NONRESIDENCE OF DEFENDANT: QUESTION OF FACT.** In a suit to foreclose a mechanic's lien, nonresidence of a defendant, upon whom plaintiff attempted to make service by publication, is a question of fact, when put in issue by the pleadings.

2. ———: **SUBCONTRACTORS.** A subcontractor who furnished at different times materials for a house, pursuant to a continuous course of dealing under a single contract, is entitled to a mechanic's lien for the balance due him, where he filed a proper statement with the register of deeds within the statutory period.

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

William Baird & Sons, for appellant.

Montgomery, Hall & Young, contra.

ROSE, J.

This is an action to foreclose a mechanic's lien on a house and two lots in Omaha. Plaintiff, as a subcontractor, furnished material for the house, and filed a lien for $166.39, the balance claimed to be due. George Dunham was the contractor. When the materials were furnished, Minnie C. Creel owned the lots, but before this suit was instituted she and her husband sold them to Andrew Sohler; the transfer having been made January 15, 1909, and plaintiff's petition having been filed August 17, 1909. Creel and wife, Sohler and wife, and Dunham are defendants. From a decree foreclosing plaintiff's lien defendant, Minnie C. Creel, has appealed.

As a reason for reversing the decree of foreclosure, it is asserted: "The action is barred, as the same was not commenced as to the owner of the real estate within two years of the filing of the lien." The lien was filed De-

cember 12, 1907, and personal service of summons was not made upon Sohler until January 6, 1910. Proof of service by publication, however, had been filed November 2, 1909, and this was within the statutory period of two years, but defendant asserts it was void. Constructive service was based on an affidavit that Sohler was a nonresident, upon whom personal service could not be made in Nebraska. Nonresidence was a controverted issue of fact, with evidence on both sides. The trial court found that Sohler was a resident of Iowa, and the more convincing proofs sustain that conclusion. It is therefore adopted as correct, and prevents a reversal on this ground.

Defendant also argues the following proposition: "Plaintiff's material was furnished under at least three distinct contracts, and, at the date of filing the lien, the time for filing the same had expired as to all of the contracts and the materials covered by the same, except as to its last set of items, totaling $86.14, and these items were paid for on November 13, 1907."

The evidence indicates a continuous course of dealing under one contract, and plaintiff was entitled to the balance due for material furnished thereunder. The trial court properly so found, and that conclusion defeats this defense. No error has been found, and the judgment is

AFFIRMED.

REESE, C. J., BARNES and FAWCETT, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

HARRY FORBES ET AL. V. STATE OF NEBRASKA.

FILED APRIL 17, 1913. No. 17,457.

1. **Criminal Law: INSTRUCTIONS: MOTION FOR NEW TRIAL: REVIEW.** The appellate court may decline to review an instruction not challenged as erroneous in the motion for a new trial in the district court.

2. Quaere. Whether the indeterminate sentence law of Nebraska requires the maximum sentence provided by law is an undetermined question.

3. Criminal Law: INDETERMINATE SENTENCE LAW: RETROACTION. The indeterminate sentence law is prospective in its operation, and does not apply to felonies committed before it went into effect.

4. ———: ———: REPEALS. The indeterminate sentence law does not repeal or change the statutes defining crimes and prescribing penalties.

5. ———: SENTENCE. Defendants, who committed burglary before the indeterminate sentence law went into effect, but who were convicted afterward, were properly sentenced under the criminal code as it existed when the crime was committed.

ERROR to the district court for Hamilton county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Charles L. Whitney, J. L. Caldwell and *Walter L. Pope,* for plaintiffs in error.

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

ROSE, J.

In a prosecution by the state in the district court for Hamilton county, Harry Forbes, John Evans, and Charles Taylor were convicted of burglary with explosives. The charge was that they blew open and robbed a safe in the Citizens Bank of Giltner. Each was sentenced to serve a term of 28 years in the penitentiary. As plaintiffs in error, defendants Forbes and Evans now present for review the record of their conviction.

In the first assignment of error the correctness of an instruction submitting to the jury two forms for a verdict is challenged. In the motion for a new trial the court below was not asked to set aside the verdict on that ground. A salutary rule of appellate procedure does not require the review of questions not presented to the trial court. *Lukehart v. State,* 91 Neb. 219.

The principal assignment is that the trial court erred

in sentencing defendants to serve a term of 28 years in the penitentiary. Under this head it is argued that the indeterminate sentence law was applicable to the conviction of defendants; that it prohibited the trial court from fixing the "limit or duration of the sentence;" that it was violated by the sentence imposed; that it was *ex post facto* as to the offense charged. Some of the pertinent facts are: The felony was committed April 25, 1911. The trial commenced August 16, 1911, and defendants were sentenced August 21, 1911. The indeterminate sentence law went into effect July 7, 1911. It thus appears that the information was filed before the indeterminate sentence law became effective, and that defendants were tried and sentenced afterward. That part of the indeterminate sentence law relating to the sentence provides: "The court imposing such sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term provided by law." Criminal code, sec. 502*a*.

The argument of defendants may be summarized thus: The following provision of the indeterminate sentence law applies, by its own terms, to the present case: "Every person over the age of eighteen years, convicted of a felony or other crime punishable by imprisonment in the penitentiary, excepting murder, treason, rape and kidnapping, if judgment be not suspended or a new trial granted, shall be sentenced to the penitentiary." Criminal code, sec. 502*a*. The indeterminate sentence law, as interpreted by this court, required the trial court to impose a life sentence, since the lawful sentence is the maximum, which, for burglary by explosives, is imprisonment for life. Criminal code, sec. 50*b*; *Wallace v. State*, 91 Neb. 158; *Williams v. State*, 91 Neb. 605. Under the statutes, as they existed before the indeterminate sentence law went into effect, the trial court was at liberty to impose a sentence of not more than 20 years, while the new act made a life sentence imperative. The indeterminate sentence

law, therefore, altered the situation of defendants to their disadvantage after they were accused of burglary with explosives, and the enactment is for that reason *ex post facto* as to that offense. *State v. McCoy,* 87 Neb. 385; *Marion v. State,* 16 Neb. 349. The old method of imposing sentence had been superseded by the new, when the jury found defendants guilty, and, there being at that time no statute under which they could be sentenced, they must necessarily be discharged. Those are the principal reasons urged for a reversal on this ground.

While the argument is ingenious and formidable, critical analysis discloses fallacies which prevent its adoption. *Wallace v. State,* 91 Neb. 158, and *Williams v. State,* 91 Neb. 605, do not commit this court to the doctrine that the indeterminate sentence law requires the maximum sentence prescribed by law. That question was not necessarily involved in those cases. An expression of the supreme court of Illinois, that the indeterminate sentence law requires the maximum sentence, is quoted in the opinion in the earlier case, with other language used by that court, to show that the statute of this state is not vulnerable to attack on the ground that an indeterminate sentence is too indefinite to meet constitutional requirements. The language quoted by this court from the supreme court of Illinois applies to the constitutionality of the act of this state, but did not commit this court to a statutory construction in regard to the sentence. The later case also left that question open. In the different states the statutes relating to indeterminate sentences vary in phraseology. The opinions on this subject have often come from divided courts. The reviewing courts of the country are not in harmony. As to the nature of the sentence required by the indeterminate sentence law of Nebraska, this court, therefore, is not committed to the construction adopted by the supreme court of Illinois.

In another respect the argument of defendants is fallacious. The indeterminate sentence law did not alter

the statute defining the crime of burglary with explosives. It remains exactly as it was before. The penalty was not changed. It was, and is: "Any person duly convicted of burglary with explosives shall be sentenced to the penitentiary for life or for any term not less than twenty years." Criminal code, sec. 50*b*. The sentence pronounced conformed to that act. The question then is: Did the indeterminate sentence law take from the district court the power to impose the sentence of which defendants complain? "Every person over the age of eighteen years, convicted of a felony or other crime," says the indeterminate sentence law, "shall be sentenced to the penitentiary." It seems clear that the legislature never intended this language, in its proper connection with the whole act, to apply to crimes committed before the enactment went into effect. The lawmakers legislated for the future, not for the past. An eminent text-writer has wisely said: "It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley, Constitutional Limitations (7th ed.) p. 529.

Under a proper construction of the indeterminate sentence law, it does not apply to the felony committed by defendants, or to their sentence. *In re Lambrecht,* 137 Mich. 450; *Murphy v. Commonwealth,* 172 Mass. 264.

Insufficiency of the evidence to sustain the verdict is another ground urged for a reversal of the judgment, but the opinion is unanimous that the ruling should be adverse to defendants on this assignment of error.

AFFIRMED.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY v. JAMES H. MALLORY, APPELLEE; J. O. MILLIGAN, APPELLANT.

FILED APRIL 17, 1913. No. 17,137.

1. **Appeal:** EQUITY: ISSUES REVIEWABLE. When a suit in equity, involving several separate and distinct issues, is appealed to this court upon part of such issues only, we are not required by the statute to try the whole case *de novo*. We are simply required to try and independently decide such issues in the case, and such only, as are presented by the appeal.

2. **Mortgages:** FORECLOSURE: SALE: DISTRIBUTION: LIMITATIONS. M. and wife executed a mortgage upon the separate estate of the latter, to secure a loan by a bank to the former. Thereafter the wife died, leaving children surviving her. After her death a decree was entered in favor of the bank in a suit to foreclose its mortgage. Before sale under the decree the husband sold and conveyed his curtesy interest in the land to a codefendant in the suit. *Held:* First. That the purchaser of the curtesy interest was chargeable with knowledge that all he could take under his deed was such interest as his grantor should be found, upon the final order of confirmation and distribution, to have had at the time of the entry of the decree. Second. That the amount required to pay said mortgage should be deducted from such curtesy interest. Third. That, as between the husband and wife and the bank, the husband was the principal debtor and the wife a surety, and that the relation of debtor and creditor did not arise between them until the sale of the property under the decree; until which time the statute of limitations would not begin to run in favor of the husband.

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

J. J. McCarthy and *Paul Hatfield,* for appellant.

John D. Ware and *J. M. Paul, contra.*

FAWCETT, J.

James H. Mallory and Mary E. Mallory were husband and wife. In 1903 Mr. Mallory owned some land in South Dakota, and one White owned a quarter section in Dixon

county, this state. Appellee's brief states: "Mr. Mallory made this proposition to Mr. White, that he would exchange his equity in his Dakota farm and pay him $1,200 in cash if he would convey to his wife, Mary E. Mallory, the land involved in this action. This was agreed to and the transfer took place; but Mr. Mallory, in order to pay the $1,200 in cash to Mr. White, was compelled to borrow said money from the Northwestern Mutual Life Insurance Company; and to secure the payment of said $1,200 to said insurance company he asked his wife, Mary E. Mallory, to join him in giving to the insurance company a mortgage on said property. The mortgage then given is the one which the court in this action decreed to be a first lien on said property." On February 15, 1904, Mr. and Mrs. Mallory executed a second mortgage upon the Dixon county land to the Farmers & Traders Bank of Wakefield, Nebraska, for $725. We think the evidence establishes appellee's claim that this money was used by Mr. Mallory in his own business at Council Bluffs, Iowa. This mortgage was decreed to be a second lien. A third mortgage was given by Mr. Mallory alone to John D. Haskell and D. Matthewson for a small amount, which was decreed to be a lien against the curtesy estate of Mr. Mallory. Suit was instituted May 24, 1909, by the insurance company upon the $1,200 mortgage above referred to, and the holders of the second and third mortgages filed answers and cross-petitions praying a foreclosure of their respective mortgages. A decree of foreclosure was entered December 1, 1909. In June or July of 1906 Mrs. Mallory died. On March 30, 1910, Mr. Mallory conveyed his curtesy estate to defendant Milligan. The property was sold under the decree of foreclosure November 22, 1910. The controversy here is over the distribution of the surplus, after the payment of the mortgages to the insurance company and the bank. September 26, 1910, the guardian *ad litem* of the minor children of Mrs. Mallory filed a paper, which he denominated a petition, but which the trial court treated as a motion, in which the court was asked to direct

that the interest of Mr. Mallory, if he is entitled to any, be first applied to the payment of the liens of the insurance company and the bank, together with the costs of the suit, and that the interests of the minors be not applied to the payment of any part of the claim of Haskell and Matthewson, and that all of the surplus left, after the payment of such liens as the court should determine to be liens upon the interests of the minors, be by the court ordered paid over to the minors in equal shares. The decree, after confirming the sale, recites: "And this cause coming on further to be heard on the motion of the guardian *ad litem* for an order of distribution, and the evidence, was submitted to the court." The court then found that the premises sold for $9,000; that the costs were $198.15, leaving a balance of $8,801.85 to be distributed; found the amount due to the insurance company to be $1,539.12, to the bank $1,001.26, to Haskell and Matthewson $66.61; found the curtesy estate of Mr. Mallory to be of the value of $1,797.54, and that the same had been duly conveyed to defendant Milligan. Allowed the guardian *ad litem* $100, to be taxed as costs, and then ordered that the clerk pay to the insurance company the amount found due to it; to the guardian of the minor heirs $5,364.29; to the bank the amount due to it, "out of the curtesy estate of the said J. H. Mallory, now owned by J. O. Milligan," and also the amount due Haskell and Matthewson, "out of the said curtesy estate;" the balance of $729.67 to be paid to defendant Milligan. From this decree defendant Milligan alone appeals.

Appellee now urges that the case is here for trial *de novo*, and asks us to review that part of the decree which ordered the payment of the amount due the insurance company out of the general fund arising from the sale. This we cannot do. None of the parties has appealed from that part of the decree. Where a decree in a suit in equity disposes of more than one distinct and separate issue litigated in the court below, and an appeal is prosecuted by one of the parties as to one of such issues only,

and no cross-appeal is prosecuted by any of the other parties, the only issue which will be considered in this court is the one presented by the appeal. The rule is stated in the second paragraph of the syllabus in the late case of *Tate v. Kloke, ante,* p. 382: "The issues presented by appeal to this court in a suit in equity must be tried *de novo,* and a proper decree entered or directed." In other words, when a suit in equity is appealed to this court we are not required by the statute to try the whole case *de novo.* We are simply required to try and independently decide such issues in the case, and such only, as are presented by the appeal. This rule will not work any hardship upon appellee in the present case, for if we were to re-examine the question the decree of the district court upon that point would have to be affirmed. Conceding that, in procuring the conveyance of the Dixon county land to Mrs. Mallory, the husband was making a gift to her, that gift was diminished, at the moment it was made, by the $1,200 mortgage which had to be given in order that the husband could raise the money which would enable him to make the gift. The giving of the mortgage and the execution of the deed from White to Mrs. Mallory constituted one transaction, and what Mrs. Mallory received was what remained after that transaction was completed.

Appellee also urges that as no answer was filed to the petition of the guardian *ad litem* filed September 26, 1910, appellant Milligan was not entitled to offer any evidence in opposition thereto. Counsel contends that there are two methods, either of which might have been pursued by the guardian *ad litem,* viz., by petition or motion; that, having chosen to pursue the former, the hearing should have been controlled by the general rules as to pleadings. All persons claiming any interest were already before the court. No new parties were attempted to be brought in. The pleading was not verified, nor was any order for making up issues made by the court, or requested by the guardian *ad litem.* Aside from the name which the guard-

ian *ad litem* gave it, the paper was in all essential respects a motion, and the trial court properly so treated it.

The only question we are called upon to decide is as to the money ordered to be paid to the bank. Upon this point the appellant Milligan contends that he purchased the curtesy estate from Mr. Mallory March 30, 1910, for an adequate consideration and without notice of appellee's claim. At the time he purchased the curtesy estate the decree of foreclosure had been entered. Mr. Mallory was a party to the suit. The order of distribution had not yet been made. Milligan knew, at the time he made the purchase, that the title to the land was in Mrs. Mallory at the time of her death, and hence was then in her legal heirs, the minor defendants, and that Mallory had only a curtesy interest therein, and we think he should be held to have had full knowledge that all he could take under his purchase was such interest as Mr. Mallory should be found, upon the final order of confirmation and distribution, to have had at the time of the entry of the decree.

His second contention is that Mallory was not indebted to the estate. It is true that at that time he was not, strictly speaking, indebted to the estate, but he was the principal debtor to the bank upon the note secured by the mortgage of his wife. Their relations then were: Mallory was indebted to the bank, and the estate was surety upon that indebtedness. Until the property was sold by reason of Mallory's failure to pay his obligation, the relation of debtor and creditor did not exist, but as soon as the sale was made that relation arose, and he then became such debtor.

His third contention is that, if the money was given or loaned to Mallory or mingled with his funds, it was afterwards expended by him in making permanent improvements upon the premises. This contention is not sustained by the evidence.

His fourth contention is that more than four years had elapsed since the money was given or loaned, if given or loaned at all, to Mallory, and hence was barred by the

statute of limitations. This contention must fail for the reasons above given in answer to his second contention.

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

AFFIRMED.

REESE, C. J., BARNES and ROSE, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

MATTIE M. MACKEY, APPELLEE, V. JOHN N. FRENZER, APPELLANT.

FILED APRIL 17, 1913. No. 17,141.

Divorce: CUSTODY OF CHILDREN: EVIDENCE: REVIEW. This appeal presents only the question of fact as to the sufficiency of the evidence to support the decree, and upon consideration of the evidence the order of the district court is affirmed.

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

Will H. Thompson, for appellant.

John C. Cowin and *M. O. Cunningham, contra.*

SEDGWICK, J.

In December, 1904, the plaintiff obtained a divorce from defendant by the decree of the district court for Douglas county. There were three children, a girl four or five years old at that time, and two boys a little older. By the decree the custody of the girl was given to the plaintiff, and the boys were confided to the care of the defendant. The plaintiff afterwards married Hiram B. Mackey, and removed from Omaha to Minneapolis, Minnesota. She took the girl with her, and afterwards it seems that the

boys left their father and were with her at Minneapolis. There has been continual disagreement between the plaintiff and defendant since long before they were divorced. This plaintiff began these supplementary proceedings in the district court for Douglas county to obtain the custody of the boys also. The defendant answered, and made a cross-application for the custody of the girl. Afterwards, and before the hearing, the plaintiff dismissed her application for the custody of the boys, and the matter was heard before the district court upon the defendant's application for the custody of the girl.

The ground for this application relied upon by defendant appears to be that the plaintiff has taken the girl out of the jurisdiction of the court, and that the plaintiff's present husband, Mr. Mackey, has such a bad character and reputation that the plaintiff's home is an unfit place for the girl. Mr. Mackey formerly resided at Minden, in this state, and several witnesses who knew him some five or ten years ago testified that he was addicted to the use of intoxicating drinks, and accustomed to bad associations, and the use of vile and profane language. The plaintiff admits that there was some ground for complaint of Mr. Mackey formerly, and testifies, and the evidence tends to show, that Mr. Mackey for several years has been an industrious and quiet man. The plaintiff appears to be well situated in her present home, and the girl has suitable surroundings and is well cared for. The district court found that it was not in the interest of the girl to take her from the custody of her mother under the existing conditions and circumstances, and that the father was not so well situated to care for her as is a mother, and confirmed the former order of the court confiding the custody of the girl to the mother. We are satisfied that the evidence justifies this conclusion, and the order of the district court is therefore

AFFIRMED.

REESE, C. J., BARNES and LETTON, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

BUFFALO COUNTY, APPELLEE, V. JOEL HULL, APPELLANT.

FILED APRIL 17, 1913. No. 17,148.

Counties: BRIDGES: LIABILITY OF ADJOINING COUNTIES FOR REPAIRS. The liability of adjoining counties for repairs of a bridge over a stream between them is fixed by statute, and it is within the power of the legislature to alter or amend the statute in that regard. The conditions and extent of the liability depend upon the statute in force when such repairs are made and the liability incurred.

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

Joel Hull and *Brown, Baxter & Van Dusen,* for appellant.

E. B. McDermott, contra.

SEDGWICK, J.

The bridge in question was built in 1874. In 1881, in an action between these two counties pending in this court upon appeal, this court decided: "That the bridge being constructed by Buffalo county alone, Kearney county could not be compelled to aid in keeping it in repair." *State v. Kearney County,* 12 Neb. 6. The court in the opinion recited the statute of 1879, which appears to contemplate that the adjoining counties should be equally liable for repairs, whether the bridge was built by them jointly or not, which statute was in force at the time the bridge was built, and then refers to the amendment of 1881, "limiting its application to bridges which have been built, or may hereafter be built by co-operation of two counties separated by a stream." It was held that this amendment, although enacted after the bridge was built, was applicable. Afterwards the statute was again amended, and, as construed by this court, makes the adjoining counties equally liable for repairs, whether the

bridge was built by them jointly or not. *Cass County v. Sarpy County*, 63 Neb. 813, 66 Neb. 476, 72 Neb. 93; *Iske v. State*, 72 Neb. 278; *Saline County v. Gage County*, 66 Neb. 844; *Dodge County v. Saunders County*, 77 Neb. 787. Under these decisions and the decision in *State v. Kearney County*, *supra*, these counties were made jointly liable for the repairs of this bridge by this last amendment of the statute. In 1894 Buffalo county made repairs to the bridge, and, complying with the last stated amendment to the statute, demanded that Kearney county contribute one-half of the expenses, which that county refused to do. A judgment was obtained in the district court for Kearney county, and upon appeal to this court was affirmed, and it was held that Kearney county was liable to Buffalo county for one-half of the repairs made by Buffalo county. *Buffalo County v. Kearney County*, 83 Neb. 550. Afterwards the commissioners of Kearney county levied a tax for the payment of the judgment, and after the money became available for that purpose this plaintiff county "filed a claim or request with the board of supervisors of said Kearney county for the issuance of the warrant upon said judgment." This defendant, Joel Hull, appears to have been interested from the first in preventing the collection from Kearney county of any part of the expenses of repairing this bridge, and appears from the pleading and evidence in this case to still contend that Kearney county is not liable therefor. The petition in this case alleges that "said claim is still pending before the said board of supervisors of said Kearney county for its action thereon in ordering a warrant drawn upon said judgment fund in payment thereof; * * * that said Joel Hull, argos-eyed and alert, is awaiting the action of said board thereon and threatens to appeal from said action." The plaintiff then asks for a temporary injunction "restraining the said Joel Hull, his agents, employees, attorneys and confederates from attempting to perfect an appeal from the action of said board in ordering said warrant

drawn as aforesaid." Upon trial in the district court the injunction was granted as prayed, and the defendant has appealed to this court.

We have concluded to waive the question whether any injunction was necessary to prevent the defendant from taking an appeal, or whether the county board should order the warrant drawn without regard to any action that might be taken by the defendant, and determine the matter upon the contentions of the defendant in the brief. It seems to be contended that the first decision of this court in *State v. Kearney County,* 12 Neb. 6, became *res adjudicata* of the whole matter, and that therefore the petition in the subsequent action, in which judgment was rendered in favor of Buffalo county, and affirmed in *Buffalo County v. Kearney County,* 83 Neb. 550, stated no cause of action, and that it follows that the judgment of the district court in favor of Buffalo county and of this court in affirming that judgment are void, and the defendant, as a taxpayer of Kearney county, should prevent the payment by that county for any such repairs. His zeal is commendable, but his reasoning is unsound. If the legislature could not amend the statute so as to change the liability for repairs incurred subsequent to such change, then the act of 1879, which was in force when the bridge was built, would control, and under that act, as said in the case relied upon by defendant, the liability for repairs would be the same as it has since been held to be under the present statute. The liability of adjoining counties for repairs of a bridge over a stream between them is fixed by statute, and it is within the power of the legislature to alter or amend the statute in that regard. The conditions and extent of the liability depend upon the statute in force when such repairs are made and the liability incurred. A consideration of the foregoing facts and the present condition of the statute, as construed by the later decisions of this court above cited, is, we think, sufficient reason for concluding that the contention of the defendant is unsound.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., BARNES and LETTON, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

JOHN H. MURTEN, APPELLEE, V. ALBERT F. GARBE, APPELLANT.

FILED APRIL 17, 1913. No. 17,157.

1. **New Trial:** TIME FOR FILING MOTION: AFFIDAVIT. The motion for new trial in district court must be filed before the adjournment of the term at which the verdict was rendered, unless unavoidably prevented. An affidavit stating generally that the defendant had reason to believe, and did believe, that the term would continue longer, without stating the conditions and circumstances leading to such belief, will not justify delay in filing the motion.

2. **Libel and Slander:** PLEADING: EVIDENCE. The defendant in an action for slander cannot, in mitigation of damages, give evidence tending to prove the truth of the alleged defamatory charge under a general denial. Such facts must be alleged in the answer.

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

Whedon & Peterson and *H. P. Wilson,* for appellant.

Charles H. Sloan, Frank W. Sloan and *J. J. Burke, contra.*

SEDGWICK, J.

The plaintiff recovered a verdict and judgment against the defendant for $1,000 damages in the district court for Fillmore county in an action for slander. The slanderous words used, as alleged in the petition, were, "He stole my corn," and in the second count, "Murten stole 700 bushels

of corn." The answer was a general denial. Two questions are presented by this appeal.

1. The motion for new trial was filed after the adjournment of the term, but within three days after the verdict was rendered. The motion was stricken from the files, and the defendant urges this ruling as the first ground for reversal. Section 316 of the code is as follows: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." One of the attorneys for the defendant filed his affidavit at the hearing, in which he testified that the court adjourned *sine die* on the 15th day of December, 1910, and that on the next day the defendant filed his motion for a new trial. The verdict was rendered in the afternoon of the 14th day of December. That neither the affiant nor either of the attorneys for defendant were in the courtroom at the time the verdict was rendered, but the affiant was informed of the nature and effect of the verdict during the afternoon of the day it was rendered, and then notified the court that he would prepare and file a motion for a new trial; that the other attorney for the defendant "returned to Lincoln the morning of December 14;" that other matters kept affiant busy for a time, and, during the latter part of the afternoon and evening, he prepared the motion for a new trial, which was later filed; that he had reason to think, and did think, that the court would be in session December 14 and 15 from the apparent amount of business in sight. His affidavit continues: "That when I had finished the preparation of said motion for new trial, it was past the closing hour for the office of the clerk of this said court, and that said office was closed; that I was called out of town during said night, leaving Fillmore county about 3 o'clock A. M. Dec. 15, and did not return

to the county and Geneva until between 8 and 9 P. M. of Dec. 16 of said day; that on the morning of Dec. 16, 1910, I went to the office of said clerk of this court to file said motion for new trial, and there and then learned for the first time that this honorable court had adjourned *sine die* Dec. 15, 1910; that I thereupon filed said motion for new trial, in support of which this affidavit is made and filed. That the said motion was made in good faith. That I fully believed, and from the amount of business apparently before the court I had reason to believe, that the court would still be in session December 16, 1910; that the business that I was called out of the county on Dec. 15 was of great importance and necessitated immediate attention, and that I returned by the first train possible after it was attended to." The words of the statute, "unless unavoidably prevented," undoubtedly apply to both requirements of the section, and the question is whether, under this evidence, the defendant was unavoidably prevented from filing his motion before the adjournment of the term. The intention of the statute is that, under ordinary circumstances, a cause shall be finally determined at the term at which it is tried. If application is made for another trial, the requirement is that it be promptly done, and this is a matter of importance to prevent unnecessary delay, especially in counties where but two short terms are held in each year. If the motion is not heard until a subsequent term, six months or more are added to the law's delay. It appears from the defendant's evidence that the motion was prepared before the term adjourned. The defendant's attorney says that he had reason to believe, and did believe, that the term would continue for two days. He does not state what his reasons were for so believing, nor does he show that the court or any of its officers were of that opinion. This court is very reluctant to deprive a litigant of a hearing upon the merits of his case, but unless the provisions of the statute, which are intended to prevent unnecessary delay in the administration of justice, are enforced by the

court, it will be within the power of any litigant to continue the litigation almost without end. If the defendant's motion could have been filed before the adjournment by the exercise of ordinary care and caution, it could not be said that he was unavoidably prevented. The trial court knew the existing conditions, which are not disclosed in this affidavit, and we cannot say that it erred in striking this motion from the files.

2. The defendant's brief is devoted principally to the discussion of the ruling of the trial court in excluding testimony offered by defendant in mitigation of damages. The question is so well presented, and is of so much importance, that we have considered it, although it is not a matter that could be presented to this court on appeal in the absence of a motion for new trial. The answer, as we have already stated, was a general denial. There was no allegation of the truth of the matters charged as slanderous. The defendant offered to prove that the plaintiff was his tenant, and as such had farmed the defendant's land; that some controversy had arisen between them as to the proper division of the crops, and that they had compromised that controversy by making an actual division upon the ground, and that afterwards the plaintiff had taken a part of the corn belonging to the defendant under that agreement. Section 124*b* of the criminal code provides: "If any tenant or lessee shall without the consent of his landlord take, embezzle, dispose of or convert to his own use the share or portion or any part thereof of the crop or products belonging to his landlord, with intent to defraud the landlord thereof, such person or persons shall be punished in the manner prescribed by law for feloniously stealing property of the value of the article or articles so embezzled, taken, disposed of or so converted." If the defendant could prove that the plaintiff had been guilty under this section of the statute, the truth of the alleged slanderous charge would be established. It is conceded that the truth of the matter charged as defamatory cannot be proved as a complete defense under a

general denial, but it is insisted that the same facts may be proved as mitigating circumstances to reduce the amount of damages. It appears that the rule at common law was that under a general denial, and without the plea of justification, evidence might be received in mitigation of damages, unless it tended to prove the truth of the slanderous words. The defendant was not allowed to prove the truth of the slanderous words without pleading it, because that would operate as a surprise to the plaintiff, and so it was generally held that evidence which tended to prove the truth of the slanderous words could not be admitted under a general denial. Other evidence in mitigation of damages was allowed under a general denial, but all evidence which tended to prove the truth of the alleged slanderous words was excluded, unless the answer alleged the truth of the charge and offered the evidence in support of that allegation. From these rules the technical holding was derived that the defendant must admit uttering the slanderous words of and concerning the plaintiff, and allege the truth as a defense, or he was not allowed to introduce any evidence tending to prove the truth of the defamatory charge. These rules of common law in protecting the plaintiff against surprise placed a hardship upon the defendant. If the defendant admitted that he spoke the alleged slanderous words, there was but one defense open to him—he must allege and prove that the words spoken were true of the plaintiff. Under the code the defendant is better protected. He may admit the speaking of the alleged slanderous words and that they are not true of the plaintiff, and yet he may prove in mitigation of damages facts and circumstances tending to show that the alleged slanderous words were true, and that he acted in good faith upon the honest belief that they were true. So far we fully agree with the contentions of the defendant. The question still remains: Is the defendant entitled to make such defense without pleading it in his answer? Can he make such defense under a general denial? Sections 131 and 132 of the code are as

follows: "Section 131. In an action for a libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him. Section 132. In the actions mentioned in the last section, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances to reduce the amount of damages, or he may prove either." In New York and other code states the language of the statute is a little more definite than our section 132. "The defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages." N. Y. Code (Rev. ed. 1869) sec. 165. The section of our code provides that he "may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances." Under the language of the New York statute, it would appear that there could be no doubt that it would be necessary to plead the mitigating circumstances, and we think that, considering the conditions that existed, and the evil that it was proposed to remedy, the language of our code must have the same construction. It follows that if the defendant, in mitigation of damages, intended to rely upon circumstances which led him to believe that the plaintiff was guilty of the matter charged, he should plead those facts and circumstances, and such evidence cannot be admitted under a general denial. There was no offer to amend the answer, and the trial court was right in excluding the evidence.

The judgment of the district court is

AFFIRMED.

REESE, C. J., BARNES and LETTON, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

DANIEL W. WILDER ET AL., APPELLEES, V. R. J. MILLARD, APPELLANT.

FILED APRIL 17, 1913. No. 17,164.

1. **Accord and Satisfaction:** PLEADING AND PROOF. The defense of accord and satisfaction is not sustained, without allegations and proof that there was a substantial difference between the parties as to the amount due, and that the accord and satisfaction was in settlement thereof.

2. **Money Received:** MISAPPLICATION OF FUNDS BY ATTORNEY. If money is paid to an attorney at law upon a claim of a third party, and the attorney so receives and receipts for the same, he cannot withhold the money from the creditor upon whose claim it was paid, upon the ground that he is also a creditor of the person paying the money.

3. ———: ———: ESTOPPEL. If oral evidence is received, without objection, that the plaintiffs were acting as executors of the will of a deceased person, and as such had possession of a note payable to the decedent as a part of her estate, and placed the same in the hands of the defendant, such evidence shows a *prima facie* right in the plaintiffs to the proceeds of the note, and the defendant cannot resist their right on the ground that their letters testamentary are not properly sealed.

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

Wilbur F. Bryant and *H. E. Burkett,* for appellant.

J. C. Robinson and *George W. Wiltse, contra.*

SEDGWICK, J.

Samuel Wilder was engaged in the mercantile business in the town of Hartington, and became financially embarrassed and assigned his property to trustees for the benefit of his creditors. He was indebted to Mrs. Erwin upon his promissory note. The trustees reduced the assets to money and applied it *pro rata* upon the liabilities of Mr. Wilder. Mrs. Erwin was formerly a resident of Kansas, and had died there, and the executors of her will had placed her note in the hands of an attorney at

Hiawatha, Kansas. The trustees of Mr. Wilder requested this attorney to forward the note to a bank, or to this defendant, so that the trustees might inspect the same before making payment. Pursuant to that request, the note was forwarded to the defendant, and one of the trustees, after inspecting the note, paid to the defendant in two several payments the amount applicable upon the Erwin note. The defendant paid over to the attorney of the executors a part of the money, and retained $500 thereof. This action was brought in the district court for Cedar county to recover this $500. There was a verdict and judgment for plaintiffs, and defendant has appealed.

The defendant's answer in the case apparently fails to state any defense. He admits the receipt of the note as belonging to the executors, and also the receipt of the money thereon, and alleges that the amount which he paid to the attorney for the executors was received as a full settlement between them and himself. He does not allege any indebtedness to him of the executors or of the estate which they represented, or any facts from which such indebtedness, or claim of indebtedness, or any other indebtedness could be found. The answer fails to show any ground for any accord and satisfaction, or compromise. This objection to the answer does not seem to have been insisted upon, and the evidence of both parties was taken in full. This evidence entirely fails to make any defense to the plaintiff's action. It is not denied that the note was received by the defendant solely for the purpose of allowing the trustees to inspect the same. There is no evidence that the executors or the estate which they represented were indebted in any amount to this defendant. The defendant offered to prove that Wilder was indebted to him, but this evidence was properly excluded by the court. The defendant's receipts to the trustees recite that the money was paid by the trustees upon the Erwin claim, and the defendant, having so received it, could not of course apply it upon his own claim against the same debtor.

The objection that the letters testamentary of the plaintiffs which were offered in evidence do not show the impression of the seal of the court appointing them is without merit. The defendant is not in a good position to take advantage of any such irregularity, having received the note from them in their official capacity, and not having made any such objection until this suit was brought. The executors (so called in the letters testamentary and other papers) were husband and wife, and one of them testified that she had the note in question as executrix of the will of the deceased, to whom it was payable, and held the same as part of her estate. In that capacity she caused the note to be placed in the hands of defendant, and, for the purpose of this action, no other evidence of the right of these plaintiffs to represent the estate of the deceased was necessary. The district court should have instructed the jury to find a verdict in favor of the plaintiffs, and did substantially do so, if the instructions are rightly construed.

The judgment of the district court is

AFFIRMED.

REESE, C. J., BARNES and LETTON, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

JOSEPH ALTER ET AL., APPELLANTS, v. W. C. SKILES, APPELLEE.

FILED APRIL 17, 1913. No. 16,868.

1. **Jury, Actions Triable by.** A law action is not triable without a jury because there are issues incidental to, or elemental of, the main one which are equitable in their nature. *Left v. Hammond*, 59 Neb. 339.

2. **Appeal: TRIAL BY JURY: WAIVER.** Where the defendant alleged by way of answer that there was a mistake in giving the note sued on because it included a larger amount than was due, plaintiffs

and defendant each had a right to have the question of the mistake submitted to the court and tried by the court without a jury, but, if they waived such right by actually trying the facts to a jury and by requesting the court to submit such fact to the jury, it is too late to complain after the verdict is rendered.

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

Thomas & Shelburn, for appellants.

John Everson, contra.

HAMER, J.

The original action was brought in the county court of Harlan county. The plaintiffs, who are appellants in this court, sued upon two causes of action; the first cause being upon a note for $188.60, bearing date May 5, 1904, drawing interest at 10 per cent. from date, and amounting, with interest, at the time of the trial to about $300. For a second cause of action the plaintiffs declared upon an account for goods sold and delivered, and amounting to $41.85.

The defendant by his answer admits the execution and delivery of the note sued on, and admits that at the time of the execution of the note he was indebted to the plaintiffs upon an old note for $61 and for certain merchandise, and alleges a statement of the account between the plaintiffs and himself, including the old note. The items of charges against the defendant, according to his own statement, cover the note of $61 and interest on the same, certain amounts for a cultivator, a disc, a scoopboard, some fence, and some posts, and a lumber bill for a barn, making a total of $272.23 charges against the defendant, according to his own account. Also, the defendant then claimed credit for cash paid on the account, $5; for an old wagon sold to plaintiffs, and which should be credited on the account, $15; for cash paid on the account, $50; for the third payment of cash, $30; and for a fourth cash payment, $50. On the account to the plaintiffs the defendant

claimed an indebtedness to the plaintiffs on several items amounting, when taken together, to $19.40. He claimed a total indebtedness to the plaintiffs of $291.63, and that he should be credited with $150, leaving a balance unpaid of $141.63. While the answer admits that the defendant executed and delivered the note described in the first cause of action, it says that at the time of signing the note defendant was unable to read or write, and so relied upon the representations of the plaintiff Joseph Alter, as to the correctness of the amount; that at the time he was owing said plaintiffs upon said old note, which was then past due, and for certain merchandise; that Alter wrote up the note sued on and presented it to the defendant for his approval, and that the defendant was unable to compute the amount due; and that the defendant informed plaintiff Joseph Alter that the amount stated in the note was incorrect, and that Alter agreed that, if it was incorrect, he was willing to correct it, and was willing to correct any error that might be made in the computation, and thereupon the defendant permitted his signature to be attached to the note; that said note was in excess of the amount due "to the extent of $85, or more;" that it (the note) also included certain items which the defendant was informed and believed belonged to D. A. McCulloch, who was a former partner of said Joseph Alter. Also, for answer to the second cause of action, the defendant admits purchasing and receiving from the plaintiffs the items set forth in a certain schedule, marked exhibit "A"; and alleged payment on the schedule to the amount of $150; and claimed that the plaintiffs had failed to give credit therefor upon the indebtedness due to the plaintiffs. It may not be very clearly stated, but a liberal and reasonable interpretation of the first clause of the answer would seem to be that there was a mistake made in giving the note, and that it was given for a greater sum than the amount actually due.

The prayer of the plaintiffs was for a judgment for $341.96. The reply to the defendant's answer was a

general denial. It was not alleged in the reply that there was any bar to proving the new matter because to do so was an attempt to controvert a written contract with oral evidence, but the defendant had notice, by the reply filed by the plaintiffs, that when he attempted to prove the things set up in his answer he would be met with evidence that the alleged facts contained in the answer were untrue. Upon a trial to a jury, a verdict was rendered in favor of the plaintiffs for $215.10, and judgment was rendered on the verdict.

It is contended by the plaintiffs that they should have recovered on their first cause of action the full amount claimed by them, and that the evidence is insufficient to prevent a complete recovery upon the note; also, that the parties had a series of transactions prior to the date of the note, and that the giving of the note merged all of the indebtedness of the defendant to the plaintiffs into the one note; that the defense is, in effect, a statement of the account, including the old note and various articles of merchandise, and that, as it fails to allege fraud, duress or mistake, the defendant is estopped to deny the terms of the note. The plaintiffs cite *Delaney v. Linder,* 22 Neb. 280.

In a trial of the case, while there was at first an effort upon the part of the plaintiffs to exclude the evidence offered on behalf of the defendant, finally the parties seem by mutual agreement to have gone behind the note and to have made inquiry concerning the correctness of the amount that was due at the time the note was given and for which it was given.

It is contended now that the district court erred in admitting evidence, over the objections of the plaintiffs, tending to alter or vary the terms of the note sued upon; but this cannot be correct, if the answer quoted sets forth that there was a mistake in the amount for which the note was given, and we think that it does. There is therefore in this case no effort to dispute a contract in writing with oral evidence, and the contention of plaintiffs is not applicable to the case which they present.

One of the plaintiffs, Mr. Alter, testified directly that he computed the amount due from the defendant and on the notes which he held which were then past due. The defendant objected and excepted. As long as the plaintiffs went into the general account of the amount due from the defendant to the plaintiffs, including the note, they had no right to object because the defendant went into the same thing. The plaintiff Joseph Alter gave it as his opinion that one note, "I think a part of two notes or more (were) taken into this note." Mr. Joseph Alter testified that, if it was not figured up right, he wanted to make it right. This was a proper sentiment, but it shows that they (the plaintiffs and the defendant) were not attempting to stand strictly upon the rule contended for by the plaintiffs. The case seems to have proceeded, upon both sides, upon the theory that the consideration of the note was to be looked into and considered and that the question was to be determined as to whether the note had been given for too much.

An examination of the defendant's evidence will show that the defendant went into the question as to what was actually due on the note at the time it was given. They (the plaintiff Joseph Alter and the defendant) seem to have gone over to the plaintiffs' office, where it is claimed by the defendant that the plaintiff Joseph Alter told him (the defendant): "You have got to pay $80 for Frank." Frank was the defendant's brother. The defendant was asked, and answered, without objection, that the note sued on included the $61 note which it was to renew. The defendant also testified that he let Joe Alter have an old wagon, for which he was to have credit, and that he never received it. The defendant also testified that he paid cash at one time to the plaintiffs, $5, and at another he delivered to the plaintiffs an old wagon worth $15, for which he was to have credit, and that he never received the same; also, that he paid $130 on the lumber bill; also, that he got himself certain articles, including twine. Also, he was asked to testify whether the plaintiffs had any other note than the

$61 note at the time the note in suit was given. On cross-examination by counsel for the plaintiffs, the defendant testified that he did not look at the account or note on the day the note sued on was given. It seems to be clearly apparent that at the time the note was given, upon which suit was brought, there was a controversy as to the amount due; that the defendant always questioned whether there was the amount due on the note for which it was given. It appeared also that there was more paid on the lumber account than was claimed to be due. There was a sharp conflict in the testimony, and therefore the case was a proper one for a jury. The plaintiff Joseph Alter testified, denying that he told the defendant that he would have to pay $80 for Frank Skiles. He said: "He is certainly mistaken about that; that is all news to me."

The third paragraph in the first instruction, an instruction given at the request of the plaintiffs, reads: "In answer to the petition of the plaintiffs, you are instructed that the defendant admits that he executed and delivered the note described in the first cause of action of the plaintiffs' petition, but that the defendant claims that at the time of signing said note he was unable to read or write, and relied wholly upon the computations, representations, and agreements of the plaintiff Joseph Alter. The defendant admits that at the time of giving said note he was owing said plaintiff a certain sum of money upon an old note then past due, and for certain other merchandise. That the defendant was unable to compute the amount then due, but that he informed the plaintiff that the amount in said note was incorrect, and that the plaintiff agreed to correct any error or mistake in computation, if any should, at any time, be found. The defendant claims that said note is in excess of the true amount due the plaintiff, at the time of the giving thereof, to the extent of $85, and that said note also includes items which the defendant claims belongs to D. A. McCulloch, and the interest thereon."

The second instruction was also given at the request

of the plaintiffs. It contains, among other things: "It does not devolve upon the plaintiffs to introduce evidence as to the execution or delivery of said note; and, unless the defendant establishes by fair preponderance of the evidence that there was a mistake in the computation of the amount due from the defendant to the plaintiffs for which said note was given in settlement, you should find for the plaintiffs for the full amount of said note, with interest."

Here is a recognition by the plaintiffs of the fact that the question was whether there was a mistake when the note was given. If the plaintiffs treat the case as one where the pleadings are sufficient to sustain testimony touching a mistake, they are in no condition to object to the sufficiency of the pleadings touching the allegation that there was a mistake. Counsel on both sides seem to have gone into the merits of the case as to whether the note was given for a proper amount; that is, as to whether there was a mistake. As there was a conflict in the evidence, it would seem that the verdict of the jury should be allowed to stand. It may be said that a law action is not triable without a jury because there are issues incidental to, or elemental of, the main one which are equitable in their nature. *Lett v. Hammond,* 59 Neb. 339; *Yager v. Exchange Nat. Bank,* 52 Neb. 321. The defendant therefore had a right to allege the mistake in giving the note, although the action was a law action. While the plaintiffs and defendant had a right to have the question of mistake in giving the note for an alleged improper amount submitted to the court and tried by the court without a jury because of its equitable nature, if they waived it by actually trying the facts to a jury, as they seem to have done in this case, both in the way the testimony was taken and by the instructions requested by the plaintiffs, it is too late to complain after the verdict is rendered.

The judgment of the district court is AFFIRMED.

SEDGWICK, J., concurs only in the conclusion.

ELEONORE BUTSCHKOWSKI, APPELLANT, V. WILLIAM BRECKS, APPELLEE.

FILED MAY 17, 1913. No. 16,632.

APPEAL from the district court for Frontier county: ROBERT C. ORR, JUDGE. *Motion to revive sustained.*

S. L. Geisthardt, for appellant.

W. S. Morlan and *Lambe & Butler, contra.*

PER CURIAM.

A, a citizen of the United States and resident of this state, died intestate, being the owner of real estate and personal property therein. He left no wife nor child, father nor mother, surviving him. His only near relatives at the time of his decease was a brother, also a citizen and resident of this state, and a married sister in Germany, who had no children. Administration was granted upon the estate of A in Frontier county. The sister brought suit in the county, where the real estate of deceased was situated, for a partition thereof, alleging her heirship equally with the surviving brother. He answered, admitting the relationship, but denying her right to inherit the land, as she was a nonresident alien. The cause was submitted to the district court upon the pleadings, when a judgment was rendered in favor of defendant, plaintiff's petition dismissed, and defendant's title to the whole of the land quieted. She appealed to this court. Pending the appeal here she died. Some time prior to her decease she is alleged to have entered into a written agreement with her husband, providing that, in case of her decease, leaving him surviving, he should become the owner of all her property. He now moves the court for an order of revivor, substituting himself as plaintiff and appellant in place and stead of his deceased wife. It is ordered that he be so substituted, but that this order shall

in no sense be an adjudication of the rights of any one, but that the whole question of his rights, or the absence thereof, be reserved to the final decision of the cause.

The motion to revive is, to that extent, sustained.

MOTION SUSTAINED.

WILSON T. GRAHAM, APPELLANT, V. ROBERT HANSON ET AL., APPELLEES.

FILED MAY 17, 1913. No. 17,110.

OPINION on motion for rehearing of case reported *ante*, p. 394. *Rehearing denied.*

PER CURIAM.

This action involved only the right to a comparatively small deposit, and the action was brought by one who was not a party to the original transaction, but claims that one of the parties to the transaction has assigned to him an interest in the deposit. It seems so clear that the main action, which involved the rights of the parties to the transaction, should be first tried that the court, as a whole, did not give that attention to the sufficiency of the evidence that it otherwise would have given. Our attention has again been called to the record by an able brief upon the motion for rehearing, and we are satisfied that some of the findings of fact stated in the opinion are incorrect, and we therefore withdraw from the opinion all such conclusions of fact as will be involved in the trial of the principal case, the intention being that the principal case shall be tried upon its merits as though there had been no hearing upon this ancillary proceeding.

The motion for rehearing is

OVERRULED.

PETER A. SANDERSON, APPELLEE, V. ALEX C. EVERSON ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,163.

1. **Joint Tenancy: RIGHT TO CREATE.** The right to create title in real estate by joint tenancy, with right of survivorship, when clearly and definitely expressed in the conveyance, has never been abridged in this state.

2. **Deeds: CONSTRUCTION: JOINT TENANCY.** Where a deed was made to husband and wife as "joint tenants with right of survivorship," this is held to clearly express the intention of the parties to the conveyance to create a joint tenancy, the survivor to take the full title conveyed upon the death of the other.

3. ———: ———: ———. While as between joint tenancies and tenancies in common the law prefers the latter, yet, if the purpose to create a joint tenancy is clearly expressed in a deed of conveyance of real estate, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created.

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

Thomas F. Hamer, for appellants.

H. M. Sinclair and *Willis D. Oldham, contra.*

REESE, C. J.

The defendants Alex C. Everson and Canzada Everson, husband and wife, were the owners of lots 1, 2 and 3, in block 18, of the Kearney Land & Investment Company's Choice addition to the city of Kearney, in Buffalo county, and occupied the property as a family homestead; the apparent title to the property being held by the wife, Canzada Everson. On the 21st of May, 1910, the husband sold the property to plaintiff, Peter A. Sanderson, the agreed price being $4,000. Plaintiff paid the sum of $500, when defendant Alex C. Everson executed to him the following receipt: "Kearney, Nebr., May 21, 1910. Re-

ceived of P. A. Sanderson, five hundred dolls. as the first payment on the lots 1 & 2 & 3 in Bk. 18, Kearney Land & Investment Choice Add. to Kearney, price to be $4,000. Subject to Mrs. A. C. Everson approval of sale. A. C. Everson." The sale was approved by Mrs. Everson, and an abstract of the title to the property was furnished to plaintiff, who submitted it to an attorney for investigation. The attorney questioned the title; his principal reason being that within the chain of title there was a deed made to "Lewis P. Main and Edith E. Main, husband and wife, joint tenants with right of survivorship," and, Mrs. Main having died, the property was conveyed to the next purchaser by Lewis P. Main in his own right. It is shown by the evidence that there was one child born to Mr. and Mrs. Main, who is now living, and at the time of the trial was between 17 and 18 years of age. The title was rejected by the attorney on the ground that the law of joint tenancy with the right of survivorship does not exist in this state.

The plaintiff, Sanderson, then brought suit for the recovery of the $500 paid on the purchase price, alleging that defendant Alex C. Everson had no title to the property, and that his wife, Canzada Everson, had but an imperfect title, at least doubtful, to the undivided half thereof, and that, upon the discovery of the defect in the title, plaintiff had informed defendants that he would go no further with the purchase, and demanded the return of the $500 paid, which was refused. The defendants answered, in effect denying the right of plaintiff to recover, and presenting their cross-petition for the enforcement of the sale, the specific performance of the contract by plaintiff, or, in case of his failure to perform the same, that the property be sold as upon foreclosure and the proceeds applied to the payment of the amount found due, with judgment for any deficiency which might remain. A trial was had to the court; the result being a judgment in favor of plaintiff and against defendant Alex C. Everson for the $500, with interest and costs; that there was no

cause of action against Canzada Everson. The cross-petition of defendants was dismissed; the court holding that "the doctrine of joint tenancies with its incidents at common law never did apply to the tenures existing between husband and wife, but estates between them that partook of this nature were confined to entireties; and, furthermore, that such tenancies, whether between husband and wife, or between other parties, are not applicable to our laws, and are 'repugnant to our institutions and the American sense of justice to the heirs,' and that such estates do not exist in this state." Defendants appeal.

The possession of the property was never changed, but, so far as is shown by this record, is still with defendants. There is no evidence that a deed was ever tendered by defendants to plaintiff. As the case is presented here there are but two questions submitted for decision: First, does the law of joint tenancies, with survivorship, exist in this state; and, second, if so, can it be applied to a conveyance to the husband and wife where an effort is made to create such tenancy?

As to the conveyance to husband and wife, we are persuaded that such fact can have no influence on the result, for, in so far as their dealings, whether with others or between themselves, are concerned, they are no longer one in the sense used in the common law. They can hold title to property separately or jointly, in all respects the same as unmarried persons. This fact furnished the basis for the decision in *Kerner v. McDonald*, 60 Neb. 663, 83 Am. St. Rep. 550, where it was held that the law of title by entireties does not exist in this state. The rule of entireties does not depend upon and is not created by contract. It is a fiction of the common law, having its origin in the feudal system, that, where land was conveyed to the husband and wife jointly, the title by entireties was created in them by act of law, and neither could dispose of the property without the consent of the other; each owned the *entire* title. Joint tenancies are created by contract, and, if not so created, they do not exist. True, they are not

favored, and, if not expressly created by contract, the law presumes the tenancy is in common, and that upon the death of one of the holders of the title his or her interest descends to his or her heirs. But this is not true of joint tenancies. It is true that, in order to create a joint tenancy, the purpose must be clearly expressed, otherwise the tenancy will be held to be in common. But no one will contend that it is not competent for the parties to contract in a deed to two or more persons, whether husband and wife or not, that the conveyance is to the one for life and to the others in remainders in fee. Such is the effect of a conveyance to both as joint tenant with the right of survivorship. It is a clear matter of contract, and the intention of the parties must govern.

It is provided in section 53, ch. 73, Comp. St. 1911: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." There can be no doubt but that it was the intention of the parties to the deed under consideration to create a joint tenancy "with right of survivorship;" that is, upon the death of one the survivors should take the whole title. Such intention was not inconsistent with the rules of law as expressed in our statute.

In 2 Reeves, Real Property, sec. 688, after a discussion of the law of tenancy by the entirety, the author says: "If such a co-ownership by them be not desired, according to the preponderance of the decisions, they may be made joint tenants, or tenants in common, by an express statement to that effect in the instrument of transfer." See, also, *Thornburg v. Wiggins,* 135 Ind. 178; *Fladung v. Rose,* 58 Md. 13; *Mette v. Feltgen,* 148 Ill. 357. In *Redemptorist Fathers v. Lawler,* 205 Pa. St. 24, it was held that, notwithstanding the legislature had abolished the right of

survivorship as an incident to joint tenancy, and provided that, "whatever kind the estate or thing holden be, the parts of those who die first * * * shall be considered * * * in the same manner as if such deceased joint tenants had been tenants in common," yet it was competent for the parties to a conveyance to contract for survivorship, and a deed containing the provision that the grantees should hold "as joint tenants, and not as tenants in common," would be upheld as the clear intent of the grantor "not to follow the statute, but to convey an estate subject to the right of survivorship, the distinguishing incident of joint tenancy at common law."

Being unable to find any provision of our statute which can be construed as rendering the contract of the parties to the conveyance under consideration unlawful, we hold that a joint tenancy was created by the deed to Lewis P. Main and Edith E. Main, and that upon the decease of Edith, without having broken the tenancy in any way, her title became vested in the husband, and he could transfer the property.

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

REVERSED.

BARNES, LETTON and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

WILHELM FLEGE V. STATE OF NEBRASKA.

FILED MAY 17, 1913. No. 17,608.

1. **Criminal Law: APPOINTMENT OF ASSISTANT PROSECUTOR.** Where, in a criminal prosecution, an application is made to the district court for the appointment of an assistant prosecutor, if the court finds that such an appointment should be made, no attorney should be appointed who is known to be a partisan as against the accused, and who has theretofore been employed and paid by

another suspected person, and for whom he has appeared in the preliminary examination and in a former trial of the accused in the district court, taking an active part in both trials for the purpose of protecting his suspected client. Under such an appointment, a fair and impartial trial of the accused person could not be reasonably expected.

2. ———: IMPANELING JURY: CHALLENGE FOR CAUSE. The statute (criminal code, sec. 468) provides that, where a proposed juror in a criminal prosecution has read the testimony of the witnesses, and upon which he has formed or expressed an opinion as to the guilt or innocence of the accused, he is incompetent as a juror. Where that fact is made clearly to appear, and that the opinion is still retained, it is manifest error to overrule a challenge for cause. Upon this subject there is no discretion lodged in the court. The statute is mandatory, and no court has the right to ignore it.

3. ———: EVIDENCE: ADMISSIBILITY. "An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted." *McKay v. State*, 90 Neb. 63. Therefore, when material evidence, such as the bloody and soiled clothing of a decedent, is admitted in evidence in a prosecution for murder, it should appear during the trial that the evidence would tend to throw light upon some material inquiry in the case. If not, it should be rejected.

4. ———: ———: EXPERT EVIDENCE. "Expert evidence in cases where the subject of discussion is on the border line between general and expert knowledge, as in questions of value, is not conclusive upon court or jury, but the latter may draw their own inferences from the facts, and accept or reject the statements of experts; but upon questions involving a highly specialized art, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence." *Ewing v. Goode*, 78 Fed. 442.

5. ———: INSTRUCTIONS: HOMICIDE. An instruction, which informs the jury that if they "believe the defendant not guilty, and that he did not shoot and kill" the decedent, they should acquit, ought not to be given, although in the same instruction they are informed that they must find the accused guilty beyond a reasonable doubt before they could convict him. It is not necessary that the jury should believe the act was not committed by him. It devolved upon the state to prove he *did* commit the crime charged beyond a reasonable doubt.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Reversed.*

J. J. McCarthy and *Berry & Berry,* for plaintiff in error.

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

REESE, C. J.

This is the second time this case has been presented to this court. The opinion upon the former hearing is reported in 90 Neb. 390, where the material facts presented by the evidence on the part of the state are quite fully stated, and need not be here repeated. After the cause was remanded to the district court, the venue was changed to Thurston county, where a trial was had, and the cause submitted to the jury on practically the same evidence on the part of the state as at the former trial. The jury returned a verdict finding plaintiff in error, who will hereafter be referred to as defendant, guilty of manslaughter, when the indeterminate sentence of the law was pronounced against him. He brings error to this court, assigning 290 alleged errors of the district court in connection with the proceedings and trial. The assignments are specific, and many are well founded, but it will be impossible for us to discuss them without extending this opinion to an unnecessary and unreasonable length. Particular attention can be given to comparatively few of them.

It appears from the record, and, as shown by our former opinion, that the principal witness on the part of the state, one Albert Eichtencamp, who testified to having seen defendant kill his sister, Louise Flege, had testified to a different state of facts at the coroner's inquest, the effect of which was the complete exoneration of defendant. While the witness was never arrested nor charged in any legal proceeding with the commission of the crime, there appears to have arisen a known suspicion on the part of

some that he might be the guilty party. He and his relatives employed an attorney to assist in the prosecution of defendant at the preliminary trial and upon the former trial in the district court, evidently under the belief that the conviction of defendant would remove all suspicion from Eichtencamp. The attorney appeared and took an active part in the prosecution at the two trials, and was paid for his services by Eichtencamp and his relatives. After the cause was removed to Thurston county, the state was represented by the county attorney of Dixon county and the county attorney of Thurston county, when application was made to the court for the appointment of Eichtencamp's former attorney to assist the two county attorneys in the prosecution of the case in the approaching trial. The application was resisted upon the ground that the attorney's former employment as a private prosecutor, employed by Eichtencamp, rendered him an improper person to have charge, or any part, in the prosecution, the purpose of which was for the protection of Eichtencamp. The attorney was called to the stand, and candidly stated his relations with Eichtencamp, which continued up to the close of the former trial, which resulted in the conviction of defendant. The objection of defendant was overruled, the appointment made, and the attorney entered upon and took an active part throughout the trial, making, to say the least, a vigorous argument to the jury, which in some respects we cannot approve. While we intend no personal reflections upon the attorney, yet we do not hesitate to say that the appointment should not have been made, and that it was prejudicial error to make it. It is impossible to conceive of an attorney, after having served Eichtencamp as he had, and for the purpose for which he had been employed, to enter upon the trial with the single purpose of impartially seeking to know the truth, protecting the rights of defendant, and seeing that they were maintained, if need be, at all hazards. Not only this court, but all courts, have so clearly stated the judicial duties of a public prosecutor as

to leave no room for doubt as to the entire impartial attitude of a prosecutor, so as to leave no room for question upon this point. In *Liniger v. State*, 85 Neb. 98, we said: "Public prosecutors and peace officers owe no greater obligation to the public than to a defendant charged with crime, and they should as zealously protect the one as the other." This being true and maintained by all courts, it must appear to the mind at once that the appointment of a partisan special prosecutor was not in the interest of the fair and impartial trial guaranteed by the constitution. The obligation of an attorney to his client, when once employed in a particular case or matter, can never be shaken off. It is a perpetual obligation which abides to the end of life, unless, in a proper case, waived by the client. With this obligation resting upon the memory of a conscientious lawyer, as the appointee, no doubt, was and is, it would be impossible for him to forget his sworn duty to his former client, and there would be a constant inclination to ask of himself, "What effect will this evidence, or argument, have upon the rights of my first client, to whom I am still bound by every principle of law and honor? I should be faithful to my trust and protect Eichtencamp in every way possible. If defendant is convicted, Eichtencamp is forever cleared of the suspicion resting against him." We are forced to the conclusion that no honest and conscientious attorney could be able, nor should he, if he could, withstand such an appeal.

Error is assigned upon the ruling of the court wherein certain jurors were challenged for cause while being examined upon their *voir dire* as to their competency and qualification as such jurors. John D. Girardot was called as a proposed juror. His examination is of too great length to be set out in full. He testified that he had read of the case from the time of the murder to the time of being called as a juror, and had in the meantime conversed with his family and others about it; that he was "real certain" that he had formed an opinion as to the guilt or innocence of the defendant; that probably it was more of

an impression than an opinion; that, if selected as a juror, he would try to give the defendant a fair and impartial trial; that the reports which he read in the newspapers published the testimony of the witnesses, all of which he read, consisting of a couple of columns each day, and upon which he formed an opinion, which he yet retained, and which would take strong evidence to remove; that he could not lay aside that opinion without some reason for it and evidence to cause the change; that he was afraid he could not lay that opinion aside until he had some evidence to change it. "Q. You think evidence might change it, do you? A. Yes; good, strong evidence I reckon would change it." The juror was challenged for cause, the challenge overruled, and the juror excused on defendant's peremptory challenge.

August Lindgrand, another proposed juror, testified that he had read the published testimony of the witnesses who were examined at the former trial "from beginning to the end," and upon that evidence he formed an opinion as to the guilt or innocence of the defendant; that he had never changed that opinion; that it would take considerable evidence to change it, as it was a fixed opinion; that he would have to have "a pretty good reason" for changing his mind. He was challenged for cause, the challenge overruled, and the juror excused on a peremptory challenge.

J. W. Twyford, another proposed juror, testified that he read the Sioux City Journal, which published daily reports of the evidence and the testimony of the witnesses at the former trial, which he read, and upon which he formed an opinion of the guilt or innocence of the defendant, and which he would not change until he had some reason for changing it. He was challenged for cause by the defendant, the challenge overruled, and the juror excused on defendant's peremptory challenge.

Wilson W. Waters, upon his examination, testified that he had read the reports of the former trial and the testimony of the witnesses in the Sioux City Journal, on which

he formed an opinion as to the guilt or innocence of the defendant; that he retained that opinion, could not change it without having some reason to change it, certainly would not; that in his present state of mind, if retained as a juror, if no evidence was introduced his verdict would be guilty, resting upon the opinion which he then had, and would continue to believe him guilty until he had sufficient evidence to change his mind, which he could not do until he had evidence to cause the change. The defendant's challenge for cause was overruled, the juror retained, and he signed the verdict of the jury as foreman.

Thomas Conley, examined on his *voir dire,* testified that during the former trial the testimony of the witnesses was published in the papers, and that he read the testimony, and upon that he formed an opinion as to the guilt or innocence of the defendant, deciding the case in his own mind; that he had never had any occasion to change his mind since that time, and had that opinion still; that it was a definite opinion to a certain extent; that he could not lay that opinion aside before hearing the evidence; that it would be impossible to divest himself of that opinion without hearing the evidence; that, if accepted as a juror, he would enter upon his duties with that opinion in his mind, and it would require evidence to remove it. The juror was challenged for cause, the challenge overruled, and he was excused on defendant's peremptory challenge.

Exceptions were taken to the ruling in each case. Counsel for the state examined each juror at length, as also did the court, when they testified that they thought they could render a fair and impartial verdict without reference to the opinion thus formed. The defendant exhausted all his peremptory challenges, being required to deplete the number to which he was entitled by law by challenging the incompetent jurors. The jurors seemed to be candid and conscientious in their answers; but the fact that they so answered was not enough to render them competent.

It is provided in section 468 of the criminal code: "The

following shall be good causes for challenge to any person called as a juror on the trial of any indictment: * * * 2d. That he has formed or expressed an opinion as to the guilt or innocence of the accused; provided, that if a juror shall state that he has formed, or expressed, an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able notwithstanding such opinion to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." It will be readily seen that, where the opinion is formed from "reading reports of their (the witnesses) testimony," the juror does not come within the proviso, and is incompetent, without reference to what he may say as to his ability to render an impartial verdict, or what influence his preconceived opinions might have upon his judgment in weighing the evidence.

In *Carroll v. State,* 5 Neb. 31, we held that, if it appear that the juror has formed an opinion from reading reports of testimony of witnesses, he is incompetent, although he may be willing to swear that, notwithstanding such opinion, he feels able to render an impartial verdict, and the judgment was reversed solely upon the one ground with reference to but one juror.

In *Curry v. State,* 4 Neb. 545, it is said: "We think it is clear that where the ground of challenge is the formation, or expression, of an opinion by the juror, before the court can exercise any discretion as to his retention upon the panel, it must be shown by an examination of the juror, on his oath, not only that his opinion was formed

solely in the manner stated in this proviso, but, in addition to this, the juror must swear unequivocally" to his ability to render a fair and impartial verdict upon the law and evidence. As an opinion formed from reading the report of the testimony of the witnesses is excluded from the proviso, it is as clear as the English language can make it that the district court had no discretion in the matter whatsoever, but its plain duty was to sustain the challenge. The jurors were wholly incompetent. Such has been the plain provision of the statute since the early days of the judicial history of the state, and the courts have recognized its binding force. Why the statute was ignored is not a question with which we have to deal. The constitution guarantees to every man a fair trial by an impartial jury. That a juror could be considered impartial, who had read the evidence of the witnesses on a former trial, and formed an abiding opinion thereon, and could by any effort on his part disrobe himself of that opinion, is not within the reach of human nature, and hence the statute absolutely disqualifies him. See *Smith v. State*, 5 Neb. 181.

The defendant exhausted his peremptory challenges, and therefore did not waive his constitutional and statutory rights. *Thurman v. State*, 27 Neb. 628; *Kennison v. State*, 83 Neb. 391; *Brinegar v. State*, 82 Neb. 558; *State v. Brown*, 15 Kan. 400.

During the introduction of the testimony, the state offered in evidence the clothing worn by the decedent at the time of her death, consisting of her dress, chemise, sun-bonnet and apron, in their soiled, burnt and bloody condition. Those exhibits were objected to by the defense as incompetent, irrelevant and immaterial, not tending to establish any issue or fact in the case, nor tending to prove defendant's guilt, but only for the purpose of inflaming the jury. The objection was overruled, the garments, admitted in evidence over defendant's exceptions, were displayed and held up before the jury. Error is assigned upon this ruling. There are, no doubt, many in-

stances in which there is no error in the admission of such articles in evidence. Sometimes it becomes necessary for the state to prove the proximity of the firearm to the wound made by the ball, and this may be done by showing the burnt condition of, or powder stains upon, the clothing. In other cases it may be necessary to prove the relative locations of the victim and person using the firearm. This may often be shown by the range and course of the ball in passing into or through the clothing and body of the decedent. It is also permissible if it tends to prove the identity of the person killed, or of the slayer. But some necessity for this class of evidence should appear to justify its admission. This involves the exercise of discretion on the part of the trial court. There is nothing in the record showing that the exhibition of the bloody and burnt garments was a proper, or necessary, part of the state's case. The court adheres to the holding in *McKay v. State*, 90 Neb. 63, 91 Neb. 281, that if it appears that the introduction of the blood-stained garments was for the purpose of arousing the passions of the jury, and by that means securing a conviction, the practice should be condemned and a judgment of conviction reversed. Unless it appears that the offered evidence would be material to some inquiry in the case on trial, such exhibits should be excluded. See *Cole v. State*, 45 Tex. Cr. Rep. 225, 75 S. W. 527; *Christian v. State*, 46 Tex. Cr. Rep. 47, 79 S. W. 562; *Melton v. State*, 47 Tex. Cr. Rep. 451, 83 S. W. 822; *Williams v. State*, 61 Tex. Cr. Rep. 356, 362, 136 S. W. 771; *Lucas v. State*, 50 Tex. Cr. Rep. 219, 95 S. W. 1055. In 2 Wharton, Criminal Evidence (10th ed.) sec. 941, it is said: "As clothing is in the nature of demonstrative evidence, it has a strong tendency to arouse feelings of prejudice or passion, and unless the articles so introduced serve the purpose of identifying the deceased, or of honestly explaining the transaction, the introduction is irrelevant, and constitutes prejudicial error; and particularly is this true when it is displayed in such manner as to arouse prejudice and passion."

On the part of the defense, Dr. Meis, of Sioux City, Iowa, Professor Walter S. Haines, of Rush Medical College, Chicago, and Professor Ludvig Hektoen, of the same place, were called as expert witnesses. It is shown beyond dispute or contradiction that, at or about 12 o'clock on the day of the homicide, the decedent ate her usually hearty dinner, consisting of a variety of food. If the testimony of Eichtencamp is true, she was slain about one hour thereafter, or about 1 o'clock P. M. A post mortem examination was had some time that evening or early the next morning. The body was embalmed and buried. Some considerable time thereafter, a number of months, the body was exhumed and found to be in a good state of preservation, the stomach removed, and the contents sent to Professor Haines for analysis. It was agreed by all that the wound in the head would, and did, produce instantaneous death. The experts testified that at death all digestion of food taken into the stomach immediately ceased. The analysis disclosed that the contents of the stomach were quite thoroughly digested, and it was shown that digestion would scarcely be commenced within one hour after eating, that it could not be advanced to the extent shown short of two and one-half to three hours thereafter, and therefore it was insisted that it was impossible that decedent could have been killed within one hour after eating the noon meal. The testimony of all the witnesses on that part of the case agrees that, about 1 o'clock on the day of the homicide, the defendant left his home, and did not return until late in the afternoon, and after the discovery of the body of the decedent. After a somewhat careful examination by questions and answers, certain hypothetical questions were asked and answered by which the testimony of the experts was further elucidated. We have examined the evidence with care, and are unable to discover where the hypothetical questions varied in any material degree from the testimony, and especially from the evidence and theory of the defense. The experts were men of high standing in their profession

and of known probity of character. In instructing the jury, the court gave the fifteenth instruction, as follows:

"You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine what, if any, of the averments are true, and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not true, and that they are of such character as to entirely destroy the reliability of the opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine from all the evidence what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you that an opinion based upon a hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable doubt, if any there should be, and where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor."

As an abstract proposition of law, this instruction may be, in the main, unobjectionable, and might be properly given in a case to which it should be applied, but we are unable to see where or how it could have any just application to this case. As a general rule the principle involved in this instruction is recognized as applying to the testimony of experts upon questions in which most people have what might be denominated common knowledge, and when such testimony is presented to the jury, or other trier of fact, who may have opinions of their own derived from common experience and observation; and, if an expert gives an opinion which is at variance with that common knowledge or ex-

perience, the juror is allowed to make use of his own knowledge, intelligence and judgment in weighing the testimony of the expert. But this rule does not apply in its entirety where the substance of the testimony is upon a subject not understood or known by the layman, and the testimony is confined to purely scientific investigations and close application with which others than those making the investigations have no knowledge. As said by Judge Taft in *Ewing v. Goode*, 78 Fed. 442: "In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts, and accept or reject the statements of experts; but such cases are when the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must depend on expert evidence. There can be no other guide."

It cannot be denied that the question of post mortem digestion is one upon which the great majority of people have never thought and have no information whatever. This want of knowledge is not confined to laymen. It involves long, careful, patient and persistent investigation, and comparatively few have given the subject sufficient thought or investigation to enable them to speak with anything like exact knowledge thereon. As said in the quotation above given, there can be no other guide than the knowledge of those who have made the subject a matter of special study. True, the jury may bring to their aid such knowledge and experience as they may have

upon the subject in hand, but, in the absence thereof, they would not be justified in ignoring the testimony of fully qualified experts. The subject is one which the layman, the lawyer, the judge, and even the physician, is not called upon to investigate as fitting him for his profession or station in life. It is safe to say that not one person in thousands has given the subject any investigation or thought. Courts and jurors are usually totally in the dark thereon, and must depend upon the researches of those who have made the subject one of special investigation and upon which they are qualified to give correct opinions. The expert witnesses were men of known competency and standing in their profession, and upon such the courts must, to a great extent, depend for their guidance when considering questions of the kind under consideration. It must also be observed that, as shown by the bill of exceptions, much the greater portion of the testimony of the experts was not given upon hypothetical questions, but upon direct questions containing no statement of facts, hypothetical or otherwise, to which they responded by the statement of facts resulting from their researches and investigations. The instruction is almost a literal copy of one given in the trial of *Guetig v. State*, 66 Ind. 94, wherein the instruction was approved. In that case the question of the insanity of the accused presented the principal defense. The difference in the quality of the subjects under investigation must be apparent to every thinking mind. On the question of the sanity of an individual the inquiry is not limited to the testimony of expert witnesses, but the nonexpert, who has observed the conversation, conduct and bearing of the accused, is as competent to testify as the expert. This cannot be true upon the subject of post mortem digestion. Upon this subject no one but the expert is qualified to testify at all. As said in Lawson, Expert and Opinion Evidence (2d ed.) 285: "It is safer, on the whole, to trust to the judgment of learned men, acquired by study, observation and skill, than to the imperfect deductions of jurors, hastily

derived from readings not familiar to them, unassisted by study, examination and comparison of kindred subjects. * * * Great respect should be accorded to the views of such a class of witnesses." It must appear to any thinking mind that the instruction was too general, as applying to all cases, and a regard to the due administration of justice would require greater care and discrimination in an instruction upon a question of this kind.

By the sixteenth instruction the jury are permitted to "accept or reject such opinions, as you may accept as true, or reject as false, any other facts in the case. The jury are instructed that the opinions of the witnesses as experts are merely advisory and are not binding on the jury, and the jury should accord to them such weight as they believe, from the facts and circumstances in evidence, the same are entitled to receive." The testimony of the experts explained to the jury the process of digestion, the combination of gases and acids which entered into the process, the necessity for vital action in order that the fluids be secreted by the stomach, but which instantly ceased upon death. All this was carefully stated and explained, without contradiction or dispute, and which the very nature of the testimony would naturally convince the minds of the jury of its truth, yet the jury were informed that they might ignore it all, without a syllable of evidence calling it in question, and, necessarily, without any knowledge or experience on their part by which it might be compared or tested. The jury evidently took the court at its word and arbitrarily cast the proof aside as not worthy of belief.

In the twenty-third instruction the jury were informed that defendant denies the killing of the decedent, and claims that she was not killed until after he left his home on the day of the homicide; "and, if you believe the defendant not guilty, and that he did not shoot and kill the said Louise Flege, as alleged in the information, or in the event that the evidence introduced in the case is so evenly balanced that you cannot tell whether defendant or some

other person shot and killed the deceased, as alleged, then you should acquit the defendant, or if you entertain any reasonable doubt of the guilt of the accused of the crime charged in the information then you should give the defendant the benefit of such doubt and acquit him." This instruction is objectionable in several particulars: First, if the jury believe the defendant not guilty, they should acquit; second, if they believe he did not shoot and kill the decedent, they should acquit him; third, if the evidence is evenly balanced, they should acquit; fourth, if they cannot tell whether defendant or some other person committed the crime, they should acquit; or fifth, if they have any reasonable doubt of his guilt, they should acquit. We know of no rule of law that requires the jury to "believe the defendant not guilty," or that he "did not shoot and kill" the decedent, before they could acquit. The burden is on the state to prove his guilt beyond a reasonable doubt, and this part of the instruction, as well as others, except the last clause, should not have been given. It could only confuse the jury, and possibly cause them to believe that they must "believe" him "not guilty," and believe he "did not shoot and kill" decedent, before they could acquit.

In the twenty-sixth instruction the jury were again informed that "if you find that he did not shoot the said Louise Flege, or entertain a reasonable doubt of his guilt, you should acquit him." Here is a repetition of the same vice. It was not necessary that the jury should find that he did not commit the deed. The question to be decided was: Has the state proved beyond a reasonable doubt that he did?

A sharp criticism is made against the conduct of counsel for the state in the closing argument to the jury, but, as that attorney will appear no further in the case, the contention need not be further considered. There is also complaint as to the conduct of other counsel for the state. As it is hardly probable that the objectionable language, which we need not specify, will be repeated on another

trial, it is thought that it need not be further noticed. Prosecuting officers should always remember that it is not so much their duty to secure convictions as to present the truth without indulging in crimination or recrimination or personal abuse of an accused. If unjust practice is indulged in, the court should repress all such efforts with a firm hand. The constitution and laws guarantee to every person a fair trial. It is the duty of the courts to see that this guaranty is fulfilled. *People v. Davenport,* 13 Cal. App. 632, 110 Pac. 318; 12 Cyc. 571; *McKay v. State,* 90 Neb. 63, 74; *Nickolizack v. State,* 75 Neb. 27, 32; *Wilson v. State,* 87 Neb. 638, 649; *Leahy v. State,* 31 Neb. 566; *State v. Irwin,* 9 Idaho 35, 60 L. R. A. 716; *Bailey v. People,* 130 Pac. (Colo.) 832.

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

REVERSED.

ROSE, J., dissenting.

The state in employing counsel in criminal cases will be unnecessarily and injuriously hampered by the rules announced. The successful prosecution of a guilty defendant in a contested case depends in a large measure upon the learning, skill and energy of prosecuting attorneys. A county cannot be expected to elect a prosecutor prepared at all times, without assistance, for every legal combat. Many eminent courts hold that the power to employ attorneys to prosecute persons charged with felonies is inherent in sovereignty. 30 Cent. L. J. 344. In the employment of counsel the county attorney, with the consent of the court, acts for the state. The trial judge, who is impartial in the contest, is acquainted with local attorneys and can readily acquaint himself with the character of the services demanded in each particular case. Accused was defended by gifted lawyers. They are capable of emotional advocacy. They are not strangers to science or philosophy. They brought to their client not only their own zeal and accomplishments, but they searched the

mysterious processes of nature in his behalf, and enlisted the services of a chemical analyst possessing perhaps the highest possible degree of human skill. Their conduct was commendable, and accused, in being thus fortified, was strictly within his rights. In the presence of such adversaries is the sovereign obliged to employ impartial counsel who will confront them in obsequious humility? If so, the case might as well have been dismissed at the start. I believe in the doctrine that "the forensic contest should be fought with something like a just equality of opposing forces." 30 Cent. L. J. 344. Any capable, upright lawyer who will conduct himself properly under the directions of the court may properly be called to assist in the prosecution. Counsel for defendant are partisans. The jury and the judge must be unprejudiced and impartial, but disinterested complacency should not be exacted of counsel for the state. Both the trial and the reviewing court should, in the midst of the legal storm, make rulings and enforce the law unaffected by sentiment or emotion, but the prosecutor should not be required to conform to that standard of official conduct. Reviewable error must be predicated upon a ruling of the trial court. Unless the assistant prosecutor was guilty of some prejudicial act during the trial, no possible harm resulted from the order overruling the objections to his employment. An erroneous and prejudicial ruling in regard to a specific act of misconduct is essential to a reversal on that ground. Such a ruling has not been specifically pointed out by the majority. The criticism of the trial court and of the assistant prosecutor in this respect is, in my opinion, unmerited.

An attorney is not bound by any duty to advocate the punishment of the innocent for the purpose of shielding a guilty client. No lawyer worthy of his profession ever recognized such a tie, either before or after employment. Happily, the thirst of religious bigots and of political tyrants for human blood has not crept into our institutions. The fears formerly inspired by such abominations

should therefore be laid to rest with the odious conditions under which they were begotten. Owing to human frailties, juries, prosecuting attorneys and trial courts may err, but the present record does not show any disposition on the part of those who participated in this trial to shed innocent blood under the forms of the law. The duty of the trial court is not confined to enforcing the right of defendant to a fair and impartial trial. There is an equal duty to see that the state has a lawful opportunity to establish its charge against accused. The violation of one duty wrongs the individual. The violation of the other wrongs society as a whole. The district judge is appointed by the constitution to be the arbiter between the individual and society collectively. In a criminal prosecution he sees the conditions as they arise. Any rule which improperly interferes with his discretion weakens his power and impairs the efficiency of the tribunal over which he presides. Rulings which have an unnecessary tendency to discourage and humiliate prosecuting officers in the performance of their duties, to weaken the power of the state, and to lessen respect for criminal tribunals, should be avoided.

I adhere to my dissent from the bloody-garment rule announced in *McKay v. State,* 90 Neb. 63, 91 Neb. 281, and followed in this case. It attaches too much importance to shadow, and too little to substance. The passions of sensible men who sit on juries play too tragic a part in records for review.

In my opinion the effect of the expert testimony, under all the circumstances of the case, was a question for the jury. It is not conclusively established by the evidence that decedent's stomach went into the hands of the analyst as nature left it. It had previously been opened and examined. It may fairly be inferred from the evidence that part of the contents was missing. That part analyzed may have been eaten in the forenoon. The report of the analyst, therefore, does not annihilate the direct evidence of defendant's guilt. If Science is to pronounce the decree

of Omnipotence in a criminal prosecution, the hypotheses adopted by the scientist should be free from infirmities like those mentioned.

LETTON, J., dissenting.

I cannot agree with the opinion on the following points:

1. The scorched and burned garments directly corroborated the testimony of Eichtencamp, and, therefore, tested by the very rule announced in the opinion, were properly admitted in evidence.

2. As pointed out by Judge ROSE, the expert evidence, under the circumstances in this case, was not conclusive as to the length of time that elapsed after the deceased ate a meal and before her death. While the principle of law quoted from Judge Taft is correct, it is not strictly applicable here.

CLARA RATHJEN, APPELLEE, V. WOODMEN ACCIDENT ASSOCIATION, APPELLANT.

FILED MAY 17, 1913. No. 17,160.

1. **Appeal: VERDICT: CONFLICTING EVIDENCE.** In an action on a policy of accident insurance, where the question of the cause of the death of the assured is submitted to the jury on conflicting evidence, a reviewing court will not set aside the verdict unless it is shown to be clearly wrong.

2. **———: WITNESSES: OPINION OF EXPERT.** Where the physician and surgeon who treated the assured for his accidental injury has shown himself competent to testify as a medical expert, has fully and clearly described the nature of the injury and its effect, together with the condition and symptoms of his patient, it is not reversible error to permit him to state what, in his opinion, caused the death of the assured.

3. **Instructions** examined, and found to be without reversible error.

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

Hainer & Craft, for appellant.

Bernard McNeny, contra.

BARNES, J.

Action on a policy of accident insurance issued by the Woodmen Accident Association, a domestic corporation, to Henry J. Rathjen, by which it was provided that, in case of his death "caused directly and exclusively by bodily injury effected by external, violent and accidental means," the association would pay to his beneficiary, Clara Rathjen, the sum of $1,000. A trial in the district court for Webster county resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

It is strenuously contended that the verdict is not sustained by the evidence, in this, that it was not shown that Rathjen's death was caused directly and exclusively by bodily injury effected by accidental means. The record discloses that the assured was a man 33 years of age, 6 feet in height, who weighed about 180 pounds. He was a farmer, and engaged in that occupation on the 27th day of June, 1910, and was apparently in good health. On that day, while working with a team and cultivator in his cornfield, he was accidently struck on this right knee by the iron lever of his cultivator; the knee commenced to swell, and the swelling continued until July 3, when he obtained treatment for his injury from Doctor Cook, who relieved the injured part by removing an effusion of water and serum, and bandaged the patient's leg. Not obtaining satisfactory relief from the treatment of Doctor Cook, the assured, on the 10th day of July, employed Doctor Moranville, who removed the bandage and applied a milder dressing. Doctor Moranville testified that at that time Rathjen had a high temperature or fever; that two days thereafter he became confined to his bed, from which he never arose, and died on the following 12th day of August, 1910.

The foregoing facts are undisputed. It is claimed, however, by the defendant, that Rathjen's death was caused by what is known as "Bright's disease," or to use the words of Doctor Raines, "chronic interstitial nephritis." On this question the evidence was conflicting. Doctor Moranville, a physician of more than 35 years' experience and practice, who appeared from his evidence on both his direct and cross-examination to have been familiar with cases of a like nature, and who treated the assured from about the 10th day of July until death ensued, testified that in his opinion Rathjen's death was the result of blood-poisoning, caused by the injury to his right knee which was sustained by the accident of June 27, 1910. For the defendant, Doctor Raines, who was called to see the patient about the 31st of July, testified, in substance, that in his opinion Rathjen's death was caused by chronic interstitial nephritis, or what is commonly called "Bright's disease." Of the two physicians Doctor Moranville seems to have had the best opportunity to ascertain the cause of Rathjen's death, and, without doubt, the jury were more impressed by his evidence than that given by Doctor Raines. Doctor Cook, who appeared to be a competent and unprejudiced witness, gave testimony, which, to some extent, strengthened the evidence of Doctor Moranville. It is true that Doctor Cook testified that about a year before the accident occurred he treated Rathjen for stomach and kidney trouble, but he also testified that the trouble disappeared as the result of his treatment. Doctor Creighton testified, in answer to a hypothetical question, that the death of Rathjen might be attributed to Bright's disease, while Doctor Cook admitted that Rathjen's death could have arisen from blood-poisoning as a result of his accidental injury. As indicating the real nature of the disease, the testimony shows that at its earliest stages the injured knee was swollen; but it appears from the evidence of the physicians that, if there had been a dropsical condition resulting from Bright's disease, both of the patient's legs would probably have been swollen. The

testimony of Rathjen's father was to the effect that the injured knee was the only one that was swollen, and there was no swelling of the left limb. Like testimony was given by a Mr. McIntyre, a neighbor, who helped to take care of Rathjen during his illness. Rathjen's wife testified, in substance, that he had never had any serious illness, and up to the time of his injury he was in good health and able to pursue his ordinary work.

In *Caldwell v. Iowa State Traveling Men's Ass'n*, 136 N. W. (Ia.) 678, it was said: "Where death results from erysipelas, which follows as a natural, though not as a necessary, consequence of an accidental wound upon the cheek, it may be deemed the proximate result of the wound, and not of the disease, within the requirements of an accident policy, that death must result solely by accidental means."

In *Western Commercial Travelers Ass'n v. Smith*, 85 Fed. 401, 40 L. R. A. 653, Judge Sanborn of the United States court of appeals used the following language: "If the death was caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent, and accidental means which produced the bodily injury, the association was equally liable to pay the indemnity. In such a case, the disease is an effect of the accident, the incidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death, and the death is attributable, not to the disease, but to the *causa causans*, to the accident alone." This rule is supported by *Delaney v. Modern Accident Club*, 121 Ia. 528; *Ward v. Ætna Life Ins. Co.*, 82 Neb. 499; *Schumacher v. Great Eastern Casualty & Indemnity Co.*, 197 N. Y. 58, 27 L. R. A. n. s. 480; *Cary v. Preferred Accident Ins. Co.*, 127 Wis. 67, 5 L. R. A. n. s. 928; *Western Travelers Accident Ins. Ass'n v. Munson*, 73 Neb. 858.

In the light of these authorities, and in view of the

testimony, we feel unable to say that the evidence does not support the verdict.

It is strenuously contended that the district court erred in receiving the testimony of Doctor Moranville over the defendant's objection. That objection seems to have been limited to the competency of the witness. It is in the following words: "Objected to by defendant as incompetent, the witness not shown to be competent." As above stated, the testimony of Doctor Moranville settled the question of his competency as an expert witness beyond all question. He was skilfully cross-examined at great length by counsel for the defendant, and acquitted himself in an admirable manner. It was shown that he had been engaged in the active practice of his profession for more than 35 years; that he had had cases of a like nature, and evidently knew the truth of the facts to which he testified. It should also be observed that after having described his treatment of the assured, and all of the conditions and symptoms in the case, including a test of the deceased's urine, he gave his opinion as to what caused Rathjen's death, and, as we view the case, the reception of this testimony was not reversible error.

It is further contended that instruction No. 9 is inconsistent with the instructions given by the court at the request of the defendant. We have examined the instructions, and, as we view them, they are not inconsistent.

After instructing the jury on the defendant's theory of the evidence, the court, by the ninth paragraph of the instructions, gave plaintiff's theory of the case, and concluded as follows: "If, on the other hand, you find from the evidence that the said Henry J. Rathjen received a bodily injury through external, violent and accidental means, and that a disease, commonly known as 'Bright's disease,' or blood-poisoning, resulted and was brought about by the injury, and that said disease so resulting from the injury, if you find it did so result, contributed to or hastened the death of said Henry J. Rathjen, that would not be such a disease or bodily infirmity as would prevent

recovery of the plaintiff in this case, as defined in these instructions." We think the part of the instruction quoted is in line with the rule laid down in the authorities above cited, and was supported by the testimony of the medical experts.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

REESE, C. J., LETTON and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

IDA L. CADY, APPELLEE, V. TRAVELERS INSURANCE COMPANY, APPELLANT.

FILED MAY 17, 1913. No. 17,202.

1. **Insurance:** ACTION ON POLICY: WAIVER: EVIDENCE. Where the question of a waiver of the conditions of a policy of life insurance by letters notifying the assured of a default in the payment of a past-due premium is submitted to the jury, the insurer is entitled to introduce in evidence the whole of the correspondence between the parties, and it is error to exclude any part of it which shows the construction of the policy agreed upon by both parties to the contract.

2. **Contracts:** CONSTRUCTION: INTERPRETATION BY PARTIES. The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction.

3. **Insurance:** PREMIUMS: NOTICE OF DEFAULT: EFFECT. A notice sent by an agent of a life insurance company to the assured that the premium on his policy of insurance is past due and unpaid, with a request for its payment, without more, payment being refused, did not change the terms of the contract with respect to the date of its conversion into a paid-up policy of term insurance.

4. ———: LAPSE OF POLICY. Where the contract for paid-up term insurance is plain and unambiguous, and the parties have agreed

as to the date when the policy will lapse, if the death of the assured occurs subsequent to that date no recovery can be had upon the policy.

5. Appeal: REFUSAL TO DIRECT VERDICT. Where, under the law and the evidence, the plaintiff is not entitled to recover, it is error for the trial court to refuse to direct a verdict for the defendant.

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

Greene & Breckenridge, for appellant.

T. J. Mahoney and *Gurley & Woodrough, contra.*

BARNES, J.

Action on a policy of life insurance. A trial in the district court for Douglas county resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

It appears that, by the policy in question, defendant insured the life of Henry F. Cady for the sum of $25,000, payable at his death to his wife, who brings this action. The policy was issued on the 24th day of April, 1893, for the consideration of the application and the payment of an annual premium of $465.25, payable in advance on the 21st day of April of each year during the life of the assured. The contract was not to take effect until and unless the first premium was paid while the assured was in good health. The policy further provided that, in case of default in the payment of a premium, after the third, the contract should remain in force for the terms specified in the table of paid-up term insurance, indorsed thereon. There was also given the assured the option, upon certain conditions, to take the paid-up value of the policy in money, due him at the time of the default, or to consider the policy as converted into paid-up term insurance for the time designated in the table above mentioned. All provisions of the policy which are not involved in this controversy are omitted from this opinion. It is agreed

by the parties that the assured paid nine annual premiums, and then declined to make any further payments; that he failed and refused to pay the premium due on the 21st day of April, 1902, and by the terms of the policy he was then entitled to a paid-up term of insurance for seven years and eight months from the date of his default, and if he should thereafter make no other payments upon the policy his term insurance would lapse on the 21st day of December, 1909. The assured refused to make any additional payments, and departed this life on the 24th day of January, 1910. Suit was brought on the policy by the beneficiary, on the theory that the defendant, by sending certain notices to the assured that he was in default of the payment of his annual premium, due April 21, 1902, and requesting its payment, extended the life provision of the policy to June 23, 1902, at which time the term insurance began to run, and therefore the death of Henry F. Cady occurred before, and not after, his term insurance had expired. The trial court adopted the plaintiff's theory of the case, instructed the jury accordingly, and the plaintiff had the verdict and judgment.

Defendant assigns error for excluding from the evidence the letters of the assured in which he notified the defendant of his refusal to pay the premium due on the 21st day of April, 1902, and in which he declared his option to claim paid-up term insurance for seven years and eight months from that date, as indicating the construction of the contract by both the assured and the defendant; and for the refusal of the trial court to direct a verdict for the defendant. The foregoing assignments present the only questions which are necessary for us to determine upon this appeal.

1. In disposing of defendant's first contention, it is sufficient to say that it appears that the trial court received in evidence the letters of the defendant company by which the assured was notified of his default in the payment of his annual premium due on the 21st day of April, 1902, and in which its payment was requested, but excluded the

letter of the assured by which he expressly refused to make the payment, notified defendant of his election to consider his policy converted into term insurance, and stated his understanding of the contract to be that he was entitled to paid-up insurance for a term of seven years and eight months from April 21, 1902. It appears that in reply to this letter defendant assented to that arrangement, and informed the assured that his understanding of the contract was correct. If the effect of this correspondence was to be submitted to the jury as showing a waiver of the terms of the policy, it was error to exclude any part of it. In *Manhattan Life Ins. Co. v. Wright,* 126 Fed. 82, the court said: "The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious error." This rule was followed in *Johnson v. Mutual Benefit Life Ins. Co.,* 143 Fed. 950. The rule seems to be well settled that where the parties have acted upon and construed a contract, in the absence of any mistake or misunderstanding between them, the court will enforce such contract as so interpreted. *Jobst v. Hayden Bros.,* 84 Neb. 735. To our minds it seems clear that, if the plaintiff was to rely upon any part of the correspondence between the assured and the defendant, then the jury should have been given the whole of that correspondence, and this assignment of error is well founded.

2. As we view the record, there is no dispute in relation to the facts of this case, therefore the court should determine the main question, and finally dispose of this action, thus preventing further litigation.

It is plaintiff's contention that the defendant waived the conditions of the contract, extended the time for payment, and thereby changed the time from that fixed by the terms of the policy itself to another date at which the term insurance in question commenced to run, by the no-

tices of default and request for payment of the past-due premium above mentioned.

In *Parker v. Knights Templars & Masons Life Indemnity Co.*, 70 Neb. 268, it was held: "A permanent waiver of a condition in a policy of insurance would not be inferred from occasional indulgences shown a policy holder. No implication of a waiver of the terms of a contract can arise from acts which may be construed as a compliance with such terms."

In *Driscoll v. Modern Brotherhood of America*, 77 Neb. 282, it was said: "A waiver of a condition will not be implied from an act not inconsistent with an intention to insist upon performance."

In *Sharpe v. New York Life Ins. Co.*, 5 Neb. (Unof.) 278, it was held that the giving of a note extending the time for the payment of a past-due premium, which contained an agreement providing for the forfeiture of the rights of the assured if the note was not paid at maturity, default having been made in such payment, did not operate as a waiver of the terms of the policy providing for forfeiture in case of nonpayment of premiums. We think this rule is sustained by the great weight of authority in this country. *Thompson v. Insurance Co.*, 104 U. S. 252; *Nederland Life Ins. Co. v. Meinert*, 199 U. S. 171.

In *Stephenson v. Empire Life Ins. Co.*, 76 S. E. (Ga.) 592, the question of the effect of a request for the payment of a past-due premium was before the court. In that case the life insurance policy contained a stipulation that if any premium is not paid on or before the day it is due, or if any note or obligation that may be accepted by the company for the whole or any part of the first or any subsequent premium, or any other payment under this policy, be dishonored or not paid, on or before the day when due, this policy shall, without any affirmative act on the part of the company, or any of its officers or agents, be annulled and void, except as herein provided. It was held that a failure to pay a note for a portion of the first annual premium when the note became due worked a for-

feiture of the policy, and that the condition of the policy was not waived by a demand made by the insured after maturity of the note for its payment, the assured having refused such payment.

Upon this question we are not without authority of our own. In *Swett v. Antelope County Farmers Mutual Ins. Co.*, 91 Neb. 561, it was held that making a demand for a payment by a mutual insurance company of an assessment upon a policy of insurance, subsequent to a loss under such policy, will not be held to be a waiver of its terms, in the absence of a plea and proof of payment by the assured of such assessment.

Schmedding v. Northern Assurance Co., 170 Mich. 528, was a case where an insured, upon giving his notes for his annual premium when it became due, was granted an extension of several months, and then failed to pay the notes at maturity. His policy lapsed and became void at once. The statute provided that every insurance policy should contain a provision giving the insured one month of grace for the payment of every premium after the first year, and the policy conformed to the statute. It was held that the facts in connection with the statute did not entitle the insured to two periods of grace.

As we view the facts of this case, the defendant's request for the payment of the past-due premium, not complied with, but, on the other hand, which was positively refused, did not have the effect to change the conditions of the policy; and the term insurance provided for thereby commenced to run on the 21st day of April, 1902, and expired by lapse of time on the 21st day of December, 1909. *Johnson v. Mutual Benefit Life Ins. Co.*, 143 Fed. 950; *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 167; *Wilkie v. New York Mutual Life Ins. Co.*, 146 N. Car. 513, 60 S. E. 427; *Grattan v. Prudential Ins. Co.*, 98 Minn. 491; *Rye v. New York Life Ins. Co.*, 88 Neb. 707; *McLaughlin v. Equitable Life Assurance Society*, 38 Neb. 725.

It is contended, however, that the understanding and the acts of the assured and the defendant could not in any

manner affect the rights of the plaintiff, who was the beneficiary named in the policy, which had become fixed by the terms of the contract. As we view the record, this contention is without merit. Under the terms of the contract itself, the assured was entitled to paid-up term insurance for seven years and eight months, in consideration of the premiums that had been paid by him before his default occurred, and the beneficiary was entitled to the same and no greater right. We have seen that the notification that the assured was in default of payment of the premium due on the 21st day of April, 1902, and the request for payment did not change the terms of the policy. Its terms were plain and unambiguous, and were understood alike by both the defendant and the assured. By no act of the defendant or of the assured were the rights of the beneficiary changed; and, the term insurance to which they were alike entitled having lapsed before the death of the assured, there was, at his death, nothing due to his beneficiary.

As we view the case, we are constrained by the authorities to hold that it was error for the district court to refuse the defendant's request for a directed verdict.

The judgment of the trial court is reversed; and, as there can be no recovery in this case, the plaintiff's action is dismissed.

REVERSED AND DISMISSED.

HAMER, J., not sitting.

IN RE ESTATE OF FREDERICK A. SASSE.

WILLIAM SASSE ET AL., APPELLEES, V. MARIE SASSE, APPELLANT.

FILED MAY 17, 1913. No. 17,215.

1. **Executors and Administrators: PAYMENT OF DEBTS: SALE OF REALTY.** If there are collectible personal assets belonging to the estate of a deceased person sufficient to pay all of his debts, the

district court has no authority to order the sale of any portion of his real estate for that purpose.

2. Wills: CONSTRUCTION: PAYMENT OF DEBTS. Will of the decedent examined and construed, certain of its provisions set out in the opinion, and *held* to create a fund, available to the executors, of more than a sufficient amount to pay all of the debts of the testator.

APPEAL from the district court for Stanton county: GUY T. GRAVES, JUDGE. *Reversed and dismissed.*

W. W. Young and *G. A. Eberly,* for appellant.

Eberhardt & Horton and *A. R. Oleson, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Stanton county, granting to the executors of the will of Frederick A. Sasse, deceased, a license to sell certain real estate, of which he died seized, for the payment of his debts.

It appears, without dispute, that on the 7th day of December, 1894, Frederick A. Sasse made a will, wherein he devised certain land to his three sons, and the residue of his estate he devised and bequeathed to his several children, share and share alike. On the 18th day of August, 1896, Sasse executed conveyances to his three sons for the real estate which he had devised to them by will, and took from them certain contracts by which they each agreed to pay him the sum of $1,200, to be distributed according to his will in case he died testate, but, in case he should leave no will, the money which they were to pay his estate was to be distributed "to his present heirs and their legal representatives." No other will was made by him. On the 15th day of June, 1908, Sasse died, and the will above mentioned was presented for probate. The will was contested by his widow, a second wife, whom he had married after his will was executed. On appeal to the district court the will was admitted to probate, subject to the

statutory property rights of the widow. During the year in which the contest proceedings were pending, there was no administrator or executor appointed, and the estate so remained until the 7th day of August, 1909, when the present executors were appointed and qualified. During the time of the contest, the real estate involved in this proceeding was in the possession of Gustav Sasse, one of the sons of the deceased, who had been the tenant thereon for a number of years, and who claimed he was authorized to make certain improvements on the premises and apply the same in payment for the rent. He continued as tenant after the death of his father, and remained such until March 1, 1910. He now claims that he expended the sum of $400 for improvements on the premises, which he insists he has the right to set off against the rent due the estate.

At the time of the death of Frederick A. Sasse he was the owner of a farm consisting of 120 acres of land situated in Stanton county, together with lots 1, 2 and 3, in block 48 of the original town of Stanton, on which was situated a dwelling-house, occupied at that time as a homestead, which property was not disposed of by his will. The farm land above mentioned was incumbered by a mortgage of $800, bearing interest at 5 per cent. from July 1, 1908, payable semi-annually. It appears that the amount due on the mortgage was not filed as a claim against the estate. The town property was clear of incumbrance, and has been occupied since the death of the testator by his widow as her homestead. The farm was rented for the year ending March 1, 1909, to Gustav Sasse, from whom there was a balance of $40 due as rent, and which has never been paid. The farm was rented for the year ending March 1, 1910, at a rental value of $360. For the year ending March 1, 1911, it was occupied by Herman Sasse at an agreed rental value of $360, and at the time of the commencement of this proceeding it was still occupied by him as a tenant, for the year ending March 1, 1912, at an agreed rental value of $360, and no part of the rents above mentioned have been paid.

It appears that the executors have made no effort to collect the rent, and it is contended by the appellant that the rents alone, which should have been collected, amount to $1,120. In addition to the rent due the estate, Herman and William Sasse, the executors, and their brother Ernest, were each indebted to the estate in the sum of $1,200, with interest at the rate of 7 per cent. from June 15, 1909, secured by mortgages, according to the contracts made between them and their deceased father, as above stated. No attempt whatever has been made by the executors to collect the amounts so due on said contracts, nor has any portion thereof been paid. Under these circumstances the executors of the will applied for, and received, a license from the judge of the district court for Stanton county to sell that portion of the real estate, designated as the 120-acre farm, for the alleged purpose of paying the debts of the deceased, which amount to about $1,200. From the order of the district court granting the license above mentioned, the widow has appealed.

The widow contends that the money due from Gustav, Herman and Ernest Sasse belongs to the estate of her deceased husband, and so much thereof as may be necessary should be used for the payment of his debts; that the executors, who are the sons of the deceased, are unlawfully proceeding to sell the land in question for the purpose of depriving her of her share of the estate, and are seeking to thus increase their own distributive portions thereof; while the executors claim that the money due from the sons of the testator belongs to and should be retained by them. The determination of this question requires a construction of a portion of the will, and it is conceded by all parties that if the sums of money above described belong to the estate, and are available for the payment of the debts of the testator, the judgment of the district court should be reversed and the proceeding dismissed. By the first clause of the will it is provided: "I direct that my funeral charges, the expense of administering my estate, and all of my debts be paid out of my per-

sonal property. If this be insufficient, I authorize my executors hereinafter named to sell so much of my real estate as may be necessary for that purpose." By the third clause of the will it is provided: "I give and bequeath to my son, William Frederick August Sasse, the following described real estate, to wit: The south half of the northeast quarter and the northwest quarter of the southeast quarter and the southeast quarter of the northwest quarter all in section seven in township number twenty-two north, range number three east in Stanton county, Nebraska, and the said William Frederick August Sasse is to be charged with the sum of one thousand eight hundred dollars, and after deducting from said sum the amount due him under the general distribution as hereinafter set forth, the balance, if there be any, shall be paid by him to my executors within a reasonable time after the amount is ascertained and determined." The other subdivisions of the will, devising certain lands to Herman and Gustav, the other sons of the deceased, are the same, in substance, as the one above quoted. By the seventh clause of the will it is provided: "I give and bequeath all the residue of my estate, real and personal, to my children, William Frederick August Sasse, Herman Sasse, Ernest Sasse, Gustav Sasse, Amelia Sasse, and Minnie Mason, share and share alike as tenants in common to be to them as herein directed. In case any of my children shall die in my lifetime leaving issue or descendants, I direct that his or her share shall not lapse, but shall be paid to such descendants in equal proportions." By the eighth clause of the will it was further provided: "The amount due to my sons hereinbefore mentioned shall be deducted from the amount due for the lands hereinbefore bequeathed, and the sum due to Amelia Sasse shall be paid to her within a reasonable time after my decease, and for the welfare and protection of my daughter, Minnie Mason, I direct that her share in my estate shall be placed in the hands of a trustee to be appointed by the county court of Stanton county, who shall give a good and suffi-

cient bond for the custody and investment of the funds, and the interest shall be paid to her as long as she shall live as the wife of her present husband, A. C. Mason. In case of the death of her said husband, then and in that case, the entire sum shall be paid to her, and in case of her death occurring prior to that of her husband, then the said sum or share shall remain in trust for her children, if they shall survive her."

Construing the portions of the will above quoted, with all of its other provisions, we are of opinion that, by the payment of the sums of money due from his three sons, it was the intention of the testator to create a fund available to his executors for the payment of his funeral charges, his debts, and the expense of administering his estate. The remainder of the funds, together with his property undisposed of at the time of his death, was to be divided equally between his children share and share alike. Any other construction of the will would deprive the daughters of the testator of any considerable portion of his estate. It evidently was his intention to require the sons to pay over to the executors so much of the money secured by their contracts as would be necessary to pay his funeral charges, his debts, and the expense of administration, and the distributive share belonging to his two daughters. Each of the sons was to be allowed to retain such remainder of the fund, if any, as would amount to his distributive share of the estate. By adopting this construction of the will, it appears that there was available to the executors a fund amounting to about $4,500 for the payment of the debts of the testator, which it is conceded were only about $1,200 at the time the district court made the order to sell the farm belonging to his estate.

It follows that the order for the sale of the land in question should not have been granted. The judgment of the district court is therefore reversed, and the proceeding is dismissed. REVERSED AND DISMISSED.

REESE, C. J., FAWCETT and SEDGWICK, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

ROBERT COULTER, APPELLANT, V. MARION T. CUMMINGS, APPELLEE.

FILED MAY 17, 1913. No. 17,240.

1. **Conversion.** An action for conversion will not lie for the disposition of property which the plaintiff has authorized. If he has an action, it is for the price or value of the property.

2 ———: PROOF. In such a case, in order to recover the value of the property, the plaintiff is required to prove that defendant expressly or impliedly agreed to pay him the purchase price, or the market value thereof.

3. **Trial:** DIRECTING VERDICT. Where the evidence will not sustain a verdict for the plaintiff, it is the duty of the trial court to direct the jury to return a verdict for the defendant.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

E. O. Kretsinger and *Ernest L. Kretsinger*, for appellant.

Hugh J. Dobbs, contra.

BARNES, J.

Action commenced in the district court for Gage county to recover a sum of money alleged to be due plaintiff from the defendant for the sale or conversion of certain capital stock of a corporation, known as the "M. T. Cummings Milling Company." At the conclusion of the trial the court below directed a verdict for the defendant, and the plaintiff has appealed.

It appears, without dispute, that in the month of October, 1901, the plaintiff and the defendant, together with certain other persons, organized a corporation, under the laws of this state, for the purpose of purchasing a mill and water-power at Blue Rapids, Kansas, to be operated in manufacturing corn products. It was provided by the articles of incorporation that the capital stock of the

company should be $30,000, divided into equal shares of $100 each, of which one-fourth was required to be issued and fully paid up at the time the business was commenced. It was also provided that all of the stock should be common stock, nonassessable, and transferable on the books of the company. Subsequent to organization, and at the date when the company began active operations as a manufacturing concern, the amount of $16,500 of stock had been issued and paid for at par. Of this stock the plaintiff became the owner of 10 shares of $100 each. From the proceeds of the sale of the stock, the milling company, in 1902, purchased a mill site, mill house, water-power and power-rights at Blue Rapids, Kansas, repaired and remodeled the mill house, flume, sea walls, and other appurtenances to said property, and installed new milling machinery necessary for their purposes, of the latest and best type. This was connected up to the power, and in the autumn of 1902 the mill was put into successful operation as a manufacturing plant. The power for the operation of the mill, as well as for the operation of a number of other milling and manufacturing plants, was supplied by a large and well-constructed stone dam across the Blue river, which had been in successful operation for more than 35 years. Thus the venture of the milling company appeared to lack no essential element of complete success.

It further appears that during the first week of June, 1903, there occurred a great flood, which inundated the entire valley of the Big Blue river from its source to its mouth. In volume of water, duration, force, and destructiveness, this flood was unparalleled in the known history of that country. It practically destroyed the property of the milling company. It washed out and destroyed the switch track connecting the property with the Union Pacific railroad, nearly a mile away, and the railroad company refused to rebuild the switch. This required the milling company to depend upon wagons for the transportation of its products and all other freight to and from the railway station, a distance of three-fourths of a mile.

In addition, the country road leading to the mill was destroyed, making access to the property difficult to the farming community. Great damage was wrought to the mill house, the flume, and machinery, and, in addition, a large amount of grain in bins and manufactured products on hand were lost and damaged or totally destroyed. At the time of this disaster the milling company was indebted to the First National Bank of Beatrice on its promissory note, which, with interest, amounted to something over $5,500, an indebtedness which had been incurred by the company to enable it to operate its mill. It further appears that the effect of the flood was to cut a new channel for the river some distance up the stream from the point where the company's property was situated, and above the stone dam, leaving that structure high and dry without water, so that the power by which the mill had been operated was completely destroyed. The milling company was thus left without assets of any kind to meet its indebtedness, except such as could be realized out of the wreck of its property. Soon after this disaster the defendant, as the principal stockholder, president of the board of trustees, and manager of the property, endeavored to sell it for a sum sufficient to discharge the company's debt to the bank. For over a year the proposition to sell the property was extensively advertised in various milling journals, and by other means, all of which resulted in a failure to make such a sale. Finally, the defendant took up the matter of adjusting the debt in some way with the other stockholders of the company, and on or about the 23d day of August, 1904, he wrote to the members of the company, including the plaintiff, advising them of the necessity of devising some means of paying the debt. Amongst the plans suggested was a surrender to him of the stock in consideration of his assuming and paying the debts of the company. Some time in the year 1904 the township in which the city of Blue Rapids is situated voted to issue its bonds in the sum of $20,000, and use the proceeds thereof in an effort to redivert the Blue river to

its ancient channel, and thereby retrieve, to some extent, the misfortune which the whole community and surrounding country, equally with the milling company, had suffered from the flood. The work was put under way in 1904, and completed in 1905, with a fair prospect that restoration of the power to the stone dam would be effective and permanent. Under these circumstances the defendant was able to interest Mr. F. B. Draper and Mr. W. E. Bryson, of Adams, Nebraska, in his milling company, and finally reached an agreement by which they were to join him in taking over all of the stock of the company on the basis of the assumption and payment of the indebtedness of the old company above described.

On June 8, 1905, defendant wrote, addressed and mailed a letter to the plaintiff, advising him of this arrangement, stating, among other things, that all the stockholders had assigned their stock to him, or were willing to do so, on condition that he pay the company's debt to the bank, and renewing his request for the assignment of plaintiff's stock on those conditions. Plaintiff thereafter delivered his stock to the defendant. The new company was organized, and the mill was repaired and put in operation. The property was leased to one Ed S. Miller, and in May, 1906, the mill house, with its contents, was totally destroyed by fire.

The plaintiff, by his amended petition, sought to recover the value of the stock which he delivered to the defendant, on the theory that the defendant wrongfully converted it to his use, or agreed to pay the plaintiff his money therefor as soon as the mill was put in operation. Defendant demurred to the amended petition on the ground that the facts stated did not constitute a cause of action. The demurrer was overruled, and the objection thus raised was kept good at all stages of the trial. The answer was, in effect, a general denial.

Several reasons are assigned for a reversal of the judgment of the district court. A consideration of the assignment that the court erred in directing the jury to return

a verdict for the defendant is sufficient to dispose of the case without passing upon the other question presented by the record.

The bill of exceptions shows that plaintiff gave no testimony showing, or tending to show, that his stock was obtained from him by any false pretext, but that it was obtained by defendant for the purpose of organizing a new corporation, and that it was used for that purpose. His testimony, in part, is: "He (meaning the defendant) requested me, and asked me, if I would be willing to turn it (the stock) over to him if he got a couple of men to go in with him and start the mill again, that was after it was flooded, you know, and I consented to it. * * * Well, he asked me if I would be willing to let him have it in his possession so he could start the new mill, and I consented to it rather than leaving the mill standing idle. I gave the stock to him on these grounds. He was to have it in his possession until he started the new mill, and I expected the money out of it then. * * * Well, he requested me to bring the stock when I came up town, and I brought the certificates and handed them to him, with the understanding—I had the understanding—I was to get my money out of them. Q. Mr. Coulter, when you took the stock to Mr. Cummings, what did Mr. Cummings say about the stock? A. When I handed it to him? Q. Yes. A. Well, he thanked me for it. I said, I expected to get my money for it when he got to running the mill. * * * He said it would be doubtful. He said, if there was any money to be got out of a water-mill, he had yet to see it."

As we view the plaintiff's own evidence, he failed to make out a case against the defendant for the conversion of stock. To maintain an action for conversion of chattels, a party must have actual possession of the property, or the right to immediate possession. Code, sec. 182; *Raymond Bros. & Co. v. Miller*, 50 Neb. 506; *Hill v. Campbell Commission Co.*, 54 Neb. 59; *Thompson & Sons Mfg. Co. v. Nicholls*, 52 Neb. 312. Plaintiff failed to

testify that he was entitled to the possession of the stock in question at the time the action was begun. He produced no evidence that he ever demanded possession of the stock, or requested the defendant to pay him anything as the purchase price thereof. His testimony, and the allegation of his petition, contradict and refute the theory of a wrongful conversion of his stock by the defendant. Conversion in law is unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of his goods, temporarily or permanently. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809; *Aylesbury Mercantile Co. v. Fitch*, 22 Okla. 475, 23 L. R. A. n. s. 573. It follows that the authorized use of the property by the defendant in this case will not support an action for conversion. In *Carlson v. Jordan*, 4 Neb. (Unof.) 359, it was said: "No action for conversion will lie on account of a disposition of property which plaintiff admits authorizing. If he has an action, it is for the price of the property."

Again, in order for the plaintiff to recover the value of his stock, it was necessary for him to show, by some competent evidence, that the defendant had promised to pay him its value when the mill was again in operation. The evidence contains no such promise. Plaintiff did not testify that the defendant ever agreed to pay him the value of the stock. He testified that, in answer to his assumption that he was to receive the money for his stock, the defendant said: "It would be doubtful * * * if there was any money to be got out of a water-mill." It seems idle to assert that this amounted to a promise to pay the plaintiff anything whatever for his stock. Again, we find no testimony in the record from which the value of the stock, if it had any value whatsoever, can be ascertained. On the other hand, it seems clear from the undisputed facts contained in the record that plaintiff's stock has no value whatever.

As we view the record, no other verdict than the one which was returned under the direction of the court could have been sustained, and therefore the judgment of the district court is

AFFIRMED.

REESE, C. J., FAWCETT and SEDGWICK, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

CHARLES F. JOHNSON ET AL., APPELLEES, V. PAYNE INVESTMENT COMPANY, APPELLANT.

FILED MAY 17, 1913. No. 17,250.

1. **Brokers**: ACTION FOR COMMISSION: BURDEN OF PROOF. In an action on a contract between real estate brokers for a division of commissions on the sale of real estate, jointly listed by both parties, by which it was provided that, if sale is made by the second party without the aid of the first party, the second party shall have all of the commission, it being conceded that the sale on which the first party claims to be entitled to a division of the commission was in fact made by the second party, the burden is on the first party to show by a preponderance of the evidence that the sale was made by or with its aid or assistance.

2. ———: ———: EVIDENCE: SUFFICIENCY. Evidence examined, its substance set forth in the opinion, and *held* insufficient to require a division of the commission.

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

Wright & Duffie, for appellant.

Morrow & Morrow, contra.

BARNES, J.

Action to recover commissions on the sale of certain lands, jointly listed for sale by the plaintiffs and the de-

fendant, as real estate brokers. By their petition plaintiffs claimed a commission of $2 an acre on the sale of 320 acres of land, for which the defendant had the exclusive agency. There was a written contract between the parties, which provided that the plaintiffs, in case they made the sale of any land listed jointly, and for which the defendant had the exclusive agency, should have a commission of $2 an acre. The contract also contained the further provision that, in case the plaintiffs should sell any land listed jointly with the defendant, and for which the defendant did not have the exclusive agency, the plaintiffs should have the entire commission if they made the sale without the aid or assistance of the defendant. The defendant, by its answer, admitted the execution of the contract, as alleged in the plaintiffs' petition; admitted the sale of the lands by the plaintiffs, as stated therein; and alleged, by way of a set-off or counterclaim, that plaintiffs and defendant had a certain tract of land consisting of about 100 acres listed for sale jointly, and on which the owner's price was $100 an acre; that it was agreed betwen plaintiffs and the defendant that the selling price thereof should be $110 an acre, and the excess over the owner's price was to be shared between them as a commission in case of a sale made by their joint efforts; that plaintiffs sold the said tract of land for $105 an acre, and kept all of the commission; that there was due from the plaintiffs to the defendant on account of the transaction the sum of $800; and prayed judgment for the balance due it, after deducting therefrom the amount of the plaintiffs' claim. The reply was a general denial. A trial in the district court for Scott's Bluff county resulted in a directed verdict and a judgment for the plaintiffs, and the defendant has appealed.

The theory on which the court directed the verdict was that the defendant's evidence did not show, or tend to show, that the defendant participated in the sale of the 100-acre tract of land, or in any way contributed to such sale. The defendant contends that the district court erred

in directing the verdict, and insists that, under the evidence, the question of the defendant's right to recover should have been submitted to the jury. A determination of that question will dispose of all of the questions presented by the record.

It appears from the evidence that, under their contract, the plaintiffs and the defendant had listed for sale jointly the northwest quarter of section 10, township 22 north of range 56, which was sold to one George W. Andrus. The defendant admits that the plaintiffs made the sale, and by the terms of the contract defendant was not entitled to any part of the commissions, unless it or its subagents assisted in, or contributed to, the making of the sale. It appears from the evidence that a concern called the Deutch Land Company had a contract similar to the one between plaintiffs and defendant, which, however, did not include the quarter section of land above described. It also appears that the purchaser of the tract of land in question came to Scott's Bluff on or about the 17th day of June, 1909. When he arrived there he had some talk with the Deutch Land Company, and was shown several pieces of land which it had for sale. They also told him that the plaintiffs and the defendant had the land in question listed jointly, that they did not have the right to sell it, and that he had better see the plaintiffs. On the following day Andrus went to a Mr. Barber, who was his brother-in-law, to look at the lands in that vicinity; and, after looking over various tracts, they went to Mitchell, where the plaintiffs had their office, who took Andrus out to view the land, and afterwards sold it to him.

One Beach Coleman, who was associated with the Deutch Land Company, and who was called as a witness for the defendant, testified, in substance, that he first met Andrus in his office in Scott's Bluff; that his company was working at that time for the Payne Investment Company; that Andrus was looking for some irrigated land, and desired something rather choice. He said: "I suggested that I show him a piece of land or two. I told him at the

time that probably our lands were not quite such land as he had in mind. As a matter of fact I was trying to tie him to us as well as I could in the short time I was with him. I took him out north of town and showed him a piece of land. The land I showed him at that time was listed with us and with the Payne Investment Company. He did not go all the way out with me. When we got near the street east of Mr. Barber's place, he said he would get out there and go to Mr. Barber's place and stay all night. I saw him again the next morning in my office. I told him that the Payne Investment Company's train would be in the next day, and I invited him to get on that train and go up to the headgate, but he did not get in in time to do that. About the time the train came back he came into the office again. I said to him that they were ready to go out and look over the country, and that it would probably give him a good idea as to the country if he would get in and go along. I was careful that he should get into the car that Mr. Deutch was in. I did not go on that trip, but turned him over to Mr. Deutch. I next saw him that evening. He came into our office with Mr. Barber. I had been talking with him about a quarter section over there, which, I think, had 104 acres. A quarter section north of that, an 80, and a piece of land belonging to Thompson and Gilmore, which was the northwest quarter of section 10, township 22 north of range 56. We told him that, from his description of the land he wanted, this land would certainly please him. I explained to him that it was a piece of land which we did not have personally listed with the Payne Investment Company, but that Johnson & Whitman (plaintiffs) at Mitchell had the piece of land listed with the Payne investment people, and that he would have to buy it there. He then left our office, and gave us the impression that he was going to look at this piece of land with Mr. Barber. I understood he made arrangements to buy it that same day." He further testified: "I do not remember of having had any further conversation with Mr. Andrus after Mr. Barber

took him out to look at the land. I told Mr. Andrus that Johnson & Whitman had this land for sale. I knew this, because I tried to get it on our list, and the Payne people told us they had it. I directed Mr. Andrus to Johnson & Whitman because we were interested in the sale. I did not have the right to sell this land, as we did not have it listed. The Payne Investment Company and Johnson had that together. All subagents of the Payne Investment Company tried to furnish buyers for all lands so listed, no matter by what subagent it was listed; that was what we were trying to do. The reason we directed this party to Johnson & Whitman was because if we directed him to the Payne Investment Company, or whoever had this land listed, we would jointly get the commissions. Mr. Barber was present when we directed Mr. Andrus to Johnson & Whitman, and heard part of the conversation. I told him to make it plain to Johnson & Whitman, that we sent him to them, and he said he would do it. I think the first conversation I had with Johnson & Whitman was by telephone, the evening after the sale was consummated. I did not demand any of the commission from the Deutch Land Company, because I did not think they were in a position to pay it. I think Mr. Whitman stated in that conversation that he did not know anything about our having had a talk with Mr. Andrus. I think Johnson told me the same thing. They stated they had no knowledge that we ever had anything to do with this deal. I did not say anything about the Payne Investment Company's commission. I was not looking after their commission. I did not close the contract for the sale of this land for two reasons: In the first place, at that time, Andrus had not decided to buy; in the second place, we had not the land listed with us and the Payne Investment Company, so we had to send him to them and take a smaller commission."

Theodore D. Deutch was called as a witness for the defendant, and testified, in substance, that he was a partner in the firm of the Deutch Land Company. "I met Mr. Andrus in the town of Scott's Bluff, I think it was about the

15th of June. After we got through showing him the Tri-State land, we told him we would be glad to show him anything we had on the list. The next morning Mr. Barber and Mr. Andrus came into our office. We had nothing to do with bringing Mr. Andrus into the country. I told him this land was for sale by Johnson & Whitman on the joint list. I have not seen Mr. Andrus since he left the country. I saw him the next morning after the sale, and had a conversation with him after he bought the land. I do not know whether Mr. Barber or Mr. Andrus told Johnson & Whitman that we had pointed out this land to him. I do not know anything about what they said to him, because I was not with them. Mr. Andrus called at our office, and asked for a map so they could designate the places for sale. We marked all the land we had jointly listed, and that we had the right to sell. We excluded the list of Johnson & Whitman and the Payne Investment Company."

We have not attempted to give the testimony in detail. For want of space we have only given the substance of it. At the close of the evidence the plaintiffs moved to strike out this testimony, for the reason that it was not shown that Johnson & Whitman had any knowledge whatever of the alleged transactions, nor is it shown that the alleged transactions were in any sense the moving cause of the sale to Andrus. The motion was sustained, and, as above stated, the verdict was directed.

Paragraph 5 of the written contract between the plaintiffs and the defendant provided: "In case the land is sold by either of the parties hereto, the commissions or profits shall be divided as above, except where second party makes sale without aid of first party, in which case second party shall have all the commission." In the contract the plaintiffs were designated as the second party, and it seems clear that, in order to recover anything on the counterclaim or set-off, the burden of proof was on the defendant to show that it contributed to or aided in procuring the sale of the land in question to Andrus. As

we view the testimony, the defendant failed to make such proof, and therefore the district court did not err in directing a verdict for the plaintiffs.

The judgment of the district court is

AFFIRMED.

REESE, C. J., FAWCETT and SEDGWICK, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

NIMROD W. NORRIS, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED MAY 17, 1913. No. 17,253.

1. **Licenses: OCCUPATION TAX: CONSTITUTIONALITY.** It is not the purpose of the fourteenth amendment to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the federal constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618.

2. ———: ———: ———. The provision of section 1, art. IX of the constitution of this state, authorizing the taxation of persons engaged in certain occupations, in such a manner as the legislature shall direct by general law uniform as to the classes upon which it operates, forbids partiality and favoritism, and makes equality before the law a rule of legislative action. It does not, however, forbid reasonable classification of persons for the purpose of taxation. *Rosenbloom v. State*, 64 Neb. 342.

3. ———: ———: CLASSIFICATION OF OCCUPATIONS: POWER OF MUNICIPALITIES. When a city charter authorizes a municipality to require by ordinance a license tax of persons engaged in any occupation, trade, or business carried on within the corporate limits of the city, the municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that it is unreasonable and arbitrary.

4. ———: ———: CITY ORDINANCE: VALIDITY. The classification of persons lending money upon chattel security in a different class from chartered banks, negotiators of loans on realty, real estate agents, and dealers in bonds and stocks, and the imposition of a tax differing in amount upon such money-lenders from that imposed upon such other classes, is not so wanting in reason that the ordinance providing for such classification will be declared void as being entirely arbitrary.

5. ———: ———: ———: ———. An ordinance providing a fine and imprisonment as a means of enforcing a license tax does not trench upon the constitution of this state. *Rosenbloom v. State*, 64 Neb. 342.

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

Burr, Greene & Greene, for appellant.

Fred C. Foster and *D. H. McClenahan, contra.*

BARNES, J.

This is a suit in equity brought by Nimrod W. Norris, a citizen of the United States, a citizen and taxpayer of this state, and of the city of Lincoln, on behalf of himself, William M. Dennis, the Lincoln Loan Company, and the National Loan Company, other taxpayers similarly situated, against the city of Lincoln to enjoin the collection of an occupation tax of $50 a year on the business or occupation of loaning money on chattel security. A restraining order was granted, but on the trial of the cause the order was vacated, the plaintiff's action was dismissed, and from that judgment he brought the case to this court. After the cause was docketed here the plaintiff departed this life, and William M. Dennis, one of the parties in interest, was allowed to prosecute the appeal.

Many reasons are assigned for a reversal of the judgment of the district court, but only three of them are argued in the brief of the appellant. Assignments of error not mentioned in the plaintiff's brief will be treated as waived, and will not be considered by the court.

There is no dispute about the facts of this case. It appears by the stipulation, found in the bill of exceptions, that by section 9 of the general occupation tax ordinance of the city of Lincoln it was provided as follows: "Any person, firm or corporation engaged in the business of loaning money upon chattel security shall pay an occupation tax of $50 per year." It was further stipulated that the school and sanitary districts, the county of Lancaster, and the state of Nebraska have assessed taxes against the property of the plaintiff proportionately to the taxes assessed against the property of others, in addition to the tax provided for by the general tax ordinance, and the city of Lincoln has not assumed nor attempted in any manner to regulate the business of loaning money upon chattel security otherwise than requiring an occupation tax of those engaged in that business. It is alleged in the plaintiff's petition that the ordinances of the defendant city provide for the collection of the occupation tax in question by a civil suit in any court of competent jurisdiction, and, further, that any person refusing to pay the tax shall be liable to a fine and imprisonment. We find no evidence in the record tending to support the last mentioned allegation. The record contains some evidence, however, tending to support the allegation that the city is threatening to and is about to collect the tax in question.

1. Appellant assails the validity of the ordinance in question as violative of the fourteenth amendment to the federal constitution, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is argued that the business in question is not such as the legislature might prohibit outright, because detrimental to the public interests, or against the public health or public morals, but is lawful in itself. It is further stated that the legislation is not directed against all engaged in the business of loaning money, is not directed against those loaning money for hire, but is directed arbitrarily and without reason against those engaged in the business of

loaning money upon chattel security, without paying the municipal government for the privilege; and a failure to pay the tax is unlawfully made the subject of punishment by a fine or imprisonment. These questions have been ably presented by appellant's counsel, and it may be conceded that there is some conflict in the authorities; but, after an exhaustive review of the judicial decisions in this and other states, we are of opinion that the ordinance in question is sustained by the greater number and better considered cases.

The charter of the defendant city provides, among other things, that the city shall have the power "To raise revenues by levying and collecting a license or occupation tax on any person, partnership, corporation or business within the limits of the city, and regulate the same by ordinance, except as otherwise in this act provided. All such taxes shall be uniform in respect to the class upon which they are imposed; provided, however, that all scientific and literary lectures and entertainments shall be exempt from such taxation, as well as concerts and all other musical entertainments given exclusively by the citizens of the city." Comp. St. 1911, ch. 13, art. I, sec. 129, subd. 14.

City Council of Augusta v. Clark & Co., 124 Ga. 254, was a case where the city imposed an occupation tax upon persons loaning money upon personal property or personal security, placing them in a different class from chartered banks, negotiators of loans on real estate, real estate agents, and dealers in bonds and stocks. It was contended that the ordinance was void for the reasons urged by appellant in the case at bar. It was there said: "When a city charter authorizes a municipality to require by ordinance a license tax of persons engaged in any occupation, trade, or business carried on within the corporate limits of the city, the municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxes in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, un-

less it manifestly appears that the classification is unreasonable and arbitrary." It was further said: "The classification of persons lending money upon personal property or personal security in a different class from chartered banks, negotiators of loans on realty, real estate agents, and dealers in bonds and stocks, and the imposition of a tax differing in amount upon such money-lenders from that imposed upon such other classes, is not so wanting in reason that the ordinance providing for such classification will be declared void as being entirely arbitrary." We find that the rule above stated is supported by *Cowart v. City Council of Greenville,* 67 S. Car. 35, 45 S. E. 122; *State v. Wickenhoefer,* 6 Del. 120; *Bradley & Co. v. City of Richmond,* 110 Va. 521, 66 S. E. 872; *Dewey v. Richardson,* 206 Mass. 430; *Sanning v. City of Cincinnati,* 81 Ohio St. 142.

The supreme court of the United States in *Field v. Barber Asphalt Paving Co.,* 194 U. S. 618, said: "It is not the purpose of the fourteenth amendment, as has been frequently held, to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the federal constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilties imposed." *Kentucky Railroad Tax Cases,* 115 U. S. 321; *Hayes v. State of Missouri,* 120 U. S. 68; *Magoun v. Illinois Trust & Savings Bank,* 170 U. S. 283; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150; *In re Home Discount Co.,* 147 Fed. 538.

Adopting the views expressed by the foregoing authorities, we are of opinion that the ordinance in question is not violative of the fourteenth amendment.

2. It is next contended that the ordinance is violative of the constitution of this state, in that it contravenes section 3, art I of that instrument, which provides: "No person shall be deprived of life, liberty or property without due process of law." This contention seems to have been conclusively answered in *Rosenbloom v. State,*

64 Neb. 342, wherein *State v. Green*, 27 Neb. 64, *Magneau v. City of Fremont*, 30 Neb. 843, and *Templeton v. City of Tekamah*, 32 Neb. 542 (cases cited by counsel for the appellant) are expressly overruled. In that case the court said: "The argument is that the law taxing peddlers trenches in various ways upon the constitution, and is therefore void. It is said in the first place that the object of the legislation is to raise county revenue, and that revenue measures cannot, in this state, be enforced by the infliction of fines or penalties. We agree with counsel in the view that the primary and paramount, if not the only, object of the law is to raise revenue by imposing a tax upon the business of peddling. The only thing the peddler is required to do is to pay his tax, and exhibit the appropriate evidence of payment to any person who may wish to see it. The only thing he is forbidden to do is to pursue his calling without having first paid the tax. No police inspection or supervision is provided for. If the things commanded and forbidden are to be regarded as features of regulation or repression, they are not, to say the least, so pronounced or conspicuous as to suggest the idea that the law is referable to the police power, rather than to the power of taxation. But granting the contention of counsel for defendant that the statute is a revenue measure, pure and simple, we are not able to discover any valid objection to the enforcement of it in the manner provided by the legislature."

In *Village of Dodge v. Guidinger*, 87 Neb. 349, it appears that the trustees of the village, for the purpose of raising revenue, passed an ordinance levying a tax upon the occupation of practicing medicine within the village limits. The validity of this ordinance was challenged; and, upon an appeal to this court, it was said: "The defendant argues that the plaintiff may only license such vocations as it may regulate in the exercise of the police power, and that the practice of medicine is not subject to such regulations. The statute authorizes the imposition of occupation taxes for the purpose of raising revenue.

The taxing power, therefore, is the source of the plaintiff's authority to demand from the defendant the tax in question. The power of the legislature to raise revenue by levying a license tax upon occupations is elaborately discussed and definitely determined in *Rosenbloom v. State*, 64 Neb. 342. See, also, *State v. Boyd*, 63 Neb. 829. The question is no longer an open one in this state. The ordinance imposes a uniform tax upon the occupation of practicing medicine in the village of Dodge. There is no suggestion that the amount is excessive, nor would the record support that contention if made."

In the case at bar the city, by the ordinance complained of, imposed an occupation tax of $50 a year upon any person, firm or corporation engaged in the business of loaning money upon chattel security. It is not claimed by the appellant that this tax is excessive, and it is apparent that it applies equally and without discrimination to all persons, firms or corporations engaged in that particular occupation. Therefore, it is not objectionable on the ground of being class legislation. *Trainor v. Maverick Loan & Trust Co.*, 80 Neb. 626; *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 72 Neb. 518; *Nebraska Telephone Co. v. City of Lincoln*, 82 Neb. 59. Neither is the ordinance vulnerable to the objection that it imposes double taxation. *Mercantile Incorporating Co. v. Junkin*, 85 Neb. 561; *Nebraska Telephone Co. v. City of Lincoln, supra; City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572.

From a consideration of the foregoing authorities, we are of opinion that the demurrer to the plaintiff's evidence was properly sustained, and the trial court did not err in setting aside the temporary restraining order, and dismissing the plaintiff's action. The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., FAWCETT and SEDGWICK, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

WILLIAM H. LANNING ET AL., APPELLANTS, V. CITY OF HASTINGS ET AL., APPELLEES.

FILED MAY 17, 1913. No. 17,818.

1. **Municipal Corporations:** STREET IMPROVEMENTS: PAVEMENT. In a city of the first class having more than 5,000 and less than 25,000 inhabitants, a three-fifths majority of the owners of the foot-frontage abutting on a street in a paving district may determine the material to be used for paving; but, aside from that limitation, all details of construction are left to the city council, and are not made a basis of the consent of the property owners.

2. ———: ———: ASSESSMENT: BOARD OF EQUALIZATION: NOTICE: PUBLICATION. A notice of the time and place of the meeting of the city council as a board of equalization to equalize special assessments to pay for street paving, published in a newspaper of general circulation within the city from the 17th to the 27th of the month, inclusive, is a substantial compliance with the provisions of section 83, art. III, ch. 13, Comp. St. 1911, which provides for giving such a notice.

APPEAL from the district court for Adams county: ERNEST B. PERRY, JUDGE. *Affirmed.*

J. W. James, for appellants.

McCreary & Danley, John M. Ragan, M. A. Hartigan, Don C. Fouts and *Strode & Root, contra.*

BARNES, J.

Action by William H. Lanning and five other resident property owners and taxpayers of the city of Hastings to enjoin the collection of certain paving taxes assessed and levied against their lots abutting on Hastings avenue in that city, and embraced in what is designated as paving district No. 12. A trial in the district court for Adams county resulted in a judgment for the defendants, and the plaintiffs have appealed.

1. Plaintiffs strenuously contend that the paving tax in question should have been declared void, because of a

modification of the contract made by the city council before the paving in question was completed. It is conceded by all of the parties to the action that a proper petition was filed with the city council of the defendant city, who, acting thereon, created a paving district designated as district No. 12, which included the property of the plaintiffs; that the subsequent proceedings relating to the paving of the street called Hastings avenue, up to and including the letting of the contract for that purpose, were regular and valid in all respects. It appears that, when the work was nearly completed, it was interrupted by the inability of the contractor to procure the kind of material theretofore used, and thereupon a petition of the owners of more than three-fifths of the foot-frontage of the lots abutting on the avenue was presented to the city council, asking a modification of the contract, and a substitution of another kind of material of equally good quality. After a hearing on the petition the city council modified the contract to the extent of authorizing the contractor to complete the work by using paving bricks made by a firm of brickmakers carrying on their business in the city of Hastings, instead of another make which had theretofore been used for that purpose.

It is argued that, by the modification in question, the contract was abrogated, and, as a matter of law, was rendered void; that, because of that fact, the collection of the special taxes assessed against the property of the plaintiffs to pay for the paving in question should have been enjoined. It is conceded that brick was the material chosen by the lot-owners, and it appears that the only change or modification of the contract was to substitute another make of the same kind of material for the one that had theretofore been used by the contractor. The record contains no evidence showing, or in any way tending to show, that the material substituted was in any way different or inferior to that which the contractor had been using up to the time of the modification of which complaint is made. It also appears that, by using the substituted material, the

completion of the work was hastened, and there was a slight saving in the cost of construction, which inured to the benefit of all of the lot-owners, including the plaintiffs. No fraud in the transaction was shown, and the contract was substantially performed.

In *Weston v. Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, the city council modified a contract for the construction of a certain sewer in that city. The resolution modifying the contract waived performance, so far as the work done was not in conformity with the plans and specifications, and provided that the work should be completed in conformity with that already done. The work was substantially performed according to the terms of the contract. In an action to recover the contract price, the court said: "The result of our examination of the charter of the city of Syracuse leads us to the conclusion that it does not place any limitations upon the powers of the common council in respect to such acts as the common council undertook to perform by means of the resolution in question. Aside from certain limitations that we need not specify, all details are left to the common council, and not made the basis of the consent of the property owners. The modification attempted, therefore, was within the power of the common council under the ruling of this court in *Meech v. City of Buffalo*, 29 N. Y. 198; *Moore v. City of Albany*, 98 N. Y. 396; and *Voght v. City of Buffalo*, 133 N. Y. 463."

Subdivision 55, sec. 48, art. III, ch. 13, Comp. St. 1911, which constitutes the charter of the city of Hastings, provides: "Whenever the owner of lots or lands abutting upon the streets, or alleys, within any paving district, representing a three-fifths of the feet-frontage thereon, shall petition the council to pave, repave, or macadamize such streets or alleys, it shall be the duty of the mayor and council to pave, repave, or macadamize the same, and in all cases of paving, or repaving or macadamizing, there shall be used such material as a majority of the owners shall determine upon; provided, the council shall be noti-

fied, in writing, by said owner, of such determination within thirty (30) days next after the passage and approval of the ordinance ordering such paving, repaving or macadamizing. In case such owners fail to designate the material they desire used in such paving, repaving, or macadamizing in the manner and within the time above provided, the mayor and council shall determine upon the material to be used."

With the exception of this provision, all details of the work are left to the city council, and are not made the basis of the consent of the property owners. It is true that the property owners petitioned the council to use brick as the material for paving the street in question. The prayer of the petition was granted, and brick was the material which was contracted for and used. By the modification complained of, there was no change of material. That substituted seems to have been equal in all respects to the kind of brick used up to the time the work was interrupted. As above stated, no fraud is alleged or proved in the transaction, but, on the contrary, it was shown that the change was a benefit to the plaintiffs in the way of lessening the cost of the construction. As we view the charter, it was within the power of the city council, when acting in good faith, and for the best interest of the taxpayers, to make the modification in question.

2. After the contract was completed, and the work was examined and accepted by the city council, a notice was given of the time and place of the meeting of the council as a board of equalization to equalize the special assessments, and levy a tax upon the property within the paving district to pay for the paving in question. The plaintiffs contend that this notice was insufficient and void, and did not authorize the board of equalization to make the assessments of which they complain. It is strenuously argued that the notice was not published for the length of time provided by the city charter. It appears that the notice was regular in form, and was published in a newspaper of general circulation in the city of Hastings, the

first publication being on the 17th day of November, 1911, and the last publication on the 27th of that month. The time of the meeting of the board was fixed at 7:30 P. M. of the last day of the published notice.

Section 83, art. III, ch. 13, Comp. St. 1911, provides for the sitting of the council as a board of equalization to equalize all special assessments, upon the giving of notice of any such sitting at least ten days prior thereto by publication in a newspaper having general circulation in the city. The general rule for computing time in such a case is to exclude the first day and include the last day of publication. The first publication of the notice in question was on the 17th day of November, and excluding that day and counting the 18th day of the month as the first publication, and including the last day thereof, it appears that the notice was published for ten days before the meeting of the board of equalization, and there is no merit in this contention.

3. Finally, it is contended that the assessment in question was not made according to benefits, for the reason the assessments were the same throughout the entire length of the paving district. There is no testimony in the record showing, or tending to show, that this course resulted in an improper assessment.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

REESE, C. J., FAWCETT and SEDGWICK, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

EDWIN L. MACRILL, APPELLEE, V. CITY OF HARTINGTON, APPELLANT.

FILED MAY 17, 1913. No. 17,130.

1 **Pleading:** DEMURRER ORE TENUS. Where the objection that the petition does not state a cause of action is made by demurrer *ore tenus* after the commencement of the trial, the allegations of the pleading will be liberally construed, and, if possible, sustained.

2. **Appeal:** OBJECTION TO EVIDENCE. A judgment will not be reversed for error in sustaining an objection to the evidence of a witness upon a point which is otherwise well established by the testimony.

3. **Municipal Corporations:** ACTION FOR PERSONAL INJURIES: ADMISSION OF EVIDENCE. Where, in an action for personal injuries, the evidence shows that the plaintiff's leg was dislocated, and that as a result of the injury his right leg is one inch shorter than the other, and that its movement is attended with pain and difficulty, and that this condition is permanent, it is not prejudicially erroneous to admit the Carlisle table of expectancy in evidence.

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

B. Ready, for appellant.

H. E. Burkett, contra.

LETTON, J.

This is an action to recover for personal injuries sustained by the plaintiff by reason of falling upon a sidewalk in a street of the defendant city. The negligence charged is "that on the 22d day of January, 1910, and for a long time prior thereto, through the carelessness and negligence of defendant, snow and ice had been allowed to accumulate and remain upon the aforesaid sidewalk, and through the carelessness and negligence of the defendant the said accumulation of snow and ice was allowed to remain upon said sidewalk for such a length of

time and to such an extent that the same formed an obstruction and nuisance there, and rendered travel over said sidewalk dangerous and hazardous." It is also alleged that, without any fault on his part, plaintiff slipped and fell on the snow and ice, dislocating his right hip-joint. The defense is a general denial and a plea of contributory negligence.

The plaintiff is a rural mail carrier, about 48 years of age. He testified that, while going from his home to the post office, his usual route was to cross the street to the walk by the public school, there being no walk on the side where he lived; that on the day alleged it was rather warm, and in the evening it started to freeze; that there had been more or less snow on the sidewalk until Christmas, and from that time on up to the day he fell, when it was snow and ice packed; that it was about 6:20 P. M. and dusk when he slipped; that the place where he slipped was just a trifle north of a tree which was about midway of the sidewalk north and south; that the greater portion of the walk north of the tree was covered with ice and snow, and for 12 to 15 feet south of the tree; that a part of the walk was free of ice, but the remainder was covered with snow and ice frozen together, and it was about six inches thick where he fell. On cross-examination he testified that for some time he did not walk upon the sidewalk because there was too much snow on it, and not until the school children made a path; that the ice extended the full width of the walk towards the tree, which stood higher than the walk.

The witness Whitney testified that from probably ten feet south of the tree, and running practically to the northeast corner of the block, there was snow, ice and frozen slush on the walk; that directly east of the tree there were three, four or five inches in depth frozen. On cross-examination he testified that he saw the walk the next evening after plaintiff fell; had not noticed it before; that there was ice and snow up to the school ground but that it was not in the same condition as on the walk, for

the reason that the walk had been traveled on and packed down more.

The janitor of the schoolhouse testified that he thought there was snow and ice on the sidewalk during all of the month of January; would not say it was there all the month; that he could not tell how long it had been on the walk just east of the tree on the day plaintiff fell; that he first noticed snow and ice on the walk about a week before the accident; that he noticed the walk the next morning after it started to thaw, and he thought the ice was not over two inches thick and ran off to one-quarter of an inch, coming from the snow drifts east of the building across the walk.

The witness Davis testified that the ice and snow on the sidewalk on the 22d day of January east of the tree was from two to four inches deep. On cross-examination he said that he was over the walk almost every day during the week before the accident; that the snow was from six to eighteen inches thick and it was deeper in some places than in others; that children stepped in the slush and made tracks, and it had frozen after that.

J. A. Olsen testified that he was on the walk the next evening after the accident; that along the upper edge of the walk nearest the schoolhouse it was two inches thick, and gradually tapered off to the east; that the school grounds were higher than the walk, and water from the melting snow there would run across the walk.

Mr. Stephenson testified that the ice was less than three inches thick where Mr. Macrill fell. On cross-examination he said that there was slush, snow and ice combined and frozen on the walk. There was other testimony practically to the same effect.

Appellant first urges that the court should have sustained defendant's demurrer *ore tenus* to the petition on the ground that the allegations therein as to notice are insufficient. Where no attack is made on the petition until a jury is impaneled, it will be liberally construed. Surprises and traps are not to be favored by the courts. *Chi-*

cago, B. & Q. R. Co. v. Spirk, 51 Neb. 167. We think the allegations, "that on the 22d day of January, 1910, and for a long time prior thereto, * * * snow and ice had been allowed to accumulate and remain" on the walk, and the further allegation that this was permitted "for such a length of time and to such an extent that the same formed an obstruction and nuisance there," were sufficient as against such a demurrer. A motion might have been made to make these allegations as to constructive notice more specific and definite, but this was not done.

It is next urged that the court erred in excluding the testimony of the witness Alvin Olsen that water from the melting snow banks on the school grounds appeared to have run across the walk and caused the slippery and icy condition at the place where plaintiff fell. This witness had already testified there was a snow drift on the school grounds on the east side of the schoolhouse; that the ice was two inches thick on the west side of the walk, and tapered to the east side; and that water had run from the bank. It would have been just as well to allow the witness to answer as to where the water ran, but taking the whole testimony of this witness, together with that of other witnesses for the defendant, it is shown without dispute that there was snow east of the schoolhouse, which had melted, and part of the water therefrom had run across the walk. This fact appears so clearly that we think no prejudicial error occurred by sustaining the objection to the question.

The remaining contentions of plaintiff relate principally to the sufficiency of the evidence to support the verdict. We think the evidence shows that snow and ice, and, when the weather was warm, slush, had been permitted to remain upon the walk, at and near where the plaintiff fell, for at least three weeks before the time of the accident, and that the fact that water from melting snow flowed to and across the sidewalk, at a point where snow or ice had been permitted to accumulate for some time before, would only add another element to the dan-

gerous condition, and would in nowise relieve the defendant from its duty to use reasonable care to keep its sidewalks in proper condition. The question of whether reasonable care had been used was left to the jury. That body thought the evidence was sufficient, and we think its conclusion is justified.

The complaint that it was error to admit the Carlisle table in evidence, we think, is also without merit. The evidence shows that the plaintiff's right leg is one inch shorter than the other; that its movement is attended with difficulty and some pain, and that this condition is permanent. Complaint is also made of several instructions of the court. Taking the whole charge together, including the instructions given at the request of defendant, and applying it to the evidence, we are convinced that the defendant was in nowise prejudiced. The case seems to have been carefully and impartially tried.

Having reached these conclusions, the judgment of the district court must be, and is,

AFFIRMED.

REESE, C. J., BARNES and SEDGWICK, JJ., concur.

ROSE, FAWCETT and HAMER, JJ., not sitting.

KATZ-CRAIG CONTRACTING COMPANY, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED MAY 17, 1913. No. 17,156.

Carriers: FREIGHT RATES: ACTION FOR OVERCHARGE. Section 5, ch. 90, laws 1907, made it the duty of all common carriers to file with the state railway commission, within 30 days after the act took effect, "all freight and passenger schedules, classifications, rates, tariffs and charges used by said common carriers and in effect on January 1st, 1907." Subdivision c, sec. 15, of the act prohibits changes being made in "any rate, schedule or classification until

application has been made to the railway commission and permission had for that purpose." In this case it appears that the rate actually charged and received for the transportation of crushed stone from Omaha to Florence for several years was $5 a car-load, which is a just and remunerative rate, while the published schedule rate was 2 cents per cwt., which the railway commision held to be excessive and discriminatory. There is no evidence of a change in either the published or the actual rate before January 1, 1907, or by the railway commission before the freight was shipped. The plaintiff was charged at the higher rate. *Held*, That the actual rate used and in effect on and prior to January 1, 1907, was the rate which should have been charged, and that the shipper is entitled to recover the overcharge.

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

Carl C. Wright, B. H. Dunham, A. A. McLaughlin and *McGilton, Gaines & Smith,* for appellant.

Charles S. Elgutter, contra.

LETTON, J.

Action to recover overcharge for shipment of freight. Plaintiff recovered, and defendant appeals.

The petition alleges that the plaintiff is an engineering and contracting company. Between May 1, 1907, and June 1, 1909, plaintiff shipped 462 car-loads of crushed stone from Omaha to Florence over defendant's railroad for use in the construction of macadam roads. For five years prior to January 1, 1907, the defendant published, and charged and collected a freight rate from Omaha to Florence of $5 a car-load on coal, ice, crushed stone, and like commodities, and this rate was continued and such freight carried thereunder until March 15, 1907, when it arbitrarily, and without notice to plaintiff, raised the rate on crushed rock, stone and sand to the rate of 2 cents per cwt., at the same time maintaining the rate of $5 a car-load on coal and ice between the same points. Plaintiff was compelled, in order to fulfil its contracts, to ship the rock over defendant's railway, it being the only rail-

road between these points, and to pay the sum of $7,120 as freight at the rate of 2 cents per cwt. It is alleged that the rate of 2 cents per cwt. is unreasonable and extortionate, and that a reasonable and lawful rate is the sum of 1 cent per cwt. for such service. It is also alleged that on June 23, 1908, plaintiff filed a complaint with the Nebraska State Railway Commission complaining against the excessive rates, and praying for the naming of a reasonable rate; that a hearing was had and evidence taken, and on June 2, 1909, an opinion was filed and an order made by the commission finding that the rate charged was excessive, unreasonable, and discriminatory, and that the rate of 1 cent per cwt., or a minimum rate of $5 a car, is a reasonable rate, and that since this order was made the rate of 1 cent per cwt. has been in force. The prayer is to recover the $3,560 overcharge, with interest.

In the answer the defendant admits that prior to January 1, 1907, certain commodity rates had been annually fixed for the movement of car-loads of coal, ice, crushed rock, sand and the like, at a rate of $5 a car-load, and that up to said date of January 1, 1907, various commodities had been hauled between Omaha and Florence at said rate, but denies that said tariff was ever a part of the published tariff of defendant railroad; alleges that this rate expired on December 31, 1906; that the published tariffs in effect on January 1, 1907, provided for a rate of 2 cents per cwt. for crushed rock, and that if any charge for less than that amount was collected after January 1, 1907, the same was collected in error; denies that the rate was unreasonable, extortionate or discriminatory; pleads that the rate had been duly filed with and approved by the Nebraska State Railway Commission, and thereby became the only lawful and legal rate which defendant was required under a heavy penalty to collect. It also admits the proceedings before the railway commission and its order reducing the rate. A reply was filed denying the affirmative matter in the answer.

Omitting objections and exceptions, the record shows

that at the trial it was stipulated that $7,120 was paid for the shipments at the rate of 2 cents per cwt. according to the tariff of the defendant and the amendments thereto issued February 18, 1907, which took effect March 26, 1907, and was filed with the Nebraska State Railway Commission April 27, 1907. That said rates remained in effect according to the published tariffs of the defendant company until modified by the order of the Nebraska State Railway Commission, as set forth in plaintiff's petition. The pleadings and the opinion and judgment in the case before the railway commission were then received in evidence, over defendant's objections, and the plaintiff rested.

Defendant then called Lyman Sholes, who testified as follows: "Q. Mr. Sholes, under what class in the classification in force during 1907 and 1908 did crushed stone move? A. Class E. Q. Now, Mr. Sholes, do you know whether on January 1st, 1907, the same rate on Class E stuff from Omaha to Florence was in force and shown by the published tariffs that was shown in the published tariff which is mentioned in the stipulation agreed to here, which is issued February 18th, 1907? A. The rates were the same. Q. Do you know? A. Yes, sir. Q. Now, then, what is the fact as to whether the rates on January 1st, 1907, as shown by the tariffs, was the same as the rate on crushed stone from Omaha to Florence as shown in the tariff issued February 18th, 1907, and referred to in the stipulation introduced by the plaintiff? A. There was no change in the rate. The tariffs were both identical. Q. I will ask you whether exhibit 5 is the same tariff of the defendant company issued February 18th, 1907, to which reference was made in the stipulation? A. Yes, sir. Q. Now, examine exhibit 6. Is that the tariff which was in force on the defendant road, in relation to these rates in question, on January 1st, 1907? A. Yes, sir."

So much of the tariff as refers to the rate on Class E from Omaha to Florence, in exhibit 5, was read into the record. Under the column headed: "Between Omaha,

Nebraska, and also Council Bluffs and Missouri Valley, Iowa, as per note below," and "Florence," and, under that heading the word "Florence," and, under the heading "car-loads," and "Class E," the rate "2 cents per cwt." From exhibit 6 was read into the record, under the heading "Between Omaha, Nebraska, and Florence, * * * Car-load rates under Class E, 2 cents per hundred pounds." Both parties then rested. Aside from the admissions in the respective answers of the defendant, this is all the evidence in the case.

In its answer before the railway commission, the defendant admits that, prior to January 1, 1907, its charges for transporting sand and stone from Omaha to Florence was the sum of $5 a car, when cars were not loaded in excess of their marked capacity, and further admits that, during the year 1907, it transported for said complainants between said points several cars of soft coal, and charged and collected the rate of $5 a car.

A portion of defendant's argument, as set forth in its brief, is based upon the provisions of the act of 1907, known as the "Aldrich Act," which applies only to the transportation of certain specified classes of freight. At the time of the collection of the freight, defendant took the position that crushed stone was not "building material," and therefore did not come within the provisions of that act, and for that reason collected what it claimed to be the full tariff rate, and not 85 per cent. thereof. At the oral argument it still took this ground. For the purposes of this case, and without examining into what perhaps may be a debatable question, we are willing to take the appellant at its word. It cannot, therefore, claim immunity under any of the provisions of that act.

Defendant relies upon the proposition that the railway commission act made it the duty of the company to file with the railway commission all schedules in effect on January 1, 1907, under a severe penalty for failure to do so, and that the carrier was prohibited from charging less than the schedule rates, and from changing any rate,

schedule or classification; that the rate, according to the published schedules of January 1, 1907, was 2 cents per cwt. on crushed stone, and that this was the legal rate which remained in force until altered by the order of the commission.

On the other hand, plaintiff insists that the actual rate in effect on January 1, 1907, was $5 a car-load; that this rate had been in effect for years before, and was collected and charged afterwards; that it was never legally changed; and that the higher rate was illegally charged and collected from the plaintiff until the railway commission act restored the former rate, after finding the changed rate to be, as plaintiff alleges it is, unreasonable, extortionate and discriminatory.

By section 5, art. VIII, ch. 72, Comp. St. 1911 (laws 1907, ch. 90), commonly known as the "Railway Commission Act," it was made the duty of all common carriers within the state to file with the state railway commission, within 30 days after the act took effect (which was on March 27, 1907), "all freight and passenger schedules, classifications, rates, tariffs and charges used by said common carriers and in effect on January 1st, 1907," under a severe penalty for a failure to do so. This section further provides that the railway commission shall fix, as soon as practicable thereafter, a schedule and classification of rates and charges for the transportation of freights upon a notice to the carrier and a hearing, and that the rates thus fixed "are *prima facie* just and reasonable." It also provides for the filing of complaints against the rates thus fixed, for a hearing thereon and for a decision by the commission, and for appeal to the supreme court, and that a decision made by the commission upon any complaint, which changes or modifies any schedule of rates, shall also be *prima facie* evidence that the rates fixed thereby are just and reasonable. By subdivision *a*, sec. 14, unjust discriminations are prohibited under penalties, and it is provided that if any railroad company "subjects any particular description of traffic to any undue or unreasonable

prejudice, delay or disadvantage in any respect whatsoever, the same shall constitute an unjust discrimination, which is hereby prohibited." By subdivision *c*, sec. 15: "It is hereby declared to be unlawful for any railway company or common carrier to change any rate, schedule or classification until application has been made to the railway commission and permission had for that purpose." At the time the freight was consigned, no action had been taken by the railway commission fixing the proper rates, as the statute directs, nor had any change in the January 1, 1907, rate been authorized by that body.

While a number of other questions are raised, the determination of this case rests mainly upon the question whether the rate to which the statute refers, which the carrier and its agents are forbidden to change, is the rate which was "used" and "in effect" on January 1, 1907, and which had been charged and collected for years, or whether it was the rate named in the printed schedule rate under Class E. Defendant admits that prior to January 1, 1907, the charges for transporting crushed stone was $5 a car-load. It has not established the fact by any competent testimony that this rate of $5 a car-load expired by limitation on December 31, 1906, or that the rate was ever changed upon crushed stone before the freight at the rate of 2 cents per cwt. was collected from the plaintiff. In the absence of any evidence that the $5 rate was changed on or before January 1, 1907, the presumption of continuance applies. It is true that the printed schedules fixed the rate under classification E at 2 cents per cwt. both before and after January 1, 1907, but for years prior to that date the actual rate charged and collected had been $5 a car, while the printed rate was 2 cents per cwt. The statute does not apply alone to schedules. The railway company is required to file all "schedules, classifications, *rates,* tariffs *and charges used* * * * *and in effect* on January 1st, 1907," and by subdivision *c*, sec. 15, it is declared unlawful to change "any *rate,* schedule or classification until application has been

made to the railway commission and permission had for that purpose."

In *State v. Pacific Express Co.*, 80 Neb. 823, 837, it is said, speaking of the act relating to express companies, the language of which is much more restricted than that of this act, in that such companies are prohibited from charging more than a certain proportion "of the rate as shown by the schedule," while this act prohibits a charge in excess of "the rates used * * * and in effect": "It cannot be reasonably contended that it was the intention of the legislature that the rates set forth in the written schedule filed should be taken as the basis, or as anything more than evidence of the rate which was actually charged on January 1. If, by mistake, the schedule filed showed a rate other than that actually charged, it would be unreasonable to say that a rate 'as shown by the schedule' should be taken as the basis, as a narrow and literal reading of the act would require, and not the rate which was actually charged and in force on the 1st day of January, 1907." It could never have been the intention of the legislature that, where a paper rate was in existence which had not been used for years, while at the same time an actual rate was in force, which was properly remunerative, the discriminatory and excessive paper or schedule rate should be made the legal rate, and not the rate which was actually being charged, and which was reasonable and just.

Moreover, while the defendant has pleaded that the rate of 2 cents per cwt. was approved by the railway commission, there is absolutely no proof of this allegation. On the contrary, the direct proof is that, as soon as the matter was called to the attention of that body, it found that "the present rates charged and collected by the defendant company are, under the facts above set forth, unreasonable, excessive and discriminatory," and it further found that the rate of 1 cent a hundred pounds or $5 a car-load was a reasonable rate for such transportation. Defendant has offered no proof that the rate of 1 cent per cwt. is

not sufficiently remunerative, or that the rate of 2 cents per cwt. is not unjust and discriminatory. It seems clear that there is no substantial difference in the transportation of brick, sand, crushed rock, coal or ice. The opinion of the railway commission is clear, positive and emphatic upon this point, and the action of the railway company itself for a series of years inevitably leads to this conclusion. The evidence satisfies us that the commodity rate which was fixed by the defendant, which had been in effect so many years, which there is no evidence to show was changed on or before January 1, 1907, and which was afterwards found by the railway commission to be the just and reasonable rate, is the rate which should have been charged, and was the legal rate at the time the money was collected from plaintiff.

The judgment of the district court is

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

MARTHA M. BROOKS, APPELLANT, V. AARON KAUFFMAN, APPELLEE.

FILED MAY 17, 1913. No. 17,171.

Negligence: ACTION FOR PERSONAL INJURIES: EVIDENCE. Unless the evidence shows that, within the owner's knowledge, a team of horses, or one of the horses composing the team, is of such a propensity or disposition that it may reasonably be foreseen or expected that a runaway will occur when the team is driven in a careful manner upon the public highway, the owner is not liable for damages to others occurring by the team running away without his fault.

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

H. D. Rhea, for appellant.

E. A. Cook, contra.

LETTON, J.

This is an action to recover for personal injuries suffered by plaintiff, which, she alleges, occurred by reason of the vehicle in which she was riding upon a public highway being struck by a runaway team belonging to defendant, and on account of his negligent and careless manner of driving. It is charged that the team which defendant was driving was spirited, fractious, vicious, uncontrollable and unmanageable, and had run away several times. At the conclusion of plaintiff's evidence, defendant moved for an instructed verdict, which motion was sustained. From a judgment of dismissal, plaintiff appeals.

The evidence shows that the defendant was driving his team at a walk along the public highway; that the plaintiff's team and a number of other teams were traveling in the same direction; that shortly before the accident a team went by that of defendant, and that almost immediately afterwards the plaintiff drove her team past him at a trot; that shortly afterwards her vehicle was run into by the defendant's team, and she was thrown out, and suffered injuries, of which she complains. The only evidence in the case as to the vicious, uncontrollable and runaway character of defendant's team is that of two witnesses, one of whom was the plaintiff's husband. He testified that the defendant was driving a bay horse, about 15 years old, and a black mare, about 9 years old; that at one time, when the bay horse was about 3 years old, it came to his place with a harness on it, and that Mr. Kauffman came after it, and said that it had run away; there was no other horse with it. He also testified that about 7 years ago he saw the same bay horse run away while Kauffman was in the field husking corn; that it was then hitched up with a black, but not with the black that was with it on the day of the accident; that he had never seen that horse run away. Mr. Miller testified that some time ago, he thinks about two years, the bay horse ran away in a corn field, while Mr. Kauffman was husking corn, and

went home; that he saw another one of Kauffman's teams with a bay horse and a black one run away in a corn field with a cultivator about 3 years ago, but upon cross-examination he said this was the same black, but a different bay, horse.

We think this proof is entirely insufficient to establish the fact that the team or the bay horse was of such a disposition as to render it negligence on the part of defendant to drive the team upon the highway. The burden of proof is upon the plaintiff to show that the defendant was guilty of negligence, either by driving in a careless and negligent manner, or using a team which to his knowledge was, from its vicious or spirited disposition, unsafe to drive upon the public roads. There is no proof that the horses had ever shown a vicious or dangerous disposition, or that they had ever run away when hitched to a wagon or buggy, or on the highway. The mere facts that more than 7 years before one of the horses had run away in a corn field, and that he had escaped or gotten away from his owner when a mere colt and gone to another farm, fails to show that his owner was negligent in driving him in a careful manner upon the road. Of course, if the allegations of the petition had been proved, a different question would be presented and a recovery would be possible; but, as the evidence stood, no case was made on this point.

It is also complained that there was evidence that, if the defendant had been driving carefully, he might have driven his team into an irrigation ditch, instead of across the bridge, and thus have avoided striking the plaintiff's vehicle. The evidence shows that it was a very cold day, the road was rough and frozen, two teams driving at a trot, one with a noisy, rattling farm wagon, had just passed defendant's team, which was being driven at a walk; that the team was within a short distance of the bridge when it started to run, and that just about the time it reached the bridge defendant was thrown out of the wagon. Under these circumstances, there could have been no time for him to balance probabilities in his mind,

and to determine whether to essay the passage of the bridge or take the risk of trying to drive down into the ditch. The evidence, therefore, fails to show actionable negligence upon this ground also.

There can be no dispute but that the law is in accordance with the contention of plaintiff. It is therefore, unnecessary to consider the authorities cited. The only thing to prevent recovery in this case is the lack of evidence.

We think the district court properly directed a verdict for the defendant. Its judgment is therefore

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

NEWTON E. BLUNT, APPELLANT, V. NATIONAL FIDELITY & CASUALTY COMPANY, APPELLEE.

FILED MAY 17, 1913. No. 17,178.

1. **Insurance:** ACTION: NOTICE. Proof of the delivery of a written notice of the commencement of sickness to an agent of a health insurance company, and of its having been sent by him to the home office of the company and there received within the time limit, is a sufficient compliance with a provision of a policy requiring such notice to "be mailed to the secretary of the company."

2 ———: ———: REPORTS OF PHYSICIAN: PROOF. Requirements in a policy of health insurance that, "if the insured is disabled by injury or illness for more than 30 days, he or his representative shall, as a condition precedent to recovery hereunder, furnish the company, every 30 days, with a report in writing from his attending physician or surgeon, fully stating the condition of the insured and the probable duration of disability," and that "affirmative proof, verified by physician, must be filed with the company at Omaha, Nebraska, within one month from date of death, or loss of limb or sight, or termination of disability, otherwise all claims

hereunder shall be forfeited to the company," are not unreasonable. Such proofs, unless waived by the insurer, or unless it is estopped by reason of facts in evidence from insisting upon their being furnished, are essential to recovery in a suit on the policy.

3 ———: ———: EVIDENCE: DIRECTING VERDICT. Evidence examined, and *held* to be so defective as to justify the district court in directing a verdict for the defendant.

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

George W. Berge, for appellant.

A. A. Heacock; E. C. Strode and *M. V. Beghtol, contra.*

LETTON, J.

Plaintiff sued to recover $90 which he alleged was due him under a policy of health insurance issued by the defendant company for two months' disability by sickness from October 20, 1909, on the basis of $45 a month. He alleges defendant was duly notified of plaintiff's illness as the policy provides. Defendant by its answer admits the existence of the contract, and pleads the failure of plaintiff to comply with the provisions of the policy with respect to notice and proofs. The policy requires that written notice of the commencement of sickness "must be mailed to the secretary of the company at Omaha, Nebraska, and failure to give such written notice within ten days after the date of such injury, or commencement of illness, shall invalidate any and all claims under this policy." It also provides that "affirmative proof, verified by physician, must be filed with the company at Omaha, Nebraska, within one month from date of death, or loss of limb or sight, or termination of disability, otherwise all claims hereunder shall be forfeited to the company," and further provides, "if the insured is disabled by injury or illness for more than 30 days, he or his representative shall, as a condition precedent to recovery hereunder, furnish the company, every 30 days, with a report in writ-

ing from his attending physician or surgeon, fully stating the condition of the insured and the probable duration of disability." The evidence shows that in the latter part of October, 1909, plaintiff was attacked by illness. He called a physician, who at first diagnosed the case as la grippe. He also notified one Marstellar, the company's agent at Lincoln, who is vested with power to appoint subagents, solicit new business, make collections, and sign receipts. He received from Mr. Marstellar or from Mr. Bigley, an agent acting under Marstellar, a printed blank furnished by the defendant company for the purpose of giving notice of illness. This was filled out by him and by his attending physician, Dr. Ballard, apparently in conformity with the requirements of the company. It was delivered to Marstellar by the plaintiff, and was forwarded by him to the home office at Omaha. It bears upon its face a stamped imprint, "Received October 29th, 1909, N. F. C. Co., Omaha, Neb." Since written notice on the blank furnished by the company's agent was delivered to him within the time specified, and by him mailed at once to Omaha, no defense can be predicated upon the provisions of the policy requiring written notice in ten days after illness.

As to the requirement of notice of a disability by illness for more than 30 days, the testimony shows that Dr. Ballard made out another notice on November 10 or 15 not upon a blank of the company. Plaintiff testified that after the first report was made he was requested by Marstellar to make out another, which was done, and in the latter report he stated the time he had been sick, that he gave it to Marstellar in his office at Lincoln, and that he also left with Marstellar a notice made out by Dr. Jonas of Omaha; that no request was made for a further report or proof. Bigley testified that he helped plaintiff fill out the first notice, and that he was instructed by Marstellar and Mr. Wolfle, the assistant secretary of the company, to leave proofs of injury and of recovery with Mr. Marstellar, and that Blunt knew this. He also testified that Blunt showed him a second notice. Marstellar testified that

Blunt left the first notice with him, and that he sent it direct to the company at Omaha; that he did not remember that any other notice was given him by Blunt, but that he sent to Omaha whatever was given him. It is neither pleaded nor proved that the requirements of the policy as to final proof of termination of disability were ever complied with. The above sets forth the gist of the testimony with respect to the notice of illness. After the plaintiff rested, the defendant requested a peremptory instruction in its favor, for the reason that there was no testimony with reference to the furnishing of proof of loss, verified by a physician, having been furnished to the company in compliance with the terms of the policy, or that the same was waived by the company. This motion was sustained, the jury were instructed accordingly, and judgment of dismissal entered upon the verdict. Appellant insists that this was error, because sufficient notice was given when the notices were left with Marstellar, and also because before the suit a different reason for the nonpayment of the policy was given by the company in a letter to the insurance deputy, and that, since the nonliability was then placed upon other grounds than insufficiency of notice, this amounted to a waiver of proofs of loss.

There is no competent proof in the record that the two notices necessary to comply with the terms of the policy, other than the preliminary notice, were ever given. It may be that the requisite notices were given, and that they are now in the hands of the defendant. If so, plaintiff is provided by the statute with the means to obtain the evidence, or, if unattainable, to supply the same by secondary proof. The requirements of the policy are not unreasonable, and it is not unjust nor unfair to the policyholder to require that information be communicated to the insurer at stated intervals as to the progress of the disability for which it will later be called upon to indemnify him, and that proof of the time of termination of his disability be furnished, so that the insurer may inquire

into the facts if it so desires. The evidence as to the contents of the papers which plaintiff's testimony shows he handed to Marstellar, even if such evidence were competent, is vague, uncertain and indefinite. Legal proof was presumably within reach, but was not furnished, nor was a foundation laid for secondary proof of the contents of the papers. There is no proof of knowledge of Marstellar of the termination of sickness, or that any knowledge of such fact was communicated to the company.

As to the second point urged by appellant, based upon the letter written to the insurance deputy by the defendant: The letter referred to is as follows: "Omaha, Nebr., Jan. 20, 1910. Mr. C. E. Pierce, Insurance Deputy, Lincoln, Nebraska. Dear Sir: Referring to your communication of the 18th inst., in re Newton E. Blunt, the reason that Mr. Blunt's claim was not allowed was that, according to his own and his doctor's statements, he had no claim against this company. Very truly yours, National Fidelity & Casualty Co. George W. Wolfle, Manager Accident Dept. Received Jan. 22, 1910, Insurance Dept., Lincoln, Nebr." There is no proof that this letter was written at Mr. Blunt's suggestion, or that its contents were at once communicated to him, or that he knew of the general denial of liability until after the time for filing proofs had expired. Of course, under these circumstances no waiver of proofs of loss can be predicated on this letter.

We think none of the authorities cited by appellant are applicable to the facts in this case, save as to the first notice and its delivery, and we agree with his contention in these respects.

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

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

BURT COUNTY, APPELLEE, V. JOHN LEWIS ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,188.

1. **Contracts:** CONSTRUCTION. A contract for the excavation of a ditch, at a certain price per cubic yard of dirt, provided, "when one-fourth of the work provided for in this contract is completed according to the terms hereof, and to the satisfaction of the engineer in charge," the engineer should make an estimate and 75 per cent. of the price fixed per cubic yard should be paid. The ditch was not excavated to the bottom by the contractor, but as the work progressed estimates were made and 75 per cent. of the contract price per yard excavated was paid. *Held*, Under such a provision in the contract, the completion of one-fourth of the work does not mean the actual completion to the bottom of the ditch of one-fourth of its lineal distance without regard to the quantity of dirt removed, but means one-fourth of the work of removing and placing the dirt, as directed by the plans and specifications, and, there being nothing in the contract or bond to forbid, the county had the right to pay as it did.

2. **Principal and Surety:** LIABILITY OF SURETY. Where a party to a contract with a county board makes a written request for an extension of time, and the board grants the extension, making the proceedings a matter of record, and indorsing the extension on a written request, sureties upon the bond of the contractor, which bond provides that any departure from the strict terms of the contract "which is made under a written agreement of both parties to said contract shall not invalidate this undertaking nor release the sureties," have no cause for complaint, and are not released.

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

Thomas R. Ashley and *Brome, Ellick & Brome*, for appellants.

James A. Clark, contra.

LETTON, J.

In 1905 the county board of Burt county entered into a contract with defendant Lewis for the excavation of a

drainage ditch. The work was let in four separate contracts, one providing that the portion of the work included therein should be paid for at 9 cents per cubic yard of excavation; the other contracts being alike in all respects, except as to location of the work and price per cubic yard. Defendants Griffin, Byram and Watson became sureties upon the bond given by Lewis to the county for the faithful performance of the work. Lewis began the work of construction, but, being unable to complete it within the time fixed in the contract, requested the county board for an extension of time to January 1, 1906, which was granted. On December 16, 1905, Lewis requested another extension until November 1, 1906, which was also granted. The request of Lewis was made in writing, and the action of the county authorities granting the request is shown by the papers on file in the office of the county clerk and by the record of the proceedings of the board. This extension to November 1, 1906, was the last extension allowed by the county authorities. A formal resolution of the board declaring the contract forfeited was passed on June 23, 1908. Lewis excavated 56,606 cubic yards of dirt under the four contracts, and was paid therefor the sum of $4,405.79. There were still 19,765 cubic yards of earth remaining to be excavated. The county, after having complied with the requirements of the statutes as to advertising, etc., entered into a new contract with another person to finish the work at an increased cost over the contract price. The additional cost and expenses, after applying the money retained under the terms of the contract as found by the district court, was the sum of $794.45. Judgment for this sum was rendered against the principal and sureties upon the bond, and the sureties appeal.

The only errors assigned are that the finding and judgment are contrary to the evidence, not sustained thereby, and contrary to law.

The contract provides that, when a part not less than one-fourth of the portion included in any contract is com-

pleted according to the specifications, he (the engineer) shall give the contractor a certificate thereof showing the proportionate amount which the contractor is entitled to be paid according to the terms of the contract, and the county clerk shall, upon presentation of such certificate, draw his warrant upon the treasurer for 75 per cent. of said amount, and the treasurer will pay the same. The ditch contracted for in the four contracts was over three miles in length. At the time the contract was canceled and the work relet only about 1,100 lineal feet had been fully completed.

The appellants contend that the language of the contract prohibits the payment of any money until one-fourth of the ditch had been wholly completed, and does not mean when one-fourth of the excavation had been made; that, since it costs more to remove the lower strata of dirt from the excavation than the top layers, the county had no right to pay full price for the dirt excavated from the top. The evidence shows that it is more costly to remove the lower portion of the excavation than the upper with the appliances that this contractor was using, but it is also shown that by using a dredge the cost of the entire excavation would be about the same without reference to the depth; that the use of a dredge was practicable, and that one was used in finishing the work. Even if it were true that it cost more to remove the lower strata than the upper, since the contract makes no distinction as to price in this respect, the estimate by yardage without reference to depth could not be a breach thereof, and the sureties cannot complain. The "work" mentioned in the contract is evidently the work of excavation. The whole work to be done was of this nature, and it seems to have been quite uniform in character. Any other interpretation of the meaning of the contract might lead to a result more detrimental to the sureties than the one adopted. If lineal distance of the completed ditch were to be taken as the test, the money might be payable when but a comparatively insignificant portion of the whole excavation had

been made. Under this theory the Panama canal might be said to be one-fourth completed when the level lands were excavated and while the shovels had barely scratched the surface of the Culebra hills. We think the estimate was properly made.

Appellants also contend there was a material variation in the contract, because it was extended without their knowledge or consent. The statute allows extensions to be made by agreement not to exceed two years. The bond itself provides that any departure from the strict terms of the contract made under a written agreement of the parties shall not release the sureties. The extension was made by a written request and a written consent to the same, hence it was within the terms of the bond. The last extension of the contract expired on November 1, 1906, and the rights and liabilties of the sureties became fixed. The county, therefore, could not increase the liability of the sureties by any interference with the work to their detriment. Nor did it do so. The evidence shows that further work was performed by the contractor, 75 per cent. of which was paid for at the contract price. This was for the direct benefit of the sureties, since the cost per cubic yard of completing the unfinished work under the new contract was in excess of the original price. The cases cited by appellant, *Brennan v. Clark*, 29 Neb. 385, *Gallagher v. St. Patrick's Church*, 45 Neb. 535, and *Bell v. Paul*, 35 Neb. 240, are not strictly in point, since no infringement of or material change in the terms of the contract has been shown, while such was the fact in the cases mentioned.

We find no error in the record. The judgment of the district court is

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

MARSHALL P. MEADOWS, APPELLEE, V. DAVID BRADLEY & COMPANY, APPELLANT.

FILED MAY 17, 1913. No. 17,190.

1. Appeal: INSTRUCTIONS: EXCEPTIONS. Ordinarily a party who fails to call the attention of the trial court to alleged errors in instructions by taking exception at the time of trial is not entitled to a review of the same in this court.
2. Evidence on the part of plaintiff examined, and *held* to support the verdict.

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

Hastings & Ireland, Harl & Tinley and *Grimm & Grimm*, for appellant.

Brown & Venrick, contra.

LETTON, J.

Action to recover damages for breach of contract, and for the reasonable value of labor and material furnished defendant. Plaintiff's petition alleges that defendant agreed to sell him a second-hand threshing outfit; that the outfit was to be made capable of doing as good work as new; that it was to have a new weigher, a new blower, and a new feeder attached; and defendant was to transfer to him a number of threshing contracts for work to be done for certain farmers with the machine. He alleges that the defendant shipped a machine worthless for threshing purposes, and without the new appliances mentioned; that immediately upon its arrival he refused to accept the same until the defective parts were remedied and the machine proved capable of doing good work, and that this was never done. It is also alleged that at the request of defendant he accompanied the threshing outfit to the farms of those with whom the defendant held the contracts, and

furnished labor and materials to aid in the work, amounting in all to $70.80. He prays judgment for damages by loss of profit on the contracts in the sum of $225, and for the amount mentioned for labor and material.

The defendant answered, setting up a general denial, and also pleading that the contract was in writing, and contained a number of conditions and warranties, which provide for the giving of notice of defects to the company by registered mail stating wherein the machinery fails to fill the warranty, and providing special remedies for the purchaser.

The evidence shows that the plaintiff had been negotiating with one Pine, who was selling machines for the defendant, for the purchase of a second-hand machine, and that they went to Council Bluffs together to look at the outfit; that an agreement was made, and the machinery was shipped to plaintiff in care of Pine at Hoag, Nebraska. Pine paid the freight. Plaintiff complained of the condition of the machine as soon as he saw it, and refused to accept it until it was shown that it was capable of doing the work for which it was purchased, and the new parts furnished. It is also shown that the labor and materials sued for were furnished by him at Pine's request after he had refused to accept the machine. Defendant's employees worked with the machine for some time, and the defendant collected the money for the threshing that was done by the machine while plaintiff was helping.

The errors which the trial court are alleged to have committed are not clearly pointed out in the brief, but we understand the argument to be, first, that the court erred in its instructions given upon its own motion; and, second, that the evidence does not support the verdict. The court eliminated any recovery for damages for breach of contract, and submitted only the question as to the reasonable value of plaintiff's services performed under a contract of employment made by defendant through Pine. No exceptions were taken to the charge of the court.

Under the settled rule, appellant cannot now complain

of error therein. We have read the instructions, however, and believe they clearly and fairly stated the issues. It is complained that the evidence did not justify the submission to the jury of the question of whether Pine was the defendant's agent. At the trial defendant took another view of this point. In an instruction given at its request, it stated: "Among the other allegations set forth is the allegation that Pine was the agent of the defendant, and some testimony has been introduced tending to establish that fact. It is for the plaintiff to establish that fact by a preponderance of the evidence," etc. We are of the opinion there was not only "some evidence," but enough evidence to warrant this question being left to the jury to settle.

It is argued that plaintiff did not comply with the conditions and terms set forth in the written order. This is true; but the machine was second-hand, and the contract expressly provides "the above warranties and conditions shall not refer to second-hand engines and machinery," hence he was not required to do so.

The evidence, while conflicting, seems to be sufficient to warrant the verdict, both on the score of the agency of Pine and the work and material furnished, as well as on the point of there being no settlement made between plaintiff and defendant's agent, Noonen, who, it is asserted, settled the account when he took over for defendant the remainder of the machine oil on hand.

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

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

MAY BULGER, APPELLEE, V. LOUIS W. PRENICA ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,193.

1. **Appeal:** REJECTION OF EVIDENCE: HARMLESS ERROR. In this an action upon a saloon-keeper's bond for damages for loss of support by causing the plaintiff's husband to become an habitual drunkard, on cross-examination objection to certain questions with reference to his habits prior to the time of sale of the liquor was sustained. There being other testimony in the record on this point, practically undisputed, *held*, not prejudicial error.

2. **Witnesses:** EXPERT: CROSS-EXAMINATION: REVIEW. By supplemental allegations in the petition, it is charged that plaintiff's husband died, after this action was begun, as a result of the habitual drunkenness caused by the defendants. A medical witness was permitted to testify as an expert to the effect of the excessive use of intoxicants upon the human system, more especially with reference to its tendency to impair vitality and lessen the resistant power to disease. He testified to his personal knowledge of the impaired physical condition of the deceased due to excessive drinking; he having been acquainted with the deceased for years, and having examined him. *Held*, Under the issues, this evidence was properly received.

3. **Estoppel:** PRINCIPAL AND SURETY: LIABILITY OF SURETY: LIQUOR LICENSE. Where a surety company has entered into the bond which is necessary to procure a saloon license, and the principal has received the license and become liable for damages to individuals by reason of the traffic, the surety is estopped to plead that there was no valid ordinance in force at the time the license was issued.

4. **Evidence:** BONDS: CERTIFIED COPIES. A properly authenticated copy of a liquor dealer's bond is sufficient *prima facie* proof of the existence of the bond and of its proper execution. *Gran v. Houston*, 45 Neb. 813.

5 **Appeal:** MOTION FOR NEW TRIAL. An assignment that the verdict is excessive, not made in the motion for a new trial and called to the attention of the trial court, will not be considered in this court.

6. **Intoxicating Liquors:** ACTION: DAMAGES. Persons engaged in selling intoxicating liquors, under licenses obtained pursuant to the laws of this state, are liable in damages for all the legitimate and proximate consequences of their traffic, and, if they have induced

habitual drunkenness in a previously sober and industrious man, they are liable for a consequent thriftless and dissipated career, followed by him, after they have ceased to furnish him with liquors. *Stahnka v. Kreitle*, 66 Neb. 829.

7. ———: "SLOCUMB LAW": CONSTITUTIONALITY. The question as to the constitutionality of chapter 61, laws 1881, known as the "Slocumb Law," has been repeatedly decided by this court, and will not be re-examined.

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

Brome, Ellick & Brome, I. J. Dunn, D. W. Livingston and *Morning & Ledwith*, for appellants.

A. P. Moran and *W. B. Comstock, contra.*

LETTON, J.

This is an action against two saloon-keepers and the sureties upon their respective bonds to recover damages for loss of support and means of subsistence occasioned, as alleged, by reason of Charles Bulger, the plaintiff's husband, having been rendered an habitual drunkard by liquor sold to him by each of the defendant liquor dealers. The answer of the principals amounts to a general denial. The surety companies each admits its qualifications to execute the bonds, and deny generally the allegations of the petition. The Bankers Surety Company also alleged that there was no valid ordinance in force in Nebraska City authorizing the issuance of the liquor license of Prenica. Afterwards the plaintiff was granted leave to amend her petition by attaching supplementary allegations setting forth that on December 19, 1910, Bulger died; that his death was caused and contributed to by the habitual drunkenness caused, and excessive use of intoxicating liquors furnished, by the defendants to him, as alleged in the petition. The reply pleads that the facts with regard to the issuance of the licenses estop the sureties from denying the existence of a valid ordinance. The

jury rendered a verdict for the plaintiff in the sum of $2,750, and from this judgment the defendants have appealed.

The testimony shows that Bulger was a man about 40 years of age, a painter and decorater, and a skilled workman. He had been married, at the time of his death, for about 20 years. There were four children in the family, ranging from 11 to 19 years of age, the oldest being a married woman, who is not a party to the suit. Mrs. Bulger testifies that Mr. Bulger supported the family until the latter part of December, 1907, or the early part of 1908, and that she and the oldest boy have practically supported the family ever since that time; that up to December, 1907, he contributed $8 or $10 a week to the support of the family, paid the bills and the house rent, but that from December, 1907, to his death in December, 1910, he contributed only about $60 to the family support; that his habits as to the use of liquor and neglect of work changed materially after 1907; that prior to that time he would sometimes go five or six months and not touch liquor, but that after that he was drunk most of the time. While attending his mother's funeral, he was taken sick, and died of pneumonia at her home in Missouri in December, 1910. A number of other witnesses, who were familiar with Bulger's habits, also testified. It seems clearly established that, while Bulger was what is usually termed a moderate drinker, and he would occasionally, prior to 1907, indulge in drinking bouts of several days, he would also abstain entirely, sometimes for months; but that from the time mentioned, until October before his death, his habits became steadily worse, and the evidences of habitual intoxication were obvious. Several witnesses testified directly to his procuring liquor from one of the defendants, and other witnesses to facts and circumstances which warranted the jury in believing that he was furnished intoxicants in the saloon of the other liquor dealer. The testimony of some of the witnesses was of such a character that the jury might well have rejected it entirely if other

facts had not furnished corroboration. One witness, at least, seems to have been pretty successfully impeached. But there was sufficient evidence of the sales, if the jury believed the testimony, to support the verdict.

A large number of assignments of error are made. Some appear to be as to matters not prejudicial, which will not be noticed, others may be grouped, since the proper limits of this opinion will not permit of all being spoken of.

1. On cross-examination Mrs. Bulger was asked whether her husband indulged in intoxicating liquors at the time of his marriage. An objection to this question was sustained as immaterial, and this is the first point upon which error is assigned. We think the court was right. There was no dispute but that he was an occasional drinker up to the time when it is charged the defendants caused him to become an habitual drunkard. For nearly 20 years he had supported his family, and they had no cause for complaint on this score until the latter years of his life. The question and answer could throw no new light upon the issues.

2. A question as to Bulger's habits prior to 1907 was excluded, probably as not proper cross-examination, and this is complained of. It was not strictly within the limits of the direct examination. It might have been just as well to allow it to be answered, but, since the record is full of the history of Bulger's habits, its exclusion was not prejudicial.

3. Over the objection of defendant, Dr. Carriker was permitted to tell, as a medical expert, the effect of the excessive use of liquor upon the human system. He testified that he knew and had examined Bulger, and that after 1907 he was always under the influence of liquor. He was then inquired of as to the power of Bulger to resist disease after that time, and testified that his vitality was impaired to an extent that he could not resist disease to any considerable degree, and especially to resist pneumonia. Objections were made that these inquiries had no bearing upon any issue in the case, and sought, with-

out any foundation, to connect the death of Bulger with the use of intoxicating liquors. These objections were all overruled, and defendants excepted. On cross-examination this witness testified, as to his knowledge and acquaintance with Bulger's condition from 1905, that his condition was worse in 1908 than it was in the fall of 1907, and in September, 1908, than it was in May.

Twelve of the assignments of error refer to the evidence of Dr. Carriker and of Mrs. Bulger as to the nature of her husband's illness and the cause of his death; the gist of the complaint being that it was not shown that the furnishing of liquor and the death of Bulger had the relation of cause and effect. A number of cases from this and other courts are cited to establish the proposition that, while it is not essential that the furnishing of the liquor must be the sole, immediate cause of the injury, yet it must have contributed in an appreciable degree. The petition prays damages for loss of means of support. If the deceased was in such a feeble and physically impaired condition, caused by habitual drunkenness induced by the acts of the defendants, that he was unable to resist the inroads of disease, this would be as much a result of the traffic as would be his inability to perform manual labor on account of physical weakness produced by the excessive use of intoxicants. In the latter case, no court would deny the right to recover. *Acken v. Tinglehoff*, 83 Neb. 296; *Selders v. Brothers*, 88 Neb. 61. In this case, the physical condition of the deceased was such that, even if the element of death had not entered into consideration at all, the verdict did no more than respond to the damages prayed. In *Acken v. Tinglehoff, supra*, although the husband was still living, his ability to resist the vicious appetite had been so destroyed, and his physical ability to earn a livelihood so impaired, that the court allowed a recovery on the theory that the man was a wreck, so far as the support of his family was concerned, his usefulness gone, and his wife might as well have been his widow. The habit of excessive drinking and appetite for liquor

created in Bulger was so strong that a few months before his death the deprivation of the stimulant resulted in hallucinations. His condition was such that a verdict for the same amount would not have been held excessive by this court on the evidence produced. Under these circumstances we deem it unnecessary to enter into extended dialectics as to remote and proximate cause, and as to whether the drunkenness or the disease was the causative force or agency in producing the death. Whether the actual death was the result of the disease or not, the condition of Bulger in his latter days was such as to justify the verdict, and, hence, proof of his death could not be prejudicial, even if erroneous, as to which we express no opinion.

4. Instruction No. 12 is attacked because it withdrew from the jury the evidence that had been received as to whether there was a valid ordinance in force at the time the licenses were issued. We are of opinion that, when a surety company has entered into the bond which is necessary to procure a saloon license for its principal, and the principal has received the license and become liable for damages to individuals by reason of the traffic, the surety is estopped to plead that there was no valid ordinance in force at the time the license was issued. If such were the fact, the sureties should have ascertained it before their undertaking put the principal in a position to engage in the traffic and cause the damages complained of.

5. In the same instruction the jury were told that they should consider the bonds as valid and binding for the period covered. In this connection the defendants complain that there was no evidence of the execution of the bonds, and that the instruction was erroneous. The original bonds were not introduced in evidence, but certified copies of the originals on file in the office of the city clerk were offered, and received, over the objection of the sureties that they were incompetent, and no proper foundation laid for their admission. The legislature, by section 15, ch. 61, laws 1881 (Ann. St. 1911, sec. 7165) has made a

properly authenticated copy of the bond evidence of its execution. This is *prima facie* evidence, and is sufficient, in the absence of opposing testimony. The statute merely gives effect to the presumption of regularity, and changes the burden of proof. This the legislature has power to do. *Gran v. Houston*, 45 Neb. 813, 834.

6. The assignment that the verdict of the jury is excessive appears for the first time in the briefs in this court, and does not appear in any of the motions filed by any of the defendants for a new trial. We have repeatedly held that such questions will not be reviewed in this court if they have not been first called to the attention of the trial court, and an adverse ruling made thereon. This assignment, therefore, cannot be considered.

7. Defendants complain that their demurrers on the ground of misjoinder of causes of action should have been sustained, and that defendants, although they answered over, have preserved the point by setting it up in the answer. The petition charged that the damages were caused and contributed to by sales of liquor furnished by these defendants between December 1, 1907, and May 1, 1908. It is said that neither Prenica nor Schneider, nor their sureties, would be liable for sales in Schneider's saloon after May 1, 1908; yet, the petition charged that Bulger became intoxicated in Schneider's saloon in November, 1909. Prenica was not in business after May 1, 1908, nor was the same surety on Schneider's bond after that date. The petition, however, fairly construed, pleads that Prenica and Schneider, by sales between December 1, 1907, and May 1, 1908, caused Bulger to become an habitual drunkard, and that he continued from about December 1, 1907, to drink and become intoxicated, and on the 22d of November, 1909, became drunk in Schneider's saloon. If defendants "induced drunkenness in a previously sober and industrious man, they are liable for a consequent thriftless and dissipated career, followed by him, after they have ceased to furnish him with liquors." *Stahnka v. Kreitle*, 66 Neb. 829.

8. Complaint is made as to the giving of certain instructions, and as to the refusal to give others. The law in such cases is well settled in this state. Taking the charge of the court as a whole, we find it not to be subject to misapprehension, and can find nothing in it of which defendants are entitled to complain.

9. An attack is again made on the constitutionality of the act of 1881, known as the "Slocumb Law." We have repeatedly held that this statute is not unconstitutional, and decline to consider the question again.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

WESTERN UNION TELEGRAPH COMPANY, APPELLANT, V. CITY OF FRANKLIN ET AL., APPELLEES.

FILED MAY 17, 1913. No. 17,205.

1. **Licenses:** OCCUPATION TAX: PENALTY: VALIDITY. The penal provisions of an occupation tax ordinance, which provides for the enforcement and collection of the tax by the imposition of a penalty or fine, are valid and enforceable. *Rosenbloom v. State*, 64 Neb. 342.

2. ———: ———: ———: ENFORCEMENT. Where a city ordinance provides that a refusal or neglect to pay an occupation tax shall render the person or corporation in default liable to a fine, and provides, further, that the suit shall be brought in the name of the state, "and may be commenced by a warrant and arrest of the person or persons against whom the suit is brought, or may be commenced by a common summons," the police court of the city has jurisdiction to render judgment for the fine or penalty, whether the defendant is brought into court by warrant and arrest or by the service of summons.

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

W. C. Dorsey, for appellant.

C. C. Flansburg, L. A. Flansburg and *H. Whitmore, contra.*

LETTON, J.

In 1909 the city of Franklin adopted an ordinance levying an occupation tax of $10 a year upon each telegraph company transacting intrastate business within the limits of the city. Plaintiff refused to pay the tax. The city then brought an action in police court in the name of the state of Nebraska for the city of Franklin, as plaintiff, and against the plaintiff herein, for the recovery of $10 for the tax and for a penalty of $50 for neglect to pay the same. The defendant in that case made a special appearance objecting to the jurisdiction of the police court, which was overruled, and on the same day, after taking testimony, a judgment was rendered as prayed. Defendant attempted to appeal to the district court, but the appeal was dismissed on the motion of the city, on the ground that the appeal was not properly taken. An action against the principal and surety upon the appeal bond was then brought by the city in justice court.

The present action was brought to restrain the maintenance of that action and the enforcement of the judgment, on the ground that it was void for want of jurisdiction, that the city is harassing and annoying defendant with a multiplicity of suits, and that plaintiff has no adequate remedy at law. Issues were made up, the city pleading the validity of all proceedings. A motion for judgment on the pleading made by defendant was sustained and the cause dismissed. Plaintiff appeals.

The principal point argued by the appellant is that the police judge had no jurisdiction to render the judgment complained of, for the reason that his jurisdiction is purely criminal in its nature, the statute providing that he shall have jurisdiction of "offenses against the ordinances of the city." The case of *German-American Fire Ins. Co. v. City of Minden*, 51 Neb. 870, is cited as authority for the proposition that an attempt to fix a criminal penalty for failure to pay an occupation tax is void, and collection can only be made by civil suit. Section 6 of the city ordinance

provides that any person, corporation, etc., who shall refuse or neglect to pay the tax, shall be liable to a fine of not less than $5 nor more than $100, and the court may commit to the county jail or to the city jail any person or persons against whom such fine shall be assessed until the fine shall be paid. It also provides: "Every suit brought under this section shall be in the name of the State of Nebraska, and may be commenced by a warrant and arrest of the person or persons against whom the suit is brought or may be commenced by a common summons." The doctrine of the case relied upon, and of the cases of *State v. Green*, 27 Neb. 64, *Magneau v. City of Fremont*, 30 Neb. 843, and *Templeton v. City of Tekamah*, 32 Neb. 542, upon which the decision in the *Minden* case was based, holding that an occupation tax could not be collected by fine and imprisonment, was reconsidered and overruled in *Rosenbloom v. State*, 64 Neb. 342, in which it was held that the provisions of section 154, ch. 77, art. I, Comp. St. 1901, authorizing fine and imprisonment as a means of enforcing the payment of a tax on occupations, are valid. This case seems to be in line with the weight of authority. *Salt Lake City v. Christensen Co.*, 34 Utah 38, 95 Pac. 523, 17 L. R. A. n. s. 898. The police judge, under the charter, has the power to punish the violation of city ordinances. The ordinance itself provides that the proceedings may be commenced either by warrant and arrest or by common summons. We have held that proceedings before a police judge to recover penalties for violation of city ordinances, which are not violative of the criminal laws of the state, while criminal in form, are of the nature of civil suits. *Peterson v. State*, 79 Neb. 132; *Pulver v. State*, 83 Neb. 446; *Cleaver v. Jenkins*, 84 Neb. 565. It seems clear that the police judge had jurisdiction of the person of the defendant and of the subject matter, and, even if erroneous, his proceedings were not void and the judgment subject to collateral attack.

As to plaintiff's contention that it was denied the right of appeal on account of the court striking the appeal bond

from the files, if there was error in making this ruling, plaintiff had a complete and adequate remedy by appeal to this court. Plaintiff has not stated facts which permit a resort to equity for relief against the maintenance of the suit or the enforcement of the judgment.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

FARMERS & MERCHANTS STATE BANK, APPELLEE, V. JOHN SUTHERLIN, APPELLANT.

FILED MAY 17, 1913. No. 17,211.

1 **Chattel Mortgages: DESCRIPTION OF PROPERTY.** A description in a chattel mortgage which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficiently definite.

2. ———: **RECORDING: REMOVAL OF PROPERTY.** Where a mortgagor removes property from another state into this state, without the consent of the mortgagee, which has been incumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage, nor necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

A. D. McCandless, for appellant.

E. N. Kauffmann, contra.

LETTON, J.

This is an action in replevin to recover possession of a horse. Plaintiff had judgment, and defendant appeals.

The case was tried on an agreed statement of facts, which shows that on the 11th day of October, 1909, M. M. O'Leary and I. F. Reed executed and delivered to the plaintiff at its bank in Greenleaf, Kansas, a mortgage note for the sum of $375, due in one year from that date, and pledged as security for the debt: "One span of bay geldings, 7 and 8 years of age, weight about 2,500 lbs., named 'Charlie and John.' One 1½ work harness. One 3¼ lumber wagon. All property this day bought of Guy Scott." The mortgage was filed for record on the 12th day of October, 1909, in the office of the register of deeds of Washington county, Kansas, and duly recorded in book 31 of chattel mortgage records of said county, as required by the laws of Kansas. The mortgage was never at any time filed or recorded in Gage county, nor in any other county in Nebraska. About May 1, 1910, O'Leary being then in Wymore, Nebraska, and having one of the horses in his possession, sold the same to the defendant, John Sutherlin. Sutherlin had no actual notice of the fact that the horse was mortgaged, and acted in good faith. It is admitted that the debt secured by the note had not been paid at the time this suit was commenced, and that the horse was taken from Washington county, Kansas, without the consent of the mortgagee.

Appellant contends, first, that the mortgage is void for uncertainty in the description; second, that the filing or recording of a chattel mortgage in Kansas is not constructive notice to a subsequent purchaser in good faith in Nebraska.

1. The rule adopted in Kansas as to the sufficiency of a description in a chattel mortgage is that "a description which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficient." *Mills v. Kansas Lumber Co.*, 26 Kan. 574. *Griffiths v. Wheeler & Barber*, 31 Kan. 17; *Inter-State Galloway Cattle Co. v. McLain*, 42 Kan. 680. The mortgage, therefore, was not void as indefinite in that state. The rule in Nebraska is identical. *Rawlins v. Kennard & Son*,

26 Neb. 181; *Union State Bank v. Hutton,* 61 Neb. 571. We conclude, therefore, that the description is sufficiently definite.

2. The most important point is whether the mortgage is valid in this state against an innocent purchaser of the property from the mortgagor, the mortgage not having been filed in the office of the county clerk in any county in this state. This seems to be a new question in this court. The general rule, as stated in Jones, Chattel Mortgages (5th ed.) sec. 299, is as follows: "The law of the place of contract, when this is also the place where the property is, governs as to the nature, validity, construction, and effect of a mortgage, which will be enforced in another state as a matter of comity, although not executed or recorded according to the requirement of the law of the latter state." In support of this general principle, cases are cited from Alabama, Arkansas, Connecticut, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Utah and Wyoming.

A different rule prevails in those states which have not substituted the filing or recording of chattel mortgages for the delivery of possession of the property pledged, as is required at common law, and also in such states as require by statute the refiling or re-recording of mortgages on property brought from other states. Jones, Chattel Mortgages (5th ed.), sec. 300.

In *Corbett v. Littlefield,* 84 Mich. 30, the supreme court of Michigan refused to enforce a chattel mortgage given in Nebraska, and duly filed in this state, from one citizen of this state to another on property within the state which was taken to Michigan without the consent of the mortgagee. This holding is an exception to the general rules of comity prevailing between the states, and is in conflict with that of the majority of courts in this country.

This court has heretofore held, on the authority of *Snyder v. Yates,* 112 Tenn. 309, 64 L. R. A. 353, that a chattel mortgage duly recorded in one state will not, under

the doctrine of comity, be given priority by the courts of another state to which the chattels are removed, with the consent of the mortgagee, over local attaching creditors who had no actual notice of the mortgage. *Pennington County Bank v. Bauman*, 87 Neb. 25. The decision in the latter case seems to have been mainly based upon another ground. In any event, it would seem that there is a distinction between a case where a mortgagee voluntarily permits the mortgagor to remove the same into another state, there to become subject to the laws of that state, and a case where the property is moved without his consent and regardless of the rights secured to him by the mortgage. In the one case, he is willing to place his security in a position where his rights may come in conflict with those of the citizens of the state to which the property is removed, and he has no right to complain if the courts of that state hold that he has waived his right of priority by failing to take possession, and that his claims are subsequent to that of its own citizens. In the other case, his property has been taken away in despite of him and without his consent, and he must rely upon the comity of the state to which it has been taken to enforce the validity of the contract and protect his rights.

The states of Kansas and Nebraska are divided by an imaginary line over 300 miles long. So far as commercial transactions of the border counties are concerned they practically constitute one commonwealth. We believe that considerations of comity and of the value of active commercial intercourse require the enforcement of the rights of the mortgagee, even as we would enforce the rights of a citizen of this state, holding a duly filed chattel mortgage, against a purchaser of property living in a county of this state hundreds of miles removed from the place of contract, and without actual notice of the existence of the mortgage.

In *Handley v. Harris*, 48 Kan. 606, the facts were that certain personal property was mortgaged in Nebraska, the mortgage duly filed and recorded here, and the property

taken to Kansas by the mortgagor, and there sold and delivered by him to a purchaser without notice. The mortgagee brought replevin and prevailed, the court holding that, "where a mortgagor removes property from another state into this state, which has been incumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage, nor necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property. The constructive notice imparted by the recording of such mortgage, by the law of comity between the different states, is not confined to the county or state where the mortgage was executed and the property then was, but covers the property wherever it is removed." This case was followed in *Ord Nat. Bank v. Massey,* 48 Kan. 762, in which another Nebraska mortgage was held to be valid in Kansas, without refiling.

The principles of comity should apply equally well both north and south of the Kansas-Nebraska line, and, since our sister commonwealth has accorded to our citizens the right to follow property upon which they hold a lien, it would be but a poor return if we failed to accord the same right to the citizens of Kansas. We prefer not to adopt the views expressed by the Michigan court, and to hold that the buyer only obtained the rights of the seller subject to the mortgage lien.

The judgment of the district court is

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

CHARLES W. EDWARDS ET AL., APPELLEES, V. EDWARD A. HATFIELD ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,026.

1. **Partnership**: TRANSFER OF STOCK TO TRUSTEES: ACTION FOR CONVERSION. Where partners engaged in mercantile business transfer their stock to a committee of their creditors under a contract authorizing the committee to conduct the business, and requiring a return of the remainder of the property whenever all claims are paid in full, the members of the committee are trustees for both creditors and partners, and the latter alone, before the claims have been paid in full, cannot maintain an action at law against the members of the committee for the conversion of stock sold by them in bulk in violation of their duties as trustees.

2. ———: ———: ———. In an action by partners for the conversion of partnership property, there can be no recovery by individual partners to the exclusion of others.

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

John L. Webster, Francis A. Brogan and *William Mitchell,* for appellants.

Wilcox, Halligan & Mothersead and *F. A. Wright, contra.*

ROSE, J.

This is an action to recover $27,700 for the conversion of partnership property consisting of merchandise, book accounts, bills receivable and the good-will of a mercantile business. From the judgment on a verdict in favor of plaintiffs for $6,000, defendants have appealed.

For the purposes of review, the consideration of one question only is necessary. Are plaintiffs entitled to relief in an action at law for conversion? Plaintiffs, Charles W. Edwards, Edgar North and Jess B. Edwards, were conducting a hardware and implement business at Minatare, January 29, 1908, as partners under the firm name

of North & Company. They were then unable to meet their obligations, and so notified their creditors, giving their liabilities as $11,733.83 and their assets as $17,549.44, and asking time for adjustment. A creditors' committee, composed of Edward A. Hatfield, C. A. Newberry and C. O. Aspinwall, met plaintiffs at Minatare, February 12, 1908. As a result, the partnership property and the real estate of individual members of the firm were transferred to the creditors' committee by a bill of sale, containing, among other provisions, the following:

"North & Company are entirely solvent, but on account of their inability to collect their accounts due them and realize upon their assets, by reason of the slow sale thereof, they are unable, at the present time, to promptly liquidate their indebtedness, and have requested their said creditors to postpone the maturity of their indebtedness until the 1st day of November, 1908.

"This assignment is made for the purpose of enabling the said creditors' committee, upon obtaining the consent of the creditors to such postponement of the maturity of their claims, to cause the said assets to be sold, and the business to be conducted and the proceeds to be applied, from time to time, to the payment of the said indebtedness *pro rata* in proportion to the amounts thereof.

"Immediately after the execution and delivery of this assignment, the said North & Company and the said creditors' committee shall together take an inventory of all the assets hereby transferred, and make an estimate of the present value thereof, and thereupon the said committee shall authorize the said Jess B. Edwards and Edgar North as their agents to proceed to sell the said merchandise at retail, and to collect the said notes and accounts, and remit the proceeds of all sales and collections to the chairman of the said committee.

"The said committee shall be authorized to make such purchases only as may be absolutely necessary to keep the said stock in a condition to carry on the business, and shall also be authorized to meet the necessary expenses

thereof. All other funds realized by them from sales and collections shall be distributed ratably among all the creditors in proportion to the amounts of their claims.

"Whenever the claims of all the creditors of the said firm of North & Company have been fully paid and satisfied, and all expenses incurred in this liquidation shall have been fully paid, any balance of property or money remaining in the hands of the committee shall be returned to the said North & Company, their successors and assigns."

To this arrangement all of the creditors agreed. The creditors' committee, with plaintiffs Edgar North and Jess B. Edwards in charge, conducted the business until March 3, 1908, when the following paper was executed:

"Know all men by these presents: That we, the undersigned, North & Company, do hereby authorize E. A. Hatfield, C. O. Aspinwall and C. A. Newberry, of the creditors' committee holding the stock of goods of North & Company under the bill of sale of February 12, 1908, to sell the said stock of goods described in the said bill of sale, in bulk, at private sale, upon such terms as the said committee may deem advisable, and apply the proceeds of such sale in the manner provided in the said bill of sale. Dated at Minatare, Nebraska, this 3d day of March, 1908. North & Company, by Edgar North. Witness: C. O. Aspinwall, R. G. Mitchell."

Newberry, a member of the creditors' committee, offered for the stock 80 per cent. of its value as inventoried, intending, as he says, to conduct the business in the name of the Minatare Hardware Company. This offer the creditors' committee accepted, and the following bill of sale was executed:

"Know all men by these presents: That we, the undersigned, North & Company, a copartnership, in consideration of the sum of one dollar to us in hand paid by North & Company, have bargained and sold, and do hereby bargain, sell, assign, transfer and set over to the said Minatare Hardware Company all that stock of merchandise,

hardware, farming implements, buggies, wagons and all the stock of goods now kept and maintained in and at the store building of North & Company, in the town of Minatare, Scott's Bluff county, Nebraska, as more fully described in an inventory which is hereto attached and identified by the signature of the parties, and made part hereof. In witness whereof the said North & Company has caused this bill of sale to be executed in its partnership name this 24th day of March, 1908. North & Company, by Edgar North. We join in the above bill of sale. Creditors' Committee: E. A. Hatfield, C. O. Aspinwall, C. A. Newberry. Witness: Clyde Spanogle."

A month later Newberry, the purchaser, a member of the creditors' committee and a trustee, sold the business to H. A. Lotspeich at a large profit, receiving $4,000 in cash and six notes for $1,000 each. It is for the conversion of property, valued at $17,700, and for the loss of goodwill, alleged to be worth $10,000, that judgment was demanded, the members of the creditors' committee and Lotspeich being named as defendants.

Plaintiffs alleged, and offered proof tending to show, that the bill of sale to the creditors' committee was executed with the understanding that the business should be restored to the partnership November 1, 1908. The bill of sale, however, is pleaded in the petition. It does not so provide, and there is no attempt to reform or to rescind it. By its terms "any balance of property or money remaining in the hands of the committee" shall be returned to plaintiffs, whenever the claims of all creditors "have been fully paid and satisfied." Only 70 per cent. of the claims of creditors has been paid, and the time for turning back the business is not fixed by written contract. The bill of sale shows on its face that the members of the creditors' committee are not only plaintiffs' trustees, but that they are trustees for creditors other than themselves. For the faithful execution of their trust, they are accountable to such other creditors as well as to plaintiffs. This action at law was commenced before they had ac-

counted in equity to either class of beneficiaries. Have the trustees made an unlawful profit by abuse of trust? Have they converted trust property to their own use? From which of the two classes of beneficiaries did the trustees illegally take trust property? In equity, did plaintiffs own the property, including the good-will of the firm, while the trust was being administered and while the assets were being managed by trustees under a common agreement made for the benefit of both debtors and creditors? The members of the committee were themselves creditors, it is true, but they were also trustees for other creditors who are not parties to this suit—an action at law wherein the petition shows abuse of the fiduciary relation between the trustees and beneficiaries in both classes. If the judgment in favor of plaintiffs for the full value of the converted property, including good-will, can be sustained, what is the measure of accountability of the trustees for abusing the confidence of the absent creditors? Are the latter deprived of their remedy in equity? Could the absent creditors adopt the remedy selected by plaintiffs and recover a second judgment for the conversion of the same property? Their claims are not paid in full. They were parties to the contract creating the trust for the benefit of both debtors and creditors, and if they seek further redress they must go to the forum where trustees are required to account according to the principles of equity. Plaintiffs should have taken that course.

For another reason, plaintiffs should seek relief in equity. While they assert that the transfer of the stock in bulk was unauthorized and void, North, one of the partners, authorized the transfer in writing and executed the bill of sale to the Minatare Hardware Company, using in both instances the firm name of "North & Company, by Edgar North." He advised the subsequent purchaser, Lotspeich, that it would be safe to purchase the stock, and he worked in the store for each transferee after there had been a change in ownership. If the transfers in bulk under the circumstances narrated were unauthorized and

void as to the other partners, a question not decided, North was nevertheless bound by his individual acts, unless the same were induced by fraud or undue means, which is not shown. *Reed v. Gould,* 105 Mich. 368; *Church v. First Nat. Bank of Chicago,* 87 Ill. 68; *Kingsbury v. Tharp,* 61 Mich. 216; *Blaker v. Sands,* 29 Kan. 551. North joined his partners as a plaintiff, though he is bound by the transfers. He is therefore in the attitude of demanding damages for a conversion in which he was an active participant. This is an anomaly not sanctioned by the law. He is not entitled to damages for conversion. Since North cannot recover, his partners have mistaken their remedy, and, under their present petition, are defeated by the familiar doctrine that, in an action by partners for the conversion of partnership property, there can be no recovery by individual partners to the exclusion of others. To state the rule in a different form: "Conversion will not lie on behalf of an individual partner to recover partnership property from one holding title through another partner." *Andrews v. Clark,* 5 Neb. (Unof.) 361; *Estabrook v. Messersmith,* 18 Wis. *545; *Reed v. Gould,* 105 Mich. 368; *Farley v. Lovell,* 103 Mass. 387; *Sindelare v. Walker,* 137 Ill. 43; *Homer v. Wood,* 11 Cush. (Mass.) 62; *Church v. First Nat. Bank of Chicago,* 87 Ill. 68.

The facts narrated are presented by the pleadings and evidence, and they show conclusively that plaintiffs have mistaken their remedy, and that they are not entitled to relief in an action at law for conversion. The judgment of the district court is reversed and the cause remanded for further proceedings, with permission to plaintiffs, or any of them, if so advised, to amend their pleadings and to bring in any other parties deemed to be necessary to an adjudication of the matters in controversy.

REVERSED.

FAWCETT, J., not sitting.

STEPHEN SCHULTZ, APPELLEE, V. WILLIAM C. WISE ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,088.

1. **Pleading:** DEMURRER. Where misjoinder of causes of action is apparent on the face of a petition, the infirmity may be challenged by demurrer.

2. **Guaranty:** LIABILITY OF GUARANTOR. The liability of a guarantor does not extend beyond the terms of his guaranty.

3. **Principal and Agent:** CONTRACT: GUARANTY OF PERFORMANCE. An agent who binds himself by a contract containing the terms of his agency and specifying his duties and obligations does not increase his liability by signing a mere guaranty of performance on his part, after it has been executed by a third person.

4. **Guaranty:** LAW GOVERNING. Guaranties of performance and of payment are controlled by the same principles of law.

5. **Action:** JOINDER. A contract of agency and a third person's guaranty of performance on part of the agent are separate contracts, and causes of action thereon cannot be joined.

6 **Equity:** SUITS IN EQUITY. In a suit wherein the claim in litigation is purely equitable in its nature, the case should be determined according to the rules regulating the procedure and the practice in equity.

7. **Principal and Agent:** ACCOUNTING. A principal cannot deprive an agent of his right to an accounting in equity by the misjoinder of a cause of action on the contract of agency with a cause of action on a third person's guaranty of performance on part of the agent.

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

J. L. McPheely, for appellants.

Adams & Adams, contra.

ROSE, J.

This is an action against an agent and his guarantor on the contract of agency and on the guaranty to recover an alleged balance of $5,039.91, due to the principal on all

transactions of the agent during the time he acted in that capacity, a period lasting about a year. Defendants, among other defenses, separately denied the existence of any indebtedness to plaintiff. A jury was impaneled, to whom were submitted testimony covering 365 pages of type-written matter, a great many exhibits, the contents of several books of account, a complicated petition pleading two contracts and containing plaintiff's statement of a complex and voluminous account, two answers in equity, two technical replies, and 12 pages of the trial court's instructions. Upon a joint verdict against both defendants for the exact amount of plaintiff's claim as pleaded, defendants appeal separately.

By contract in writing, executed January 29, 1909, Stephen Schultz, plaintiff, appointed defendant William C. Wise agent for the remainder of the year to sell farm implements, vehicles and harness at Heartwell. The terms of the agency and the duties and obligations of the agent were formally recited in the contract. It was signed by the principal and the agent, but not by defendant Albert Abrams, the guarantor. Among other stipulations, it was provided that the "agent shall receive one-half of the net profits of the business as he shall conduct it, the net profits to be that amount that represents the difference between the cost of the goods and that amount received from them as sold, less the expense of conducting the business." The following guaranty was indorsed on the back of the contract of agency:

"In consideration of the appointment of W. C. Wise as selling agent for Stephen Schultz, for the year 1909, ending January 1, 1910, we, the undersigned, hereby guarantee unto Stephen Schultz the fulfilment of every part of this contract, by W. C. Wise, that all money and notes received from the sale of goods will be turned over to Stephen Schultz, except that which rightfully belongs to W. C. Wise, that is his one-half the commission on sales made. Should W. C. Wise fail to properly turn over to Stephen Schultz or his assigns all notes and money re-

ceived for the sale of goods, less one-half the commission, we do hereby agree and bind *myself* to make good unto Stephen Schultz such shortage. Signed this 1st day of February, 1900. Albert Abrams, W. C. Wise."

In a petition designating the agent and his guarantor as joint defendants, plaintiff pleaded both contracts, alleged facts showing the amount due from the agent to plaintiff under the terms of the contract of agency, averred that guarantor was liable therefor, and prayed for a joint judgment against defendants for the agent's indebtedness. Defendants filed separate demurrers, each assailing the petition on the ground, among others, "that several causes of action are improperly joined." If misjoinder is apparent on the face of the petition, the infirmity was properly challenged by demurrer. *Porter v. Sherman County Banking Co.*, 36 Neb. 271. The trial court overruled the demurrers, but the rights asserted by defendants were preserved in the answers, and were presented to the trial court at every appropriate stage in the proceedings.

Guarantor did not sign the contract of agency. His liability was limited to his guaranty. The agent, by signing the guaranty, did not increase his liability nor make guarantor a party to the original contract. The paper signed by Abrams is a technical guaranty. He did not agree to perform the obligations imposed by the terms of the agency, but guaranteed, to the extent of his separate contract, that the agent would do so. The distinction between such contracts should always be recognized in enforcing them, where the guarantor asserts his legal rights. "Guaranties of performance and of payment," said the supreme court of Wisconsin, "are placed upon the same ground." *Hubbard v. Haley*, 96 Wis. 578. Guarantor's contract being a guaranty of performance, his obligations must be determined according to the principles applicable to the enforcement of a guaranty of payment. In the early history of this court the rights asserted by defendants in their demurrers were explained as follows: "A contract of guaranty is not a primary obligation to pay,

but is an undertaking that the debtor shall pay. The contract of the maker and sureties upon a promissory note is to pay the same. The guarantor is not a promisor with the maker. How, then, can he be sued with the maker of a promissory note upon an obligation to which he is not a party? The contract of guaranty is a separate and independant contract, and the liability of the guarantor is governed by the express terms of his contract. He cannot be joined in an action against the maker of a note, he not being liable as maker." *Mowery v. Mast & Co.*, 9 Neb. 445. These principles have been consistently followed ever since they were first announced. *Barry v. Wachosky*, 57 Neb. 534; *Ayres v. West*, 86 Neb. 297.

Both the petition of the principal and the answer of the agent show that the latter was entitled to a hearing in an accounting in equity. This right would not have been questioned, except for the erroneous misjoinder of the two causes of action. In *Wilcox v. Saunders*, 4 Neb. 569, 581, it was said: "When the claim is one purely of an equitable nature, the action must be determined according to the rules regulating proceedings and practice in equity." The trial court, by overruling the demurrer of the agent and by forcing him into a trial before a jury, deprived him of substantial rights. Guarantor pleaded, and adduced testimony tending to prove, that he was drunk when he signed his name. He interposed other separate defenses. Instructions relating thereto were mingled with instructions applicable alone to the cause of action for an accounting. The agent is entitled to findings and a decree by a court of equity, and to a trial *de novo* in the appellate court, in case of an adverse decision below.

For these reasons, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., dissenting.

The opinion holds that the defendants, Wise and Abrams, could not be joined as defendants in the same

action because the two contracts upon which they are liable are separate and distinct contracts, Abrams' contract being purely a contract of guaranty. The case was begun, it appears from the opinion, as an action at law, but the opinion rightly says that, under the conditions and considering the matters in litigation, both the petition and answer show that it is in fact an action in equity. In actions in equity all parties directly and indirectly interested should be made parties to the action, and the court should do complete equity to all parties, settling all questions that arise between them, growing out of the subject matter in litigation. Abrams is not liable unless Wise is, and, on the other hand, if Wise is liable, then Abrams is. There is no distinction between them in that respect. In an action against Abrams upon this claim, the evidence upon both sides would be precisely the same as it would be in an action against Wise. There is, then, so far as I can see, no reason under our code practice for not uniting them in this action in equity and settling the whole controversy at once, instead of making two suits, one against Wise, and then a suit against Abrams, in which, if there was already a judgment against Wise, Abrams could make no possible defense.

WILLIAM D. ARMSTRONG, APPELLANT, V. WILL N. RANDALL ET AL., APPELLEES.

FILED MAY 17, 1913. No. 17,139.

Deeds: CANCELATION: FRAUD. A deed to valuable land, if procured for an insignificant consideration by fraudulent misstatements of facts and by concealment of conditions on the part of the grantee, may be canceled in equity, where the circumstances were such that grantor was justified in relying on the acts constituting the fraud, and did so in good faith.

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

Allen G. Fisher, William P. Rooney and *Andrew M. Morrissey,* for appellant.

F. A. Wright, J. G. Mothersead, William Milchrist and *J. W. Joseph, contra.*

ROSE, J.

Plaintiff began the suit to quiet title to a quarter-section of land in Scott's Bluff county. George B. Siemer preempted the land, lived on it a short time, and obtained a patent for it in 1891. Shortly afterward he moved to the eastern part of the state, and later to Iowa. Through a deed from him, procured for $25 August 23, 1909, plaintiff claims title. Defendants pleaded title or liens through a void tax foreclosure sale. Siemer intervened, and prayed for a cancelation of his deed on account of fraud on the part of plaintiff in procuring it. The differences between defendants and intervener were amicably adjusted, leaving the charge of fraud the only controverted question. On this issue the trial court permitted intervener to refund the consideration of $25, canceled his deed, and quieted in him the title to the land. Plaintiff has appealed, asserting that the decree is not supported by the evidence.

The land was of little value when intervener left it shortly after receiving his patent. It was arid land without water or canals for purposes of irrigation. It was 35 miles from a railroad. When plaintiff procured the deed the land was irrigable by means of a government canal. The town of Scott's Bluff on a railway system had sprung up within three or four miles, and the land was worth, perhaps, $6,000. It may fairly be inferred from the evidence that plaintiff knew the changed conditions, and that intervener did not. Plaintiff was expeditious and painstaking in procuring his deed, in having it recorded, and in bringing suit. All was accomplished within a few days. Intervener was sought out in Iowa, where he transferred his title and accepted $25 for interests of great value.

These circumstances alone raise strong inferences that plaintiff knew existing conditions, and that intervener did not, but there is other proof of those facts. There is direct evidence that plaintiff misrepresented conditions, concealed facts when he should have spoken, and made misstatements preventing an inquiry which would have disclosed material circumstances and conditions unknown to intervener. While the evidence in many respects is conflicting, the findings of the trial court, when the entire case is considered, seem to be not only correct, but to be in harmony with the principles of justice and equity. In addition to the return of the consideration as provided by the decree below, intervener, however, is required to pay to plaintiff, on account of taxes paid by him, $10.35, with interest. As thus modified, the judgment is affirmed, plaintiff to pay the costs.

AFFIRMED AS MODIFIED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

ISAAC N. MORELAND ET AL., APPELLEES, V. WILLIAM BERGER ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,172.

Quieting Title: OCCUPYING CLAIMANT. In a suit by the owners of the fee to quiet their title to land, a defendant who transferred all his interests in both the land and the improvements and surrendered possession to his grantee before the action was commenced is not entitled to relief under the occupying claimants' act.

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

H. D. Rhea, for appellants.

E. A. Cook and *Warrington & Stewart, contra.*

ROSE, J.

Plaintiffs began this suit to quiet their title to a lot in Gothenburg. They acquired the fee by descent from their father, subject to the life estate of a widow, who died after having attempted to convey the entire estate to William Berger, relying on a void decree rendered by the county court under an unconstitutional act of the legislature. Berger improved the lot and sold it to William H. Bedell, who took possession and paid the entire purchase price of $650, except $52, which he offered to pay upon receiving a proper conveyance. Afterward Bedell sold the lot to Thomas Lemmon. Berger and wife, Bedell and wife, and Lemmon and wife are defendants. After the suit was instituted, and before the case was decided, Bedell bought the fee from plaintiffs and transferred it to Lemmon, his former grantee. Berger makes no claim to title, and it was properly quieted in Lemmon through Bedell. Berger, however, had made a demand under the occupying claimants' act for the value of his permanent improvements, and from an adverse judgment on this branch of the case he and his wife have appealed.

Is the judgment erroneous? Berger never owned the fee. If he owned the improvements or interests therein, he had transferred them to Bedell, and had received the agreed price of both the improvements and the lot, except $52, which had been tendered to him upon compliance with his contract. Long before this suit was commenced he had parted with his interests in the improvements and had surrendered possession to his grantee. Not being in possession of the lot, and not having any interest in the improvements, he is not entitled to relief under the occupying claimants' act. *La Bonty v. Lundgren,* 58 Neb. 648.

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

LYSLE I. ABBOTT ET AL., APPELLEES, V. IDA N. JOHNSTON, EXECUTRIX, ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,181.

1. **Judgment: VACATING: CONCURRENT REMEDIES.** The provisions of section 602 of the code, enumerating grounds under which judgments may be set aside after expiration of the term at which they were rendered, are concurrent with independent equity jurisdiction.

2. **Dismissal of Action: RELIEF IN EQUITY.** The dismissal of an action for want of prosecution, on motion of defendant without notice to plaintiff, may, after expiration of the term at which the order was rendered, be set aside by a court of equity having jurisdiction of the parties and of the subject matter of the suit, where the circumstances call for equitable relief.

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

A. J. Sawyer, for appellants.

Ray J. Abbott, contra.

ROSE, J.

Plaintiff began a suit in 1909 to cancel a mortgage on a number of lots in Crete, on the ground that enforcement of the lien had been barred by the statute of limitations. The mortgage was given to secure a note for $2,780, dated May 17, 1888, and payable May 17, 1890. Guy L. Abbott and Elizabeth Abbott were mortgagors, and Johnston, Foss & Stevens were mortgagees. Plaintiff asserted title to the mortgaged lots through mortgagors, and undertook to sue the heirs and legal representatives of a purchaser of the mortgage. Plaintiff did not plead payment or offer to pay the debt. His action was dismissed for want of equity. In a cross-petition it was pleaded that a suit to foreclose the mortgage had been instituted March 17, 1893, and that it had been wrongfully dismissed and stricken

from the docket November 12, 1907, for want of prosecution. The equity powers of the court are invoked by cross-petitioners for the purpose of reinstating the foreclosure suit. By demurrer the cross-petition was attacked on two grounds: (1) The court has no jurisdiction over the subject matter. (2) The facts pleaded are insufficient to state a cause of action. The demurrer was sustained, and, cross-petitioners refusing to plead further, the cross-action was dismissed, and they have appealed.

1. Was the district court without jurisdiction to reinstate the dismissed foreclosure suit? The term at which the dismissal was entered had long since passed, and cross-petitioners did not seek redress under section 602 of the code, enumerating grounds under which judgments may be set aside after expiration of the term at which they were rendered. The code, however, does not provide the exclusive remedy. Its provisions are concurrent with independent equity jurisdiction. *Spence v. Miner*, 90 Neb. 108; *Hitchcock County v. Cole*, 87 Neb. 43; *Wirth v. Weigand*, 85 Neb. 115; *State v. Merchants Bank*, 81 Neb. 704; *Williams v. Miles*, 73 Neb. 193; *Sherman County v. Nichols*, 65 Neb. 250; *Meyers v. Smith*, 59 Neb. 30; *Munro v. Callahan*, 55 Neb. 75; *Radzuweit v. Watkins*, 53 Neb. 412; *MacCall v. Looney*, 4 Neb. (Unof.) 715; *Edney v. Baum*, 2 Neb. (Unof.) 173. Under the cross-petition in equity to which plaintiff appeared, the trial court, therefore, had jurisdiction. It follows that the first ground of demurrer was not well taken.

2. Do the facts pleaded by cross-petitioners state grounds for equitable relief? The pleading is long and complicated, but the following, in substance, appear among the alleged facts: The mortgage was duly executed, delivered and recorded. No action at law to recover the debt, which is due and unpaid, has been commenced. Mortgagees assigned the paper to the State Bank of Crete, November 22, 1888, and afterward the receiver of that bank sold it to John R. Johnston, who died March 12, 1908. His heirs and legal representatives are the cross-petitioners. When

Johnston became the owner of the note and mortgage, he committed them to the control of Frank H. Connor as trustee with power to collect the debt and release the lien. Connor, pursuant to his trust, began a foreclosure suit March 17, 1893. With Charles Offutt as his sole attorney, he filed therein, September 16, 1893, in his own name as trustee, and in the name of the beneficiary, an amended petition in due form praying for the foreclosure of the mortgage. A copy of that petition is inserted in the cross-petition. Mortgagors appeared in the foreclosure suit. While it was pending Offutt died. Johnston was in feeble health, and moved to California, supposing the case would receive the attention of his attorney or his trustee or of some one for them. He did not give the matter his personal attention. Under direction of his physician, he went to Europe in 1907, but returned shortly to California, where he died. The trustee also moved from Nebraska while the suit was pending. Not knowing of Offutt's death, and being absent from Nebraska, the trustee gave no attention to the prosecution of the foreclosure suit. Under the circumstances outlined, the action was pending from March 17, 1893, until November 12, 1907. On the latter date, the attorney for mortgagors, who became plaintiff in the suit to cancel the mortgage, taking advantage of the death of Offutt, and of the removal of Johnston and Connor from the state, filed a motion to dismiss the foreclosure suit and to strike the case from the docket for want of prosecution. Of this motion no notice of any kind was given, nor did any person having an interest in the security or in the prosecution have any knowledge of the motion. The order of the court was made without knowledge of the circumstances stated. It was made when there was no one present to represent the owner of the note and mortgage. Neither Johnston nor any one else interested in prosecuting the foreclosure suit had any knowledge of the dismissal until June 20, 1908, when a request was made for a release of the mortgage. Negotiations between the proper parties for such a release

promptly followed, and resulted in an agreement for an amicable adjustment, which mortgagors and their attorney repudiated. Afterward, the action to cancel the mortgage was instituted. The negotiations and the adjustment are pleaded as an excuse for the delay in asking for the reinstatement of the foreclosure suit. The foregoing facts and others are pleaded in greater detail than is necessary to this inquiry.

Is the petition demurrable? Are facts entitling cross-petitioners to relief pleaded? The circumstances under which the foreclosure suit was dismissed without notice appeal strongly to a court of equity. Upon default in payment of the debt, the proper action was promptly commenced in the usual manner. There is nothing to show that it was ever set down for trial, or that a hearing was ever postponed by the lienors. For anything appearing in the pleadings, mortgagors may have caused the delay. It is admitted by demurrer that they had not paid their debt. The record contains nothing to show that there is any valid defense to the original suit. The present owner of the incumbered lots began an action to cancel the lien without alleging that the debt had been paid or that he was willing to pay any part of it. His only ground of relief was the statute of limitations, which could be available only through the advantage obtained by the dismissal procured without notice under the circumstances already outlined. The precautions which a plaintiff ordinarily takes to protect his rights had been taken. The trustee had engaged an attorney to prosecute the suit. The trustee and the beneficiary moved away and the attorney died while the action was pending. Though it is the duty of a plaintiff to be diligent in asserting his rights and in observing what is done in the litigation, the legislature has recognized the justice of granting relief from a judgment obtained without actual notice. Provision has been made by statute for opening a judgment within five years, where, after published notice only, it was rendered against a party having no knowledge or actual notice.

Code, sec. 82. "Irregularity in obtaining a judgment" is ground for setting it aside after the term. Code, sec. 602. In *Berggren v. Berggren,* 24 Neb. 764, it is said: "Where it is sought to dismiss an action for want of prosecution, the party filing the motion must serve a notice of the same upon the adverse party. This is necessary in order to enable the party against whom the motion is filed to show some valid reason for his default."

Failure to give notice is clearly an irregularity apparent on the face of the record. The order was not a dismissal entered by the court on its own motion. Mortgagors were the moving parties. According to the petition, the court was not advised of the circumstances which accounted for the delay in prosecution. When the apparent irregularity described is considered with the death of the attorney, with the absence of both the real plaintiff and his trustee, and with other facts mentioned, relief in some forum should be granted under the liberal practice permitting reinstatement of cases dismissed through laches of attorneys or misunderstanding of parties, where no consideration has passed. *Steinkamp v. Gaebel,* 1 Neb. (Unof.) 480. Should that relief be granted in this case upon proof of the facts pleaded? The alleged owner of the land brought the owners of the mortgage into a court of equity for the purpose of canceling the apparent lien. The court of equity had jurisdiction of the subject-matter and of the parties, and should retain it for the purpose of determining the question presented by cross-petitioners. For these reasons, the cross-petition is not demurrable.

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

REVERSED.

FAWCETT and HAMER, JJ., not sitting.

BENJAMIN H. COOPER, APPELLEE, V. ELLA A. HICKMAN, APPELLANT.

FILED MAY 17, 1913. No. 17,207.

1. **Appeal From County Court: FAILURE TO FILE TRANSCRIPT: RIGHTS OF APPELLEE.** Under section 1011 of the code, providing that an appellee in a suit before a justice of the peace or a county court may file a transcript in the district court and there obtain a dismissal of the appeal or a judgment similar to that rendered in the inferior court, if the appellant fails to perfect his appeal within 30 days, the appellee by merely invoking the statutory remedies described does not do so at the peril of waiving appellant's delay and of opening litigation otherwise settled.

2. ———: ———: **NEGLECT OF APPELLANT.** A district court does not err in declining to entertain an appeal from the county court, where failure to file a transcript within 30 days from the rendition of judgment was due to the mistake or neglect of appellant's attorney in acting under the misapprehension that he had 30 days from the filing of the appeal bond to perfect an appeal.

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

O. A. Williams and *H. Halderson,* for appellant.

Charles H. Kelsey, contra.

ROSE, J.

This is an appeal from an order overruling a motion by defendant to docket in the district court an appeal from the county court and to open a judgment rendered against her in the district court, under section 1011 of the code, providing that an appellee in a suit before a justice of the peace or a county court may file a transcript in the district court and there obtain a dismissal of the appeal or a judgment similar to that rendered in the inferior court, if the appellant fails to perfect his appeal within the statutory period of 30 days.

Did the district court err in overruling defendant's

motion? In the county court plaintiff sued defendant on a promissory note for $480, dated August 31, 1909, and payable January 1, 1910. Judgment was rendered against defendant August 4, 1910, for the full amount of plaintiff's claim. A proper appeal bond was executed and filed by defendant August 15, 1910. In due time a transcript of the proceedings of the county court was ordered and prepared, but was not filed in the office of the clerk of the district court until after the time for perfecting an appeal had expired. Plaintiff, however, November 22, 1910, presented to the district court a transcript and a motion for judgment similar to that entered in the county court. This motion was sustained the same day. Defendant applied to the district court December 14, 1910, for an order setting aside the judgment against her and permitting her to docket her appeal. It is from the judgment overruling her application that she has appealed.

Defendant asks for a reversal on two grounds: (1) By presenting to the district court a transcript of the proceedings of the county court and by demanding a judgment similar to the one therein rendered, plaintiff entered a general appearance in the district court and waived the delay on part of defendant in perfecting her appeal. (2) The failure of defendant to file her transcript in time resulted from a misunderstanding between attorneys or to negligence not attributable to her, and she was not responsible for the delay in any event.

1. The record of the county court shows that a proper appeal bond had been given. The county judge prepared the transcript in time. After the statutory period had expired, plaintiff presented a transcript to the district court and demanded a judgment similar to that of the county court. He asked only for relief grantable under the specific terms of the code. He did not appear for the purpose of opening a controversy settled by a judgment and the lapse of time. The legislature, in providing for a dismissal of the appeal or for re-entry of judgment in the appellate court, did not intend that those remedies

should be invoked at the peril of opening a controversy which had otherwise been settled. The appearance for those purposes alone was not a waiver of defendant's delay in filing her transcript. *Schoonover v. Saunders*, 48 Neb. 463.

2. Defendant relies on an affidavit to show that her failure to file the transcript within 30 days was due entirely to a misunderstanding between attorneys or to neglect of others, and that she was in nowise responsible for the failure to perfect her appeal in time. Her application raised an issue of fact as to the cause of the delay. There was proof on both sides. The evidence is sufficient to support a finding that an attorney regularly employed by her to perfect an appeal ordered the transcript, thinking he had 30 days from the filing of the appeal bond to deposit the transcript with the clerk of the district court, and that this was the cause of the delay. The excuse is not sufficient. The evidence sustains the judgment.

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., concur.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

ESTERLINE BEELS, APPELLEE, V. GLOBE LAND & INVESTMENT COMPANY ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,175.

1. **Appeal:** MOTION FOR NEW TRIAL: REVIEW. To obtain a review in the supreme court of alleged errors in an action at law, the record must show that the error was presented to the trial court in a motion for a new trial, and a ruling had thereon.

2. ———: ———: ———. In a case submitted upon abstracts, an alleged error of the trial court in overruling a supplemental motion for a new trial will not be considered, unless the abstract contains the substance of the motion and of the affidavit in support thereof.

3. ———: VERDICT: REVIEW. "A verdict, supported by competent evidence, will not be set aside simply because it does not comport with the conclusion which this court, as triers of fact, might have reached." *German-American Bank v. Stickle*, 59 Neb. 321.

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

A. P. Lillis, H. P. Leavitt and *Charles E. Foster*, for appellants.

Henry E. Maxwell and *George L. Davis, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county against the Globe Land & Investment Company, a corporation engaged in the business of buying, selling and exchanging land for itself and as agent for others, and John L. Maurer and William J. Hartman, its president and secretary, respectively, to recover damages arising out of an exchange of real estate between plaintiff and one C. A. Campbell, which was alleged to have been caused by the false and fraudulent representations of President Maurer and Secretary Hartman, while acting for their company. The jury returned a verdict in favor of plaintiff for the sum of $3,000, and from a judgment thereon defendants appeal.

By their eighth assignment defendants allege error in a number of instructions given by the court on its own motion; but, as this assignment is not discussed in the brief, it must be treated as waived. The eighteenth assignment, that the verdict is excessive, was not presented in the motion for a new trial, and cannot be considered. It is urged in the tenth assignment that a new trial should have been granted upon defendants' supplemental motion for a new trial. Neither the supplemental motion nor the affidavit in support thereof appears in the abstract, and cannot be considered.

We have carefully read the abstract and additional

abstract, and are unable to find any errors in the admission or rejection of evidence. The case was submitted to the jury upon instructions which respond to the pleadings and the evidence. The whole case turned upon the credibility of the witnesses. Plaintiff and her husband testified to facts and circumstances, and statements made by Maurer and Hartman to them, which, if true, justify the verdict returned by the jury. Their testimony is squarely controverted at every point by defendants Maurer and Hartman. Outside of these four parties, very few witnesses were introduced on either side, none of whom was present at the time when plaintiff and her husband say the fraudulent representations were made to them by Maurer and Hartman. On some of the collateral points the testimony of these witnesses corroborates to some extent the testimony of plaintiff and her husband, and to some extent that of defendants Maurer and Hartman, the corroboration of the latter being rather stronger than of the former. From this statement it will be seen that the testimony was conflicting upon every material point. The weight of the evidence and credibility of the witnesses were for the jury, as the jury were properly told by the trial court. Under the well-settled rule, we cannot, under such circumstances, disturb the verdict. Nothing would be gained by setting out the testimony of the witnesses in detail.

Finding no errors of law in the record, and there being sufficient evidence to sustain the verdict of the jury, the judgment of the district court must be affirmed, even though, if we had been sitting as triers of fact, we might have found the other way.

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

JOHN M. WHITE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MAY 17, 1913. No. 17,182.

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

2. ———: ———: KILLING LIVE STOCK. The mere fact that an animal is killed upon the public highway at a railroad crossing is no evidence of negligence on the part of those in charge of the train.

3. ———: ———: EVIDENCE. Nor can negligence be established by inference or conjecture in contradiction to the testimony of a competent and unimpeached eye-witness.

4. ———: ———: DUTY OF EMPLOYEES. The duty of an engineer and fireman of a locomotive, to keep a lookout for animals on the track, is not their sole duty, but is such as is consistent with their other duties.

APPEAL from the district court for Furnas county: ROBERT C. ORR, JUDGE. *Reversed.*

Byron Clark and *Arthur R. Wells,* for appellant.

John Stevens, contra.

FAWCETT, J.

From a judgment in the district court for Furnas county, in favor of plaintiff, for the value of a horse killed by one of defendant's passenger trains, defendant appeals.

The petition alleges that on April 27, 1907, a horse belonging to plaintiff, of the value of $100, "went upon the railroad track of the defendant, at a point where the right of way of the defendant was fenced, and not within the corporate limits of any city or village, the same being in Furnas county, Nebraska, and the said defendant, in the operation of one of its trains on said railroad, negligently and wilfully struck and killed said horse; that said kill-

ing occurred in the daytime, at a time and place where the persons in charge of said train had a clear and unobstructed view of said track, and the engineer in charge of said train, by the exercise of ordinary care and caution, could have prevented such collision, but the said engineer negligently and wilfully failed to use any care or precaution to prevent said collision." The answer admits that the location described in plaintiff's petition is not within the corporate limits of any city or village, and that the right of way is fenced; denies all allegations not specifically admitted; and pleads contributory negligence on the part of plaintiff. The reply is a general denial.

The evidence shows that the crossing where the animal was injured is in the open country and can be seen for a considerable distance in the direction from which the train was approaching. The train was running 50 miles an hour. Plaintiff testified that he was at his home, a little less than half a mile from the crossing; that he saw the train go by, but did not see it hit the horse; that his residence is near enough to the track so that he can always hear the signals made by the engine, such as the ringing of the bell or the blowing of the whistle; that it was about 7 o'clock in the morning. Over the objection of defendant, he was permitted to testify that the engine on the train in question did not whistle for the crossing, "only just when they got amongst the horses. They seemed to give us a little short screech or two, as they usually do when they strike anything," and the bell was not sounded; that it was a nice, bright morning, with no fog.

Mr. Stout, examined as a witness in behalf of plaintiff, testified that at the time the train passed he was at the home of a Mr. Schondler, whose house is about 20 rods from where the horse was struck; that he noticed the train as it passed; that he saw the horses (five in number) "on the north side of the track, probably ten or fifteen rods." They fed their horses, and as they were going in to breakfast he saw that the horses were still on the north side of the track, "and we came up the walk, and I saw where

the horses were at, and we saw the train coming, and it was coming awful fast. We thought the horses would not go on the track, so we went back to the house. I did not see the engine strike the horse." About five minutes afterwards he went up to the crossing and saw the horse. At that time two of the horses were on the south side and two still on the north side of the track. The injured horse was on its front feet, and seemed to be struck on the right hip. It was then more than 100 feet east of the cattle-guards.

H. O. Beatty, the engineer, was introduced as a witness by plaintiff, and testified that, if he had seen any horse on the track within any reasonable distance, he had means of stopping the train; that the train and engine were equipped with automatic, quick-action air brakes, in working order, which can be applied instantly, and the instant it is applied it diminishes the speed of the train. Upon being examined by defendant, he testified that he remembered hitting the horse that day; that the first he knew of the horse was when the engine struck him; that he felt the jar; that he was going east, and his seat was on the right-hand side of the engine, so that he was on the south side. "Q. When did you say you first knew of this horse being on the track, or near the track, or coming to the track? A. The horse was not on the track. If he had been on the track, I probably would have seen him; that is, if he would have been right on the track." He further testified that the engine was equipped with an automatic bell, and that "I am satisfied the bell was ringing when I passed that crossing. I sounded the whistle at the post. I have no distinct recollection of it any more than it is our general work. We always aim to follow our rules, and we did on that morning. I was attending to the duties of engineer, watching the machinery of my engine, and the crossing and the track ahead. My attention was first called to this horse about the time it was struck, and we were then going at least 50 miles an hour. It would not have been possible after seeing this horse to have stopped

before he was struck." No other witnesses were examined as to the collision.

At the conclusion of plaintiff's case, defendant moved for an instructed verdict. The motion was overruled, and that ruling is the error principally relied upon on this appeal. The motion should have been sustained. In the open country, outside of cities, villages and towns, where there are no obscure crossings, negligence cannot be imputed to a railroad company solely by reason of the speed of its train. *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627; *Brown v. Chicago, B. & Q. R. Co.,* 88 Neb. 604. The mere fact that an animal is killed upon the public highway at a railroad crossing is no evidence of negligence on the part of those in charge of the train. *Burlington & M. R. R. Co. v. Wendt,* 12 Neb. 76; *Starke v. Chicago, B. & Q. R. Co.,* 82 Neb. 800; *Cox v. Chicago & N. W. R. Co.,* 87 Neb. 136; *Kennedy v. Chicago, B. & Q. R. Co.,* 80 Neb. 267. Nor can negligence be established by inference or conjecture in contradiction to the testimony of a competent and unimpeached eye-witness. *Kennedy v. Chicago, B. & Q. R. Co., supra.* The duty of an engineer and fireman of a locomotive, to keep a lookout for animals on the track, is not their sole duty, but is such as is consistent with their other duties.

Applying the rules announced in the foregoing cases, we do not see how defendant can ever be held liable for the injury to plaintiff's horse. The only witness who saw the horses prior to the collision locates them 10 or 15 rods from the track. He thought about the train, but he also "thought the horses would not go on the track." At that time the train was coming, and, to use the language of the witness, "was coming awful fast." Had the engineer seen the horses at that time, we think he would have been warranted in thinking, just as Mr. Stout thought, that the horses would not go upon the track. Even if it were established that the whistle was not blown or the bell rung, we do not see how that could make any difference, for it is evident from the testimony of Mr. Stout that the

noise of the train itself was sufficient to start the horses in motion. They evidently tried to run across the track ahead of the engine. Two of them got across, the third was struck, and the other two remained on the side where Stout saw them. The one that was struck, according to the testimony of the engineer, was not upon the track. He evidently was trying to get across, but was struck before he really got upon the track. Treating the petition as having stated a cause of action for negligence, which is, to say the least, construing it very liberally, we are compelled to hold that no negligence is shown.

REVERSED AND REMANDED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

OMAHA FOLDING MACHINE COMPANY, APPELLANT, V. HENRY E. STRIPLIN, APPELLEE.

FILED MAY 17, 1913. No. 17,184.

Appeal: EVIDENCE: SUFFICIENCY. The evidence examined and set out in the opinion, *held* insufficient to sustain the verdict and judgment.

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

Mockett & Peterson, for appellant.

Guile & Guile, contra.

FAWCETT, J.

In 1908 plaintiff, a copartnership composed of Clark A. Sigafoos and Henry Haubens, commenced the manufacture of a newspaper folding machine. Mr. Haubens was apparently financing the enterprise and Mr. Sigafoos conducting the business. Plaintiff alleges that defendant

entered its employ about July 1, 1908. Defendant fixes the date as March 19. After entering its employ defendant continued to work for it until some time in December following. This action was commenced by plaintiff in justice court, in Lancaster county, to recover the sum of $73.23, which plaintiff claimed to have advanced to defendant for expenses and to apply on salary not earned at the time defendant quit his employment with it. Defendant filed an answer and counterclaim, in which he denied being indebted to plaintiff, and claimed that plaintiff owed him $331 as salary earned, for which he had not been paid; and, in order to bring his claim within the jurisdiction of the justice of the peace, he remitted all in excess of $200. The justice of the peace found against the plaintiff on its cause of action, and against the defendant on his counterclaim, and dismissed the action at plaintiff's cost. Plaintiff appealed to the district court, where upon a trial to a jury there was a verdict against plaintiff upon its cause of action, and in favor of defendant for the full amount claimed in his cross-petition. From a judgment upon the verdict plaintiff appeals.

There are no questions of law involved which require consideration. The case turns entirely upon the question of the sufficiency of the evidence to sustain the verdict and judgment. It is undisputed that when defendant commenced working for the company it was for a compensation of $15 a week. Mr. Sigafoos testifies that there was never any agreement for any different compensation during the time defendant continued in its employ. A transcript of the day-book of plaintiff, appearing in the abstract, the accuracy of which is not questioned, covers a period of time from July 6 to December 19, 1908. It shows that all money paid to defendant for salary during that entire period of time was at the rate of $15 a week. Defendant does not testify to having at any time received salary at any greater rate, notwithstanding the fact that he bases his claim upon an allegation that from July 1,

1908, his salary should have been at the rate of $125 a month. During the period of time covered by the transcript from the day-book above referred to, plaintiff paid defendant on salary $315, and for expenses $209.77.

We think the evidence fully sustains the jury in finding against the plaintiff on its alleged cause of action; but we are compelled to hold that the verdict in favor of defendant upon his counterclaim cannot be sustained, even on the testimony of defendant himself.

Defendant testified that Mr. Sigafoos met him in Lincoln, "and asked me to come and help him, saying that he had a couple of machines partly finished and would like to get them out, and thought he could get them out within a couple of weeks, and asked me to come up and help him out with those machines. Q. What, if anything, was said with reference to salary at that time? A. Well, he said to me that we are just starting up and I can't afford to pay you over $15 a week until we get those machines out and get started, and get squared up. He said he had been quite a little while on the machines, getting them ready to go. Q. Sigafoos was the man that was pushing this invention? A. Yes; the promoter. * * * He was the promoter of this machine and the manager. Q. When was the next conversation you had with Mr. Sigafoos, state as near as you can remember, in reference to the salary? A. In reference to salary, was not many—we completed those two machines. Instead of getting them out within a couple of weeks, we did not get them out until about the first days of May—went out and put them up. And I think as we came back on the train we were talking with regard to the salary, and I said to him, 'Sig, I am not making enough out of this to pay my expenses, my home expenses, and keep up,' and he says, 'Well, I will tell you what I am doing,' he says, 'I am just taking enough out of the concern to live with;' he says, 'We are not making anything, not taking anything yet,' and he says, 'We will just aim to take enough to do each of us to meet our home expenses until we get the

thing up to where it is right and good,' he says, 'and when we get started on the road—goods started—the job is worth then to you $125 a month; we can afford to pay you $125 a month when we get started up and straightened up on our feet.' And he says, 'It might get better eventually according to how the machine comes along, how it develops.' Q. And you continued to work for them from that time on until January, about the 1st of January, wasn't it? A. No; it was the latter part of December, the 29th of December, I think it was, the 29th day of December. * * * I went on the road about along the 1st of July, 1908. I was on the road off and on from that time until I left there; I think I was at Red Oak three or four weeks or such a matter, two or three or four weeks or such a matter in the shop, and then was in the shop a few days at Omaha. They had a shop in Red Oak, and in August and September I was there, part of the time during August and September, and I think in and out on the road, two or three trips or such a matter, while I was at Red Oak. I was hurt in a railroad wreck on October 26, and didn't go back to work until November 24. Q. What else did Mr. Sigafoos say, if anything, with reference to salary in your conversation you have just told about? A. Well, I don't know that there was anything else said at that time. Q. Or at any other time? A. Not that I know of, no, sir; not that I can remember of any other time."

The only other evidence offered by defendant is the testimony of Mr. H. B. Berggren, who testifies that he is in the transfer business in Lincoln; that in the latter part of July or first part of August he had a conversation with Sigafoos; that he asked Sigafoos where Striplin was, whether he was working for him or not; that he answered he was; that witness' reason for asking him was that he was figuring on Mr. Striplin to go into business with him. He then states: "And he said he was traveling for him on the road, and, of course, he had just started up and was making machines, improving them, or something

more than I can repeat, and I don't just remember word for word. Q. Well, just in your own way tell the jury; was anything said about the salary of Striplin? A. There was. Q. What, if anything? A. Why, I said to Mr. Sigafoos that I would like to have Mr. Striplin with us, and he says, well, he says, he is getting a good salary with us now, he says, he is getting a hundred and a quarter a month, but how long I don't know; he just said he was getting a hundred and a quarter a month at that time, and he was traveling on the road for them."

Mr. Sigafoos testified: "Q. You heard the testimony of Mr. Berggren when he said that you told him that Mr. Striplin was receiving $125? A. Yes; I heard that. Q. Is that a fact, or not? A. No, sir." He further testified: "Q. Just state to the jury what was said by Mr. Berggren and what was said by you. A. Berggren and I were visiting in his office; he said to me, they tell me you are —no, I think he said Strip tells me—at any rate he, or somebody else, tells me that you are paying Strip $125 a month. I knew they were figuring with Striplin at that time, and, not wishing to disrupt what figures might be going on between them, I said $125 is a pretty nice salary, Henry. Yes; he says, it is. I presume that left the inference with Berggren that I did do that."

This version of the interview between Sigafoos and Berggren was not called to the attention of or contradicted by the latter. Defendant, on recall, was again interrogated *in re* the talk on the train in May. He then testified that, after telling Mr. Sigafoos that he was not getting enough money to keep up his home expenses, Mr. Sigafoos said: "I am just taking enough out to meet my expenses and go along and keep up with, and he says I will see that you shall do the same, and he says while we are new, just starting up, and have been to a big expense, I don't feel like that I could draw on the old gentleman (referring to Mr. Haubens) for any more money, seeing I have him considerable in debt, with no income. And I think from that on then I got a little bit more money; I

got six or eight dollars a week more money from that time on. I had been paying my own expenses, board and room up until that time, and from that on then I drew enough to meet my expenses while I was in Omaha. While I was in Red Oak my expenses were paid." He then explains his reason for quitting and returning to Lincoln, by stating that his son was taken sick; that he came home and found the boy in bad shape; that he died on the 3d day of February following; and that he subsequently received a letter from Mr. Sigafoos that he had an overdraft. "Q. That is the first you ever knew that they claimed an overdraft? A. Yes; that he claimed an overdraft against me. Q. And you had been going on the presumption that they owed you all the time? A. Yes; with the understanding that when the machine got up to where it could, and brought money enough in, that I should have my pay as we had talked."

There is an entire absence of any evidence in the record even tending to show that the business had ever, up to the time he quit work, reached the point or was in any condition to justify defendant in claiming the increased salary referred to. He never at any time during his employment with plaintiff made any such claim, nor, according to his own testimony, was the question ever again talked of between them, after the conversation on the train in May. A claim for such a substantial advance in salary should be supported by some tangible proof. No such proof was furnished.

For the insufficiency of the evidence upon this important point, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

LAWRENCE E. MCNEER ET AL., APPELLANTS, V. ROBERT PATRICK ET AL., APPELLEES.

FILED MAY 17, 1913. No. 17,187.

1. **Trust Deed:** CONSTRUCTION. P., a resident of the state of Kentucky, conveyed land in that state to I. as trustee for L., the recently married daughter of P. The conveyance to I. recited that it was in trust for the sole and exclusive use and benefit of L. and her heirs forever. *Held*, That the placing of the title in I. for the benefit of L. was for the sole purpose of protecting her against her husband and his creditors, and did not vest any estate in L.'s children; the words, "her heirs," being technical words of inheritance merely, and not words of purchase.

2. ———: ———: LAW GOVERNING. And the lands in controversy, situated in this state, having been purchased with the proceeds derived from the sale of the Kentucky land, in accordance with the terms of the deed from P. to I. as trustee for L., the rights of L., under her deed to the Nebraska land, must be determined by the laws of Kentucky, and the decisions of the supreme court of that state construing the same, at the time the deed from P. was executed.

3. ———: ———: TERMINATION OF TRUST. And L. having subsequently become discovert by the divorce of herself and husband, the reason for the trust no longer existed, and the trust estate terminated; and, no other trustee having been appointed for her, thenceforward she was vested with the fee simple title to the lands so conveyed, with full power to sell and convey the same.

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

George J. Humbert, J. C. Dort and *Tibbets, Morey & Fuller*, for appellants.

Story & Story and *Burkett, Wilson & Brown, contra.*

FAWCETT, J.

This suit was instituted in the district court for Pawnee county by the sons and only heirs at law of Lavinia W. McNeer, deceased, to establish their title to and to re-

cover the possession of the north half of the southeast quarter and the south half of the northeast quarter of section 34, township 2, range 11, in said county. From a decree dismissing their action and cross-action, they prosecute this appeal.

The controlling question in the case is the construction to be given to a deed executed by Watts Parker, the father of Lavinia (Mrs. McNeer), August 30, 1872, to lands in the state of Kentucky. Lavinia had become the wife of A. D. McNeer seven months prior to the execution of the deed by her father. The deed was as follows:

"This indenture, made this 30th day of August, 1872, between Watts Parker of Jefferson county, Kentucky, of the first part, Reuben E. Parker of county and state aforesaid, of the second part, and John Q. Irwin of county of Ballard and state aforesaid of the third part, trustee for Lavinia W. McNeair (wife of A. D. McNeair) of Jefferson county, Kentucky, witnesseth, that the said Watts Parker for and in consideration of the sum of eight thousand five hundred dollars in hand paid to him as follows, viz., five thousand dollars by the said Reuben E. Parker and three thousand five hundred dollars by the said Lavinia W. McNeair the receipt of all of which is hereby acknowledged by the said Watts Parker, hath and doeth hereby grant, bargain, sell and convey unto the said second and third parties (certain lands therein described), to have and to hold the said three tracts or parcels of land to said Reuben E. Parker and John Q. Irwin in the following proportions and conditions, namely, to the said Reuben E. Parker 7-12ths thereof for himself, his heirs and assigns forever, and the remaining 5-12ths thereof is conveyed to said John Q. Irwin in trust for the sole and exclusive use and benefit of the aforesaid Lavinia W. McNeair and her heirs forever.

"It is expressly understood that the said Lavinia shall use and occupy said five-twelfths of said land hereby intended to be conveyed to her and said Reuben E. Parker as tenants in common in the proportions aforesaid; that

is, 7-12ths to said Reuben E. and 5-12ths to Lavinia W., and should she and her said trustee, John Q. Irwin, at any time think it would be to the interest and benefit of the said Lavinia W. to sell her interests in the above described three tracts of land they, the said John Q. and Lavinia, shall have the same to the purchaser or purchasers, provided nevertheless that the purchase money received therefor shall be reinvested in real estate such as said John Q. and Lavinia W. may select, and the land so purchased shall be conveyed to and held by a trustee for the use and benefit of said Lavinia on the same terms and conditions that the land herein and hereby conveyed to John Q. as trustee is held, to have and to hold the same in the proportions aforesaid; that is, 7-12ths to the said Reuben E. and 5-12ths to John Q., trustee, as aforesaid, as tenants in common with covenants of general warranty."

Subsequently, by deeds from each to the other, the regularity of which is not questioned, the lands covered by the deed of Mr. Parker were partitioned. Thereafter, in accordance with the provisions of the deed for sale and reinvestment, Lavinia and her husband, Andrew, acting as her trustee (Mr. Irwin being then deceased), sold her interest in the Kentucky land and reinvested the proceeds in the Pawnee county land. The Pawnee county land was conveyed to Andrew McNeer, husband of Lavinia, as trustee, by a deed containing the terms and conditions of the original deed from Mr. Parker. In 1886 Lavinia and Andrew McNeer were divorced, and a few months later Andrew married another woman. On October 16, 1888, Lavinia sold and conveyed the land to one Miller, from whom it passed by mesne conveyances to defendant Robert Patrick. On June 28, 1908, Lavinia died without having remarried.

The decision of this case rests upon the construction to be given to the deed of Mr. Parker in 1872, the question being: By that deed, did Lavinia take a life estate only, with remainder to her children, or did she take an

estate in fee simple? That is to say, did the language of the deed, "for the sole and exclusive use and benefit of the aforesaid Lavinia W. McNeair and her heirs forever," give her children a vested interest in remainder in the property conveyed? The district court held that the terms of the deed to Irwin in trust for the sole and exclusive use and benefit of Lavinia and her heirs forever, and the subsequent deed of partition from Reuben, "created a trust estate for the sole and separate use and benefit of Lavinia W. McNeer, and that she became the *cestui que trust* to the fee simple title, and that the word 'heirs' as used in the deeds was merely a technical word of inheritance, and not a word of purchase, as to said Kentucky lands." The court made the same finding as to the word "heirs" in the deed to the Pawnee county land, and further found that the deed from Lavinia to Miller, made in October, 1888, after she had been divorced from her husband, conveyed a fee simple title to Miller; and that the subsequent deed from Miller to McAllister and from McAllister to defendant Patrick conveyed to the latter a fee simple title. In accordance with the findings, the decree dismissed the action of plaintiff and the cross-action of his two brothers at their cost.

The lands in controversy having been purchased with the proceeds derived from the sale of the Kentucky land, under the terms of the deed from her father, we think the rights of Mrs. McNeer, under her deed to the Pawnee county land, must be determined by the laws of Kentucky, and the decisions of the supreme court of that state construing the same, at the time the deed from Mr. Parker was executed. Upon the trial certain sections of the statutes of Kentucky of 1873, and a number of decisions from the supreme court of that state, were introduced in evidence. Section 1, art. II, ch. 52, p. 518, provides: "Marriage shall give to the husband, during the life of the wife, no estate or interest in her real estate, including chattels real, owned at the time, or acquired by her after marriage, except the use thereof, with power to

rent the real estate for not more than three years at a time, and receive the rent." Section 17, art. IV, ch. 52, p. 532, provides: "Separate estates and trust estates conveyed or devised to married women, may be sold and conveyed in the same manner as if such estates had been conveyed or devised absolutely, if there be nothing in the deed or will under which they are held forbidding the same, and if the trustee and husband unite with the wife in the conveyance. But her interest shall be the same in the proceeds as it was in the estate." Section 7, art. I, ch. 63, p. 585, provides: "Unless a different purpose appear by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple, or such other estate as the grantor or testator had power to dispose of." Section 8, art. I, ch. 63, p. 585, provides: "All estates heretofore or hereafter created, which, in former times, would have been deemed estates in tail, shall henceforth be held to be estates in fee simple; and every limitation on such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple."

Appellants contend that the word "heirs" in the Parker deed should be construed as a word of purchase, because it is the only word in the deed to show where the grantor intended the fee to go after the life use of Lavinia McNeer should have terminated; that effect must be given to the intention of the grantor. The trouble with appellants' contention is, there is nothing whatever in the deed under consideration which in any manner limits the use of Mrs. McNeer to the term of her life. Those words, or words akin to them, are not to be found in the deed. The deed recites that it is an indenture between the grantor, of the first part, the son Reuben, of the second part, and John Q. Irwin, of the third part, "trustee for Lavinia W. McNeair (wife of A. D. McNeair)." The habendum recites that Reuben and Irwin are to have and to hold in the proportion of seven-twelfths and five-twelfths; that the five-twelfths is conveyed to Irwin "in trust for the sole and

exclusive use and benefit" of Lavinia and her heirs forever; no limitation here as to Lavinia's life. The deed then recites that it is expressly understood that Lavinia shall use and occupy said five-twelfths of said land "hereby intended to be conveyed to her and said Reuben E. Parker as tenants in common in the proportions aforesaid"—a distinct recital that the intention is to convey the five-twelfths to her and thereby make her a tenant in common with her brother Reuben. It then gives Lavinia and her trustee the right, at any time they think it would be to the interest of Lavinia, to sell her interest in the land conveyed, and reinvest it in other real estate, which latter estate, when so taken, shall be conveyed to and held by the trustee "for the use and benefit of said Lavinia," on the same terms and conditions as those imposed by the father's deed. To our mind, the use of the words, "Lavinia W. McNeair and her heirs forever," instead of showing an intention to limit Lavinia to a life estate, was intended to show that he was conveying to her an absolute and unqualified estate, with the right of inheritance; in other words, a fee simple estate. It is conceded that the deed was in fact a gift from the father to the daughter. When we take into account the relation of the parties and the statute of Kentucky above quoted, it is apparent that the father was giving this land to Lavinia as a marriage gift or portion, and that the deed was made to a trustee, instead of to her direct, for the purpose of giving her the land in such a way that she could have the free and full use of the same as against the right to the use thereof by the husband, which he would have if the deed were made to her direct; and for the purpose also of enabling her to hold it free from his contracts or debts. That this was the only reason why the deed was made to a trustee is too apparent to admit of any other theory.

In *Carter v. Carter,* 2 Bush (Ky.) 288, it is held: "The power of the husband to lease and receive the rent of his wife's land does not apply to land held by a trustee for the *'sole and separate use'* of the wife." In the opinion

it is said: "The object of such a conveyance, as in this case, was to preserve the use to the wife from the control of her husband, or the interference of his creditors." In *Lane v. Lane,* 106 Ky. 530, the parties to the deed were stated to be John L. Lane, party of the first part, "and Daniel Lane and his heirs after him, party of the second part." The deed further recited: And the grantor "does hereby sell and convey to the party of the second part, his heirs and assigns, the following property (etc.), to have and to hold unto the party of the second part, his heirs and assigns, forever." The court said that they regarded the word "heirs," in the clause where it first occurs, as a word of limitation merely, "denoting the inheritable quality of the estate conveyed, and not the particular persons who were to take the estate." In *True v. Nicholls,* 2 Duval (Ky.) 547, it is held: "A father conveyed land to his daughter 'and her bodily heirs.' As the deed contained nothing from which it could be inferred that the words were used in a sense different from their technical import, the grantee acquired the fee." In the opinion it is said that, upon examination of the deed, the court found that it contained nothing from which a reasonable inference could be drawn that the words were used in a sense different from their legal and technical signification, and that the grantee therein did not take a life estate, but acquired the fee in the land. In *Pritchard v. James,* 93 Ky. 306, the deed named "Julia James and her heirs" as the parties of the second part, and the granting clause recited that the party of the first part "hath granted, bargained and sold unto the said Julia A. James and her heirs" the land described. The habendum was: "To have and to hold unto the said Julia A. James and her heirs and assigns forever." The court held that Julia took a fee simple title, and that her children took no interest, the word "heirs" being used as a word of limitation, and not as synonymous with the word "children." In *Lanham v. Wilson,* 15 Ky. Law Rep. 109, the syllabus holds: "The grantor in a deed conveyed a tract of land

to his daughter and her *'bodily heirs.' Held,* That the intention of the grantor, as shown from the deed, was to use the words *bodily heirs* as words of limitation, and not of purchase." In *Chenault v. Chenault,* 22 Ky. Law Rep. 122, the deed recited that it was made and entered into by and between C. P. Chenault, party of the first part, and Mary H. Chenault, party of the second part; that the party of the first part "has bargained and sold, and by these presents does grant, bargain, sell and convey the following real estate, * * * in consideration of $1 in hand paid, and the further consideration of the love and affection first party has for second party, who is his wife, and the further consideration of the love and affection first party has for his infant child, James Hazelrigg Chenault, this property is sold and conveyed to second party in order that she and her infant child may enjoy and receive the benefit during second party's natural life, and that she may know that her infant child will receive said property at her death; to have and to hold the same unto the party of the second part, her heirs and assigns forever, with covenant of seizin and general warranty." The court say: "It will be noticed that nowhere in the deed does the grantor use words of conveyance or grant with respect to the infant child. The sale, conveyance and grant are to the wife alone. When he comes to give the reason he conveys the land to his wife, the grantor refers to his love and affection for his son, and recites, in effect, that he conveys the land to second party, the wife alone, because she may then know she and the son will receive the benefits of the grant during her natural life, and at her death the son may receive them. Nothing is, in terms or by necessary implication, given the son, but the mother is given the property for certain reasons which the grantor deems proper to state. The habendum clause likewise fails to make the son a grantee, the words, 'heirs and assigns forever,' being merely words of inheritance."

The trust in this case being for a married woman and designed for the protection of the estate from the husband

during coverture, the trust estate terminated when the estate was freed from any liability or control on the part of the husband by the divorce of the parties. 28 Am. & Eng. Ency. Law (2d ed.) 947. In *Roberts v. Moseley,* 51 Mo. 282, it is held: "When land is conveyed to a trustee for the sole use and benefit of a married woman, upon his death, the use is immediately executed in her, and if she be dead, then in her legal heirs." In that case George W. Moseley conveyed the premises in question by deed to one Armstrong in trust for the use and benefit of his wife, "Ann M. Moseley, and her heirs forever." In the opinion, on page 286, it is said: "Where a trustee is appointed to hold the estate of a married woman, to protect it from the husband, and the marriage relation comes to an end, his estate at once becomes executed in the person who is to take it, the wife, if living, or if she is dead, her heirs at law." In *Steacy v. Rice,* 27 Pa. St. 75, it is held: "A trust for a married woman is a *special trust,* and such are not within the statute of uses. But when she becomes discovert, the special trust for her separate use ceases and the legal estate vests fully in her." In *Bush's Appeal,* 33 Pa. St. 85, the syllabus reads: "A testator, by his will, gave a part of his estate to his daughter, a married woman; and in another part of his will, in order to secure it to her, he appointed a trustee for her share, directing him to invest the same at interest, to pay her the interest yearly during her life, and at her death to pay the principal to her heirs in equal parts: *Held,* That, on becoming discovert, the legacy vested in the daughter, discharged of the trust; and that she was entitled to have it paid over to her by the trustee." In the opinion, on page 87, the court say: "The creation of the trust was not to lessen her interest in it, but to 'secure' it to her. He was providing against her husband, in the usual form of a trust, and not providing a protection for his daughter's heirs against their mother. Now that the husband is dead, the trust is without purpose, and she may claim an account and payment of the legacy; and this

has very often been decided." The court then proceeds to say that, without regard to any express intention of the testator concerning the purpose of the trust, the legacy was Mrs. Snyder's absolutely, because it was given "to her and her heirs; to her for life, and then to her heirs. The trust, if valid, does not affect the real title. The equity form does not at all obscure the substantial title. A devise to one for life, with remainder to his heirs, or to the heirs of his body, in legal or equitable form, gives a fee simple or fee tail in land."

Cases similar to the above might be multiplied, but we deem further citation unnecessary. The purpose of the deed from Watts Parker to a trustee for the sole use and benefit of Lavinia was for the sole purpose of protecting her against her husband and his creditors. It was not intended to and did not vest any estate in her children. The words, "her heirs," were technical words of inheritance merely, and not words of purchase. When Lavinia became discovert by the divorce of herself and husband, the reason for the trust no longer existed, and the trust estate immediately terminated; and no other trustee having been appointed for her, thenceforward she was vested with the fee simple title to the land, with full power to convey the same, and her deed to Miller passed the full and complete title to the land in controversy. The title having been subsequently conveyed to defendant Patrick, he likewise took and holds a full title in fee simple. It might be said in closing that this holding does full justice in this case, as Miller and his grantees paid full consideration for the land, and had been in actual possession of the same for about 21 years at the time of the commencement of this suit.

The above holding renders a consideration of the other questions raised upon the trial and discussed in the briefs immaterial.

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

ALLIE CLUTE, APPELLANT, V. OSCAR CLUTE, APPELLEE.

FILED MAY 17, 1913. No. 17,197.

Divorce: REVIEW: PROPERTY RIGHTS: ADJUSTMENT. Record examined and *held:* (1) The evidence is not of such a character as to justify a review of the decree of divorce. (2) In equity and good conscience, the property of the parties, accumulated by their joint efforts during a long period of years, should be treated as joint property in equal shares. (3) The joint possession and use of the property having by the decree been terminated by reason of the wrong-doing of the defendant, in whom the title rests, he should account to the plaintiff for the reasonable value of her share. (4) Land in another state, recently inherited by plaintiff from her father, should not be included in the accounting.

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

Lambe & Butler, for appellant.

W. S. Morlan, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Furnas county for a divorce on the ground of extreme cruelty, and for alimony, suit money and attorney's fees. The answer denied the cruelty, and controverted plaintiff's allegations as to the value of the property, the title to which was in defendant. The court found generally in favor of the plaintiff on the question of cruelty, and awarded her a divorce; allowed her $3,100 permanent alimony, and denied her application for attorney's fees and suit money. From all of the decree, except as to the granting of the divorce, plaintiff has appealed.

The evidence shows a condition of affairs in this family which perhaps would have justified the court in refusing relief to either party. The language used by defendant to plaintiff, both when they were alone and in the presence of third parties, and the contents of a letter written by him

to her a few years before the separation, are too degrading to be permitted to disgrace the pages of our published reports. We turn from them with disgust. The conduct of plaintiff, judging from her admissions upon cross-examination, was evidently little better. It is true, she testified that her conduct in the premises was in resistance to his. The letter above referred to was written to her while she was absent in Wisconsin. When asked if she remonstrated with him for the way he had written, she answered, "No, I didn't. I said I would settle that when I seen him." She was then asked, "Did you?" To which she answered, "Sure, I did." She also admitted that she wrote just as bad letters to him as he did to her, and that whenever he was abusing her she "tried to keep even with him." The record also shows that, while they were living together, plaintiff's brother, a man over 40 years of age, was permitted to bring to their home a "lady friend" and live with her there as if they were husband and wife, although plaintiff admits they knew that the brother and his "friend" were not married. It is evident that these parties have little conception, and certainly no appreciation, of the sanctity of the marriage relation. They lived a cat and dog life, and disregarded all ideas of morality and decency to such an extent that they invited their son and his wife and child to a Sunday dinner, at which plaintiff's brother and his "friend" were present. These things were permitted, not only by plaintiff, but by defendant as well, who, if he had possessed any of the instincts of true manhood, would, as the head of the family, have banished the brother-in-law and his adulterous friend from the home. Under these circumstances, as said in *Arthur v. Israel,* 15 Colo. 147, the parties "cannot complain if we insist upon treating the present controversy as one relating solely to property rights, unaffected by those legal considerations which give to marriage and the family their peculiar status, with accompanying special privileges and protection." The doctrine of that case is considered and fully affirmed in *Marvin v. Foster,* 61 Minn. 154. We

therefore decline to review the record as to the granting of the divorce, and will consider only the property rights of the parties.

The record shows that about 34 years before the filing of the petition in this case the parties, then recently married, settled in Furnas county. That county was then a part of the western frontier. Neither had any money nor property at that time. The privations and hardships which they must have endured during the succeeding 34 years, in sustaining life, establishing a home, and raising a family of three children to manhood and womanhood and until they were married and settled in homes of their own, must have been great. During all of those years plaintiff was faithful in the performance of her full share of the work. She did all the housework, milked the cows, fed the calves and pigs, raised chickens, made butter, and with the butter and eggs contributed largely to the support of the family, thus materially aiding in the accumulation of their property. During the last 15 years it is undisputed that defendant led an intemperate life. While the plaintiff was at home doing the chores and looking after things generally, he would be in town on drunken sprees, from which he would return sullen, cross and quarrelsome. The last four or five years of their married life his sprees were not so frequent, but they were not entirely discontinued. Two or three times each year he would indulge his propensity in that direction. Under these circumstances, we think that, in determining the question we are now considering, these parties should not be considered as a husband and wife. They have no appreciation of that relationship. It would be more consonant with their true relations to consider them simply as a man and women engaged in the business of earning a living and accumulating property—a sort of copartnership, so to speak.

Conceding that defendant did his part, which, under the evidence, is treating him very liberally, their interests in the property should be treated as equal, undivided in-

terests, and, their joint use and possession having by the court been dissolved by reason of the wrong-doing of the defendant, he should now be required to account to the plaintiff for her full share in the joint assets. The property consists of 240 acres of land, upon which there was a mortgage for $300. The record is not entirely clear as to whether this mortgage has been paid off. We are inclined to think it has been paid, but will permit defendant to have the benefit of the doubt, and will give him credit for that amount. Plaintiff testified that the land was worth $60 an acre. A neighbor placed the value at $42.50 an acre, but upon cross-examination he varied so much that it is hard to tell what his estimate is. Defendant himself testified that it is worth from $30 to $35 an acre. We are satisfied that plaintiff's estimate is too high, and are inclined to think that that of defendant is too low. Here again we have concluded to give the defendant the benefit of the doubt, and will take his highest estimate of $35 an acre as the value of the land. This would make the land worth $8,400, from which we deduct the $300 mortgage, leaving the net value $8,100. At the time of the trial defendant had in his hands personal property which he concedes to be of the value of $1,460. Plaintiff contends that it was about $1,200 more than that sum, but we are unable from the record to verify her figures, and therefore take the figures of defendant. This makes the net value of the estate at the time of the divorce $9,560. This sum divided by two shows the interest of each in the joint assets to be $4,780. If that sum be allowed plaintiff, she will then be obtaining her full interest in the property, and should not be allowed anything else in the way of suit money or attorney's fees. Each party, receiving one-half of the assets, should pay his or her expenses in the litigation.

It appears that, at the time of trial below, plaintiff had become the owner, by inheritance from her father, of 120 acres of land in Wisconsin, the value of which she places at $2,500. Defendant insists that the value of that prop-

erty should be taken into account in fixing the amount of plaintiff's allowance in this case. While the rule contended for might be sound under some circumstances, which we do not decide, it cannot be applied here. We are disposing of the property rights of the parties under the general rules of equity as to an accounting between joint owners of property, who are unable to agree upon a division of the same after their joint possession and use has been terminated. In such a case, where the parties have contributed equally to the joint fund, they are entitled to an equal division thereof, without reference to property which either may own individually, and to the acquirement of which the other did not contribute.

On June 22, 1911, we entered an order allowing plaintiff $100 as suit money, $100 attorney's fees, and $25 monthly as temporary alimony from July 1, 1911, until the further order of the court. Defendant having refused to pay this allowance, an execution was issued, which has been returned unsatisfied. It appears, therefore, that nothing has ever been paid under that order.

The judgment of the district court is modified and the cause remanded, with directions to enter a decree in favor of plaintiff for $4,780, and with the further direction that if it is made to appear that defendant has paid plaintiff any sum whatever under our order of June 22, 1911, above set out, such sum be deducted from said sum of $4,780. If defendant so elects, he may, in lieu of the specific judgment awarded, pay to plaintiff $730, being one-half of the personal property, and have an equal partition of the real estate under the direction of the district court. The decree as to the divorce is affirmed.

AFFIRMED AS MODIFIED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

E. A. BULLOCK, APPELLANT, V. E. H. BUETTNER, APPELLEE.

FILED MAY 17, 1913. No. 17,200.

Appeal: AFFIRMANCE. Record examined, and found not to contain any reversible error.

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

R. R. Hazen, for appellant.

D. A. Harrington, contra.

FAWCETT, J.

This action was instituted in the county court of Boyd county, to recover the consideration for an alleged sale of a feeder for a threshing machine. There was a trial and judgment for defendant, from which plaintiff appealed. The trial in the district court resulted in a verdict and judgment for defendant, and plaintiff now appeals to this court.

The questions presented are: A ruling of the court permitting an amendment to the answer; the sufficiency of the evidence; and exceptions to instructions. Upon the first point it is sufficient to say that, in order to obtain a review of a ruling of the district court permitting an amendment to a pleading in a case appealed from an inferior court, upon the ground that the amendment changes the issues tried below, the record in this court must show the change in such issues. We have carefully examined the record as to the other two points, and find that it contains no reversible error. The evidence appears to us to be sufficient to sustain the verdict, and no questions of law are discussed, which have not been repeatedly decided by this court. Neither the parties to the action nor the profession would derive any benefit from an extended discussion of the case.

The judgment of the district court is therefore

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

STATE, EX REL. DANIEL BALLMER, APPELLANT, V. WILLIAM STREVER, APPELLEE.

FILED MAY 17, 1913. No. 17,209.

Municipal Corporations: TREASURER: REMOVAL FROM OFFICE: PROCEDURE. The power given the city council of a city of the second class, under section 8905, Ann. St. 1911, to remove a city treasurer for any of the reasons therein set out, cannot be exercised until there has been preferred against such treasurer some specific charge, of which he shall have notice and an opportunity to be heard in his defense.

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

Niles E. Olson, for appellant.

E. A. Cook and *W. A. Stewart, contra.*

FAWCETT, J.

On April 15, 1910, relator was elected city treasurer of the city of Cozad for the ensuing municipal year. He duly qualified and entered upon the discharge of the duties of his office. On November 3, following, the city council, without notice to relator, and without any complaint having been filed against him, by resolution declared his office vacant, for the reason, as alleged in the resolution, that he had failed and neglected to render his account at the end of each month after his election, had failed and neglected to file warrants paid and redeemed by him, and had "failed and neglected to comply with the conditions of section 8905 of Cobbey's Annotated Statutes of the State of Nebraska, and of ordinance No. 5 of the city of Cozad, Nebraska, and said Daniel Ballmer has not given or offered any reason for such failure, and more than ten days have elapsed since said failure." Ordinance No. 5 is substantially the same as section 8905 of the statutes, referred to in the resolution. On the next day the council again met, and elected the respondent as relator's suc-

cessor, and on the next day respondent filed his bond in the sum of $5,000, which was approved by the council, and since that time he has been assuming to discharge the duties and receive the emoluments of the office. This action was begun in the district court for Dawson county to oust respondent from the office and reinstate relator therein. There was a trial to the court and judgment in favor of the respondent. Relator appeals.

We deem it unnecessary to enter upon a discussion of this case. Under the authority of *State v. Smith*, 35 Neb. 13, and *State v. Hay*, 45 Neb. 321, relator having been elected for a definite term, the power of removal could not be exercised by the city council until there had been preferred against him specific charges, of which he should have been given notice and an opportunity to be heard in his defense.

The judgment of the district court is therefore reversed, with directions to enter judgment of ouster in favor of relator as prayed in his petition.

REVERSED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

FETZER & COMPANY, APPELLEES, V. JOHNSON & NELSON, APPELLANTS.

FILED MAY 17, 1913. No. 17,146.

1. **Sales:** ACTION FOR PRICE: DEFENSES: PLEADING. The consideration for the contract of a vendee to pay for goods sold and delivered is the goods themselves. If failure of warranty of the goods is not sufficiently pleaded and proved, it cannot be relied upon as a defense of failure of consideration.

2. **Contracts:** ACTION: FRAUD: PLEADING. To avoid a contract on the ground of fraud in procuring it, the facts constituting the fraud must be pleaded and proved.

3. **Sales:** ACTION FOR PRICE: EVIDENCE. If a machine is purchased under a written warranty that it is made of good materials and

with good workmanship, and there is no evidence of a failure thereof in those particulars, evidence that it was tried and failed to do good work is not sufficient proof that it was not intended nor adapted to do the work for which it was sold.

4. ———: ———: DAMAGES: ADMISSIBILITY OF EVIDENCE. If a party to an action is not entitled to recover or recoup damages, evidence as to his alleged damages is properly excluded.

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

H. Halderson, for appellants.

Willis E. Reed, contra.

SEDGWICK, J.

This action was brought in the district court for Madison county to recover $623.20, the purchase price of 10 disc and shoe drills, manufactured by the plaintiffs. The case was tried by the court without a jury, and there were findings and judgment for the plaintiffs for the amount claimed. The defendants have appealed.

The plaintiffs are manufacturers and wholesale dealers of farm machinery, and the defendants are retail dealers therein. The contract of sale was in writing, and contained this clause: "We refuse to give any warranty on goods of our manufacture other than that of good material and workmanship, refusing absolutely to sell any such goods on trial with the privilege of returning if not satisfactory."

The defendants in their brief say that they set up five defenses: Want and failure of consideration; fraud and deceit; breach of warranty and counterclaim for same; counterclaim for damages necessarily arising from the failure of the above farming implements to work; and general denial. They answered quite at large. The answer covers more than six pages of the closely printed abstract. It admits the purchase of the goods, and the written contract, and the delivery of the goods thereunder.

The first count in the answer appears to be an attempt to allege the failure of the consideration for the contract. It contained the following allegation, which illustrates the defendants' apparent idea of failure of consideration: "The defendants allege that the said drills, and each of them, were and are defective in mechanical construction to a degree that the operation of same, and each of said drills, involves the contravention of natural law; that the said drills are not made of good material, but of cheap, defective and inferior material; that the design and make-up of said drills are purely experimental, and upon fair and exhaustive trial said drills, and each of them, have proven to be complete failures in this agricultural section, and are complete failures; that said drills, with proper management, adjustment and power, will not and cannot do good work, and the work which said drills were warranted to do and intended for." And the count closes with the allegation: "And, by reason thereof, there is and was a total failure of consideration for the making of the said contract, and that there was no consideration moving to any third party with the defendants' consent." The defense of want of consideration is based upon the claim "that the drills would not do work, were utterly worthless, of no value." This, of course, is virtually a defense of breach of warranty. The goods were the consideration for the contract made by the defendants; and, if failure of warranty of the goods is not sufficiently pleaded and proved, it cannot be relied upon as a defense of failure of consideration. The defendants cited numerous authorities holding that, as between the original parties to an agreement, oral evidence is admissible to show want or failure of consideration. There is no doubt of this proposition, but these authorities are not applicable to this case. This contract was not *nudum pactum*.

The next contention is that "the defense of fraud may be shown by parol, not to contradict but to destroy the effect of a written contract." Of course, it is always competent to show that any contract was procured by fraud,

and fraud vitiates all contracts. The defendants in this case, however, failed to either allege or prove that this contract was procured by fraud. The allegations of the attempt in that regard are that the plaintiffs' agent who procured the contract "did then and there, at the time of the signing of said contract exhibit A, state, represent and say, that the said ten disc and shoe drills described in said exhibit A, and each of them, were constructed and made in a manner identical with and similar to the Superior Press Drill handled and sold by the Kingman Implement Company; that they were made of material of same weight and quality; that they were mechanically constructed, and operated and worked in the same manner as the said Superior drills, and would do as good work; that said representations and statements were false; the plaintiffs knew they were false, but made the same with the intention to defraud and deceive these defendants, who relied on said representations of fact, and signed the said contract by virtue and under authority of which said disc and shoe drills described in exhibit A were delivered to the defendants." If we consider that these statements of the agent would be sufficient in any event upon which to predicate fraud in procuring the contract, the allegation is still insufficient for that purpose. There is a general statement that the representations and statements were false, but it is not alleged which of the statements were false, nor in what particular. There is no allegation of fact inconsistent with the alleged statement of the agent. So far as the allegation goes, the falsity of the agent's statement may have consisted wholly in the statement that the drills would do as good work as the Superior drills, and this is a mere matter of warranty covered by the written contract between the parties. The evidence offered to support the allegations fails to show that the contract was procured by fraud. The offer of proof was in the same words as those contained in the answer. There was no offer to prove that the defendants relied upon the statements, nor in what respect the alleged statements were false.

The principal contention in the brief appears to be that the defendants should have been allowed to prove that the machines did not perform the work for which they were intended. It is said that, whether or not the goods sold are especially warranted, there is an implied warranty that they are suitable to "do the work for which it was made. The plaintiff in the case at bar being a manufacturer of the drills sold, it is in law bound to furnish a drill that will sow and cover up grain." The pleadings and evidence and the defendants' offer of proof did not present such a case as the defendants seems to have in mind. The quotations already made from the answer will show the nature of that pleading. One of the defendants testified: "We tried the drill, used four horses; with the press wheel attachment, the dirt and trash would check and stop the wheels on account of the double drawbar, and grain for that reason left on top of the ground; seed would come from spout, but would not be covered up; we then took the press wheel attachment off, and put on the chain cover attachment; scraper on convex side of disc and scraper on shoe on concave side of each disc are fixed and nonadjustable, so that straw, dirt and trash would lodge on both sides of each disc and stop them; would not seed nor cover up grain." It had already been testified that these machines were in general use for which they were intended. There was evidence tending to show that the ground was very wet and weedy, too foul and muddy to operate any seeder. We do not find that the defendants offered any evidence tending to prove that the drills were not intended nor adapted "to sow and cover up grain."

The defendants asked the witnesses on the stand: "What is the value of the drills you bought, in controversy here?" This was objected to as immaterial, and the objection was sustained. The defendants then offered to prove that the drills are of no value. This was excluded. And then various offers were made relating to the defendants' damages by the supposed failure of the machines, which were, of course, excluded. The brief discusses the

measure of damages in breach of warranty; but, as no breach of warranty was shown, this evidence was properly excluded. There was evidence tending to show that the drills were of good material and workmanship as warranted, and there is no evidence to the contrary.

The judgment of the district court is

AFFIRMED.

REESE, C. J., BARNES and FAWCETT, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

IN RE ESTATE OF WILLIAM D. LYLE.

ISABELLA LYALL SCOTT ET AL., APPELLANTS, V. JOSEPH J. O'ROURKE, ADMINISTRATOR, APPELLEE.

FILED MAY 17, 1913. No. 17,208.

1. **Witnesses:** COMPETENCY. Witnesses who know the fact whether boys of a certain age were at a stated time admitted into the British army are competent to testify as to such fact, although they are not familiar with the law so as to be able to say whether such boys were legally admitted.

2. **Evidence:** OBJECTIONS: DEPOSITIONS. Objection may be made to the competency and materiality of evidence contained in a deposition without filing objection thereto in writing under section 390 of the code.

3. ———: EXCLUSION. Evidence stated in the opinion *held* to have been improperly excluded.

4. ———: ———. A document, reciting that it is an "extract entry of birth," and signed "Hugh Pearce, Registrar," but without any other authentication or explanation, was properly excluded.

5. ———: DECLARATIONS: QUESTION FOR COURT. The question of the competency of the declarations of a deceased ancestor as to family pedigree and history is for the court, and not for the jury, to determine.

6. **Heirs:** EVIDENCE: TRIAL: INSTRUCTIONS. Declarations as to pedigree and history must relate to family relatives of the decedent.

When, in determining the next of kin of a deceased person, the question is as to the identity of the decedent with one who is shown to be a member of the family of those claiming heirship, it is erroneous to instruct the jury that such identity must be established before such declarations as to the family relative can be considered.

7. ———: ———: ———: ———. In such case, it is misleading and erroneous to instruct the jury that the petitioners claiming heirship must prove by a preponderance of the evidence "that they are the next of kin, blood relatives, of the said William D. Lyle, deceased, and that they are the only next of kin and blood relatives living" of decedent, the only question being as to the identity of the decedent with the relative whose heirs they are.

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

William E. Shuman and *Cook & Gossett,* for appellants.

Wilcox & Halligan and *James G. Mothersead, contra.*

SEDGWICK, J.

William D. Lyle died in Lincoln county, in this state, in March, 1905. He left some property and no will, and an administrator was duly appointed. He left no heirs in this country, and these petitioners, who are residents of Scotland, filed their petition in the county court of Lincoln county, asking that they be declared to be the next of kin and heirs of the decedent. The county court denied their petition, and they appealed to the district court. Upon trial in that court with a jury, there was a verdict and judgment against them, and they have appealed to this court.

1. The evidence shows that one Robert Lyall of Dundee, Scotland, was the father of three sons, James, William and David Lyall. These petitioners are the lineal descendants of William. David left a son, William D. Lyall. The petitioners attempt to identify this William D. Lyall as the deceased William D. Lyle, who died in Lincoln

county. The petitioners produced evidence tending to show that their relative, William D. Lyall, when a very young boy, 13 or 14 years of age, enlisted in the British army, and afterwards deserted and came to this country, and became a soldier in the Union army in the civil war. Three several witnesses, residents of Scotland, testified by deposition that boys of 13 years of age were allowed to enlist in the British army, but when the petitioners offered this part of the depositions in evidence it was excluded, and this ruling is now assigned as error.

The theory of the petitioners is that the fact that decedent deserted from the British army is an important matter in this case as furnishing a reason for his reticence as to the place of his birth and his relatives, and that this fact also explains statements by decedent as to his former home and relatives, which statements would seem to be inconsistent with some of the evidence produced by petitioners. The petitioners testified that their relative, William D. Lyall, did enlist in the British army, and deserted and left the country. The evidence offered would tend to corroborate them, and could not prejudice the administrator in any way. The objection to the evidence was that it was an attempt to prove the law of a foreign country by witnesses not shown to be familiar with that law. It does not seem to relate so much to the question of the legal right of boys to enlist as to the fact that they were allowed to do so. These witnesses testified to their knowledge of the fact that boys of that age were then received in the army for certain purposes.

2. Some time before the trial the administrator filed in the district court objections to these depositions, on the ground that they are "incompetent, immaterial, irrelevant, and not the best evidence, and no foundation laid." When the case was called for trial, the court did not determine this objection before the trial as required by section 391 of the code, and the petitioners now insist that the evidence could not be excluded for that reason. This evidence was excluded on the ground that it was incompetent

and irrelevant. Therefore section 390 of the code has no application.

3. The petitioners offered in evidence a photograph that was identified as that of William Lyall, who was the ancestor of these petitioners, and the nephew of David Lyall, whose son the petitioners were seeking to identify as the decedent. This photograph was excluded, and the petitioners urge this ruling as reversible error. The photograph bore the stamp, "J. Roger, South Tay St., Dundee." This same stamp was on a photograph found among the effects of the decedent after his death, and there was evidence tending to show that at the time William D. Lyall left Dundee, according to the theory of the petitioners, there was a photographer of that name doing business in the place named. We do not see how this evidence could have improperly prejudiced the administrator in any way, and, together with other circumstances in the case, might have been of some assistance in determining the issue presented to the jury. We think the evidence should have been received.

4. A document attached to the deposition of Helen Lyall Graham, called an "extract entry of birth," was properly rejected by the court as not sufficiently authenticated.

5. The court instructed the jury: "The jury are instructed that, before you can consider the declarations made by William Lyall, you must find by the testimony in this case, other than the declarations of William Lyall, that the said William Lyall was a relative of William D. Lyle, deceased, who died in Lincoln county about March, 1905." This instruction was erroneous. The evidence showed beyond any question that the petitioners were the children and grandchildren of William Lyall, whose declarations were referred to in this instruction, and that the said William Lyall was also the cousin of William D. Lyall, who was the relative of these petitioners, and who left Scotland as testified to by them. His declarations then related entirely to William D. Lyall, whom he had personally known as his cousin, and were competent to

show transactions and relations existing between the cousins. It was not necessary that the identity of the cousin, in regard to whom these declarations were made, with this decedent should be established before the declarations in regard to the conduct and habits of his cousin could be received in evidence. Whether these facts showed that the cousin became a soldier in our federal army, and afterwards located in Nebraska, and showed or indicated where he lived in Nebraska were all questions for the jury in determining whether or not this cousin was in fact the decedent, William D. Lyle. The question of the competency of such declarations is a question of law for the court, and should not be submitted to the jury.

6. The court instructed the jury: "The jury are instructed that the sole and only question for you to decide under the evidence in this case is, have the petitioners shown by the evidence that they are the only living blood relatives of William D. Lyle, deceased. * * * That William D. Lyle died in this county during the month of March, 1905, is undisputed. The jury are instructed that the burden of proof rests upon the petitioners to show by a preponderance of the testimony that they are the next of kin, blood relatives, of the said William D. Lyle, deceased, and that they are the only next of kin and blood relatives living of the said William D. Lyle, deceased." These instructions are complained of by the petitioners, and we think justly so. There was but one substantial question to be determined by the jury, and that was whether the William D. Lyall who was the relative of these petitioners, and who left Dundee, Scotland, many years ago, was the same person as the decedent, William D. Lyle. The petitioners established satisfactorily that their relative, William D. Lyall, left Scotland and came to this country about the time of the commencement of our civil war, and that they are his next of kin and would be entitled to inherit his property upon his decease. The evidence shows that the Lyall family of Dundee, Scotland, were not particular as to the spelling of their family name,

and there is evidence that it was sometimes spelled Lyall, sometimes Lyle and sometimes Lyel, and that, even in the churchyard, "you can see the name spelled there differently of the same race of Lyalls." It was sufficient if the plaintiffs had shown by a preponderance of the evidence that they were the only next of kin to the decedent; and to require them, in addition to that, to prove that they were his only blood relatives living was erroneous. The sole question for the jury was whether the decedent was in fact William D. Lyall, shown by the evidence to be the relative of the petitioners.

7. The administrator contends that under the evidence in this case no other verdict could be sustained than the verdict rendered. The evidence is without contradiction that these petitioners are next of kin to William D. Lyall, formerly of Dundee, Scotland; that he left no other heirs to inherit his property to the exclusion of the petitioners; that as a boy he joined the British army, and that he probably deserted and came to this country. It remained for the petitioners to prove his identity with this decedent. This seems to be the only question that the court should have submitted to the jury. If the decedent was in fact the William D. Lyall described in these depositions, the petitioners are his next of kin and entitled to inherit his property. The difference in the spelling of the name, and the statements of decedent as to the place of his birth, and as to his relatives, would, of course, be considered by the jury, but these facts should be considered in the light of the circumstances that the name was written in different ways by the Dundee family, and that the evidence tends to show that the decedent had a motive for concealing his identity, as well as other circumstances disclosed by the evidence. The photograph found among the personal effects of decedent was found by Mr. Christie to be the photograph of William D. Lyall of Dundee, with whom the witness had played in his boyhood and with whom he was very familiar. This witness also identified positively the two other persons shown in the photograph.

The photograph bore an imprint which showed that it was made in Dundee, Scotland, at the gallery where other photographs of the Lyall family were made, and the evidence shows that it must have been made many years ago. There are other circumstances in the case tending to show the identity of the decedent as the William D. Lyall of the photograph. The petitioners insist that the evidence of identity is so strong that we ought to dispose of the matter by directing a judgment in their favor. The trial court excluded important evidence, and we do not feel justified in disposing of the case upon the evidence before us.

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

REVERSED.

HAMER, J., not sitting.

FROTUNATO ZANCANELLA, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MAY 17, 1913. No. 17,213.

1. **Street Railways:** ACTION FOR PERSONAL INJURY: ADMISSIBILITY OF EVIDENCE. The plaintiff testified that, as he attempted to cross the track of the street car, he was struck and knocked down by a passing car; he did not see the car until it struck him; while the car was passing he could see that it was running at from 25 to 35 miles an hour. *Held*, That, while his evidence was not competent for the purpose of determining the exact speed of the car, it was properly admitted as tending to support the allegation that the person in charge of the approaching car failed to reduce its speed and advance slowly while passing another car.

2. ———: ———: ———: PHOTOGRAPHS. Photographs showing the location of the alleged accident and the condition of the street and surroundings are not necessarily to be excluded from the evidence merely because the situation is capable of verbal description.

3. ———: ———: NEGLIGENCE: INSTRUCTIONS. The plaintiff testified that after he had alighted at a street crossing on the west side of the south-bound street car, intending to go west on the street,

he changed his mind, and started to go east across the parallel track, and was struck by a passing car. *Held*, That it was erroneous to submit to the jury the question whether the conductor was negligent in not warning him of danger in crossing the parallel track, there being no evidence that the conductor knew that he intended to cross the track, or knew before he alighted from the car that another car was approaching.

4. ———: ———: ———: EVIDENCE. Under such circumstances, the testimony of the plaintiff that he did not see or hear the approaching car is not sufficient to prove the allegation of his petition that there was no headlight on the approaching car, nor any bell sounded as it approached.

5. Appeal: INSTRUCTIONS. It is erroneous to submit to the jury issues upon which there is no evidence.

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

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

George W. Cooper and *T. W. Blackburn, contra.*

SEDGWICK, J.

Between 10 and 11 o'clock on the evening of July 14, 1909, the plaintiff became a passenger on one of the defendant's cars at Farnam street in Omaha. He informed the conductor that he wanted to leave the car at G street in South Omaha. When they reached G street, the conductor notified him, and he left the car. Early the next morning he was found unconscious some distance beyond the crossing at G street. His foot was crushed so that his left leg was necessarily amputated below the knee, and he had suffered other injuries. He brought this action against the defendant in the district court for Douglas county, alleging that the defendant's negligence was the cause of his injuries. The trial resulted in a verdict and judgment in his favor, and the defendant has appealed.

The defendant contends that the evidence is entirely insufficient to support the verdict; that there was failure of evidence to show negligence on the part of the defendant; that the evidence does not satisfactorily show that

the injury was caused by the defendant's car, and, if it was so caused, it was occasioned by the plaintiff's own negligence; and that the court erred in submitting various questions to the jury of which there was no evidence, and in refusing instructions offered by the defendant. The plaintiff's case depends almost entirely upon his own evidence. He testified that he was going to South Omaha to spend the night with his friend, Jim Canadella; his friend lived on G street, west from the street car track about two blocks; that he and his friend are Austrians, and the plaintiff is unfamiliar with the English language. He appears in that respect to be somewhat embarrassed in giving his testimony. He says that, when the conductor stopped the car at G street, he got off from the car, and passed towards the back end of the car, and the car went on. It was a very dark and stormy night, and there were no lights there, and he had forgotten the street number of his friend's residence, and, seeing a light at some distance to the east, he started at once across the parallel track; that he looked both north and south, and saw nothing, and just as he stepped upon the other track a north-bound car struck him, knocked him down and passed over his foot. He then saw by the light in the car that the car was running at from 25 to 35 miles an hour. The defendant objected to this testimony in regard to the speed of the car, and there is much discussion of this objection in the briefs upon the part of both the plaintiff and defendant.

It seems clear that the plaintiff did not show himself competent, under the circumstances, to testify with any degree of accuracy as to the rate of speed of the car. He did not see the car until after he was hurt, and was then lying upon the ground in his injured condition, and but a few feet from the car that was passing. The evidence, however, shows that there is a wholesome and necessary rule of the company that, when a car is approaching another car of the company that has come from an opposite direction and stopped to receive or land a passenger, the speed of the approaching car must be reduced, and such

car must advance slowly until it has passed, and ready to stop immediately if necessary to avoid injuring any person getting off or on, or persons or vehicles who may be crossing the street. If this rule was violated the company was negligent; and, while the evidence of the plaintiff was wholly inadequate to establish to any degree of accuracy the exact rate of speed of the approaching car, yet it is not so clear that the jury might not find from this evidence that the person in control of this car failed to reduce its speed and advance slowly ready to stop immediately if necessary, as the rule required. It is true that the conductor of the car which the plaintiff had left testified that no other car was passing at the time, and there are circumstances that seem to corroborate this testimony of the conductor; but we cannot see that the court erred in submitting the consideration of this conflicting evidence to the jury. This evidence, then, was competent for the purposes indicated, and the court did not err in so regarding it.

The petition contained several allegations of negligence on the part of defendant. That, when the south-bound car stopped at the intersection to permit the plaintiff to alight, the north-bound car approached and ran over said intersection at a high and dangerous rate of speed; that there was no headlight on the north-bound car; that the bell was not sounded; that the man in charge of the car failed to keep a sharp lookout or be prepared to stop the car; and that the conductor on the south-bound car negligently failed to warn plaintiff of danger from the approaching car on the parallel track.

The defendant offered in evidence four several photographs of the location where the accident is supposed to have occurred. These were received by the court, but afterwards, upon motion of the plaintiff, were stricken from the record. The ruling of the court in striking these photographs from the record is assigned as erroneous. The photographs show the location of the tracks, the condition of the street on each side of the track, the location

of the buildings and other similar matters, and we do not see how they could have misled the jury in any way. The plaintiff says that "photographs are not generally admissible where the situation they are intended to illustrate is capable of verbal description," and undoubtedly some courts have applied such a rule, but they are in the minority, and that is not the rule in this state. *Carlson v. Benton*, 66 Neb. 486. In *Omaha S. R. Co. v. Beeson*, 36 Neb. 361, quoting from Thompson on Trials, it was said: "Where an inspection of the premises is proper, but impracticable or impossible, a photographic view of it is admissible." It was not intended to say that photographs could not be received under any other circumstances. The admission of this evidence is largely within the discretion of the trial court, depending upon the circumstances and the condition of the evidence, and this evidence is not of so much importance in this case that the error in excluding it would necessarily require a reversal.

During the trial of the case, the plaintiff was permitted to amend his petition by inserting the allegation "that, notwithstanding it was dark and stormy, the conductor of the car on which plaintiff was a passenger negligently failed and omitted to warn plaintiff before he left the car, or at any time, of danger from an approaching car on the parallel or other tracks." The court submitted this question to the jury in the instructions. The defendant insists that there was no evidence before the jury justifying the submission of this question, and we have not found in the abstract sufficient evidence to justify it.

The condition of the plaintiff is indeed unfortunate. A laboring man in a strange country; he has lost his limb and has been otherwise injured so as to greatly affect, if not destroy, his ability to supply himself with the necessities of life. The jury might naturally think that there ought to be some remedy for him, but the defendant company cannot be required to provide for all who may use their cars and meet with accidents to their injury. Unless it is affirmatively proved that the company or its em-

ployees were guilty of some negligent act which was the proximate cause of the injury, it is not liable. If society in general owes a duty to one so injured, it cannot shift that duty upon one not at fault. There seems to be no possible theory under this evidence upon which to charge negligence upon the defendant company, unless it could be found that while the south-bound car, upon which the plaintiff was a passenger, was standing for the plaintiff to alight therefrom, the north-bound car upon the parallel track passed it, and failed to reduce speed and advance slowly, ready to stop immediately if necessary, and that this neglect was the proximate cause of the injury. There is no affirmative evidence from which it could be found that there was no headlight on the approaching car, or sound of bell. These matters were not mentioned by the witness. He testified that he did not see or hear the car, and that he looked and listened. There is evidence that he was in a stupor or sleep from Omaha to the place of the accident, and that the conductor aroused him at G street. The car was an open one and so well lighted that he saw the lights until it was a block distant after it passed him. A car running at the rate he says this car did must have made sufficient noise to be heard by a careful listener before it struck him. The other car, he says, was between him and the approaching car until it began to move slowly just before the car struck him. This might have distracted his attention, if indeed he tried to give attention, and his statement that he did not see or hear the car tends as strongly to show the degree of care that he used, as it does to show that there was no sound or light to attract his attention. It does not amount to affirmative evidence of negligence in failing to show a head light or sound the bell.

Likewise, there was no evidence of negligence in failing to warn him of danger. He alighted from the west side of the car in a paved street. The parallel track was on the other side of the car. Two witnesses testified that after alighting from the car he went west nearly, if not quite, to

the sidewalk. He denies this, and says he went north along the side of the car. He says that he intended to go west on G street, until after he left the car, when he saw a light to the east and concluded to go in that direction. There is no evidence of any indication before he left the car of intention on his part to cross the parallel track. He alighted from the car in safety and in a safe place. There was no danger known to the conductor, and not known to the plaintiff. It is said in plaintiff's brief that, conceding the plaintiff's intoxicated condition (there was some evidence tending to show that he was intoxicated), "the presumption would be that he would go into a place of danger." This might call for a general warning that he was unfit to care for himself, but would not enable the conductor to foresee what dangers he might run into. It was not negligence to fail to tell him not to go around the car from which he was alighting without looking and listening for a passing car. The plaintiff's danger was not increased by such failure on the part of the conductor, for the plaintiff by his own statement knew that he must be careful, and must look and listen, which he did, and which was all that the conductor could have suggested. There is no evidence that the conductor knew that another car was approaching; he could not therefore warn him of that fact.

The form and language of the instruction given by the court are above criticism. The issues that they present are well and carefully presented, but there was no evidence to support them, with possibly the one exception which we have indicated. The trial court should, as far as possible, eliminate all superfluous matters, and submit to the jury only the controverted questions of fact upon which their verdict must depend. To submit to the jury matters not in issue, or to submit issues that are so wholly unsupported upon the one side or so conclusively established upon the other that reasonable minds could not differ with regard to them, is erroneous.

Putting these unsupported questions before the jury was

manifestly misleading and requires a reversal of the judgment.

REVERSED AND REMANDED.

REESE, C. J., BARNES and FAWCETT, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

GEORGE D. DARLING, APPELLANT, V. ANNA KIPP, APPELLEE.

FILED MAY 17, 1913. No. 17,214.

Sales: ACTION FOR PRICE: DEFENSE: PUBLIC POLICY. It is not a defense to an action to recover the price of goods sold that the vendor knew that the purchaser was conducting an illegal business, when it is no part of the contract that the goods shall be used for such illegal purpose, and the vendor has done no act in aid or furtherance of the unlawful design.

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

E. H. Boyd and *C. C. Barker,* for appellant.

William Mitchell, contra.

SEDGWICK, J.

This action was brought to recover the alleged purchase price of one piano, one music roll, and a roll of carpet felt. Upon trial in the district court for Box Butte county, the court instructed the jury to find a verdict for the defendant, and the plaintiff has appealed.

There was a written contract between the plaintiff and defendant, in which it was recited that the piano was leased by the plaintiff to the defendant, but the contract is, in substance, a contract of conditional sale, and not of lease. It provides that the defendant should pay $25 a month until the sum of $650 was paid for the piano, and that until that amount was paid the title should remain

in the plaintiff. It was provided that the defendant might pay the amount with interest at any time. After several payments had been made the property was destroyed by fire. The contract, however, contained an agreement that the defendant should keep the property insured for the benefit of the plaintiff, and this agreement was not fulfilled on the part of the defendant; no insurance having been obtained on the property.

The defense was that, at the time the contract was made, the defendant "was running a house of prostitution," and that the plaintiff knew that fact, and that the contract was therefore contrary to public policy and not enforceable. The plaintiff, upon cross-examination, testified that he knew that the defendant was conducting a house of prostitution; that he delivered the piano at her house; that he knew that she was going to use it in her house of prostitution; that it remained in her house until it was destroyed by fire. The plaintiff was a retail dealer in furniture at Alliance. He sold these articles in the regular course of his business. He had no interest in the defendant's business and was in no way connected with it. There seems to be no reason for holding him responsible for her business, any more than one who should sell her groceries, fuel, wearing apparel, or any such like articles. Under such circumstances, he is not *particeps criminis*, and was entitled to recover for the goods sold. This was determined in this state in an early case, *Kittle v. De Lamater*, 3 Neb. 325. Mr. Justice GANTT, speaking for this court, quoted with approval from *Tracy v. Talmage*, 14 N. Y. 162, 176, "I consider it as entirely settled by the authorities that it is no defense to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose," and pointed out that it is only in case "it is made a part of the contract that the goods shall be used for such illegal purpose, or if the vendor has done some act in aid or furtherance of the unlawful design, (that) there cannot be a recovery." In the same case, upon another hearing, 4 Neb. 426, it was held

that one who had knowledge of the illegal purpose for which the goods were intended, but had nothing to do with using them for that purpose, was not *particeps criminis*, and that the defendant was liable for their value. Under the evidence in this case, the plaintiff was entitled to recover, and the court erred in instructing the jury to find for the defendant.

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

REVERSED.

REESE, C. J., BARNES and FAWCETT, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

ROLLIN HANAN, APPELLEE, V. DON MCLEOD ET AL., APPELLANTS.

FILED MAY 17, 1913. No. 17,249.

Brokers: SALE OF LAND: ACTION FOR COMMISSION: QUESTION FOR JURY. The defendants, who were engaged in a general real estate business, made a written contract with the plaintiff to procure purchasers of land. The contract provided that, if plaintiff "shall not accompany, or arrange with general agent, J. McLeod, to accompany the party to whom any land is sold," his compensation shall be one-half of the amount he was to receive if he accompanied the purchaser himself. There was evidence tending to prove that one Overton was authorized to act for McLeod in the matter, and that he agreed on behalf of McLeod to accompany a certain purchaser of land, and that plaintiff should receive his full compensation. *Held*, That the questions of Overton's authority and whether in fact he made such agreement were for the jury, and that the court did not err in submitting them with proper instructions.

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

Brome, Ellick & Brome, for appellants.

Elmer E. Ross, contra.

SEDGWICK, J.

Don McLeod and John McLeod were engaged in general real estate business, and contracted with the plaintiff to assist them in the sale of lands. The contract between them was in writing, and provided that the plaintiff should be paid $1 an acre for all lands sold by the McLeods through him for cash. The contract contained the following provision: "It is expressly understood and agreed that if first party shall not accompany, or arrange with general agent, J. McLeod, to accompany the party to whom any land is sold or with whom any trade is made, that he shall receive but one-half of the commission above mentioned." The plaintiff found a purchaser for 640 acres of land, and after the deal was consummated demanded his commission, $1 an acre, $640. He brought this action in the county court of Merrick county to recover that amount, and the defendants paid $320 thereon, and answered that the plaintiff was not entitled to more than 50 cents an acre because the plaintiff did not accompany the purchaser to examine the land in making the contract of purchase. The plaintiff replied that he arranged with one Overton, who was the general agent of the defendants, and each of them, to accompany the prospective purchaser to the land "as and in the place of the said defendant J. McLeod, under the terms and agreements aforesaid," and that the said Overton did accompany the purchaser.

Upon the trial in the district court for Merrick county, the court instructed the jury: "There are only two questions for you to determine in this case under the pleadings filed, viz.: (1) Did the plaintiff arrange with B. J. Overton to accompany the purchaser of this tract of land? (2) If he did, was Mr. Overton authorized to make such an arrangement? To entitle the plaintiff to recover you must find both of these questions in favor of the plaintiff. And the burden is upon the plaintiff to satisfy you by a preponderance of the evidence that he made such an arrangement. * * * If upon either of these questions the evidence is evenly balanced, or if it preponderates in favor of the defendants, your verdict shall be for the defendants."

The defendants insist that the instruction is erroneous; that Overton had no authority to alter or vary the terms of the written contract between the parties, and, as the plaintiff did not comply with the terms of the contract by accompanying the proposed purchaser to the land, he could not recover more than the 50 cents an acre for the land sold. The evidence shows that Overton was, in general, acting as the agent for the defendants, and the plaintiff testified that, while he was negotiating with the purchaser for the sale of the lands in question, Overton told him that it would not be necessary for him to accompany the purchaser, and that other arrangements would be made, and that the plaintiff would be entitled to his full commission as though he had accompanied the purchaser. This was denied by Overton, but it presented an issue of fact for the jury to determine. It appears that the plaintiff had correspondence with John McLeod in regard to the matter, and, among other things, McLeod wrote the plaintiff in that connection: "You understand that the terms of the contract require you to accompany the men, but, if you had an agreement with Mr. Overton, all we need to understand is what the agreement was and you will receive credit for your commission." There is other evidence in the record tending to show that Overton was acting as the agent for McLeod, and that an arrangement with Overton to accompany the purchaser was in effect an arrangement with his principal, McLeod; and, while the evidence is somewhat conflicting upon this point, there is no doubt that the court was correct in submitting this question of fact to the jury. The instruction given fairly presented the question, and there appears to be nothing in the instructions inconsistent with this view. The verdict of the jury therefore must control.

The judgment of the district court is

AFFIRMED.

REESE, C. J., BARNES and FAWCETT, JJ., concur.

LETTON, ROSE and HAMER, JJ., not sitting.

HENRY W. O'NEILL ET AL., APPELLANTS, V. JACOB F. LEAMER ET AL., APPELLEES.

FILED MAY 17, 1913. No. 17,695.

1. **Drainage Districts**: ORGANIZATION: INJUNCTION. When the petition filed for the formation of a drainage district, under article IV, ch. 89, Comp. St. 1909, and the proceedings thereunder are sufficient to give the district court jurisdiction of the subject matter, and an order is entered therein declaring the organization a public corporation of this state, as provided in the third section of that act, the supervisors of the district, duly elected, cannot be enjoined from proceeding with the work for which the district was organized on the ground of irregularities in the organization thereof.

2. ———: PUBLIC CORPORATIONS. A drainage district organized under article IV, ch. 89, Comp. St. 1909, is a public corporation.

3. **Public Corporations**: ORGANIZATION: CONSENT OF PUBLIC. When a public corporation is organized for subordinate governmental purposes, such as a village, township, city, or drainage district, it is not necessary that all of the people embraced within the corporate limits should consent to incorporation. The legislature has power to provide for such incorporation by the required number of inhabitants and property owners therein without the unanimous consent of all.

4. **Drainage Districts**: RIGHT OF EMINENT DOMAIN. Condemnation proceedings are allowed under said statute (section 12) when the "board of supervisors are unable to agree with the owners" of the property. When the condemnation proceedings and the work thereunder are enjoined on the ground that the drainage district has no legal organization, and that no right exists to take the land for such purpose, and there is no evidence that the plaintiffs seeking the injunction are, or ever have been, willing to grant the right of way upon any terms, it sufficiently appears that the parties cannot agree.

5. ———: INJURY TO LAND: INJUNCTION. If lands not taken by the condemnation proceedings are damaged by the improvement, the law provides an adequate remedy. The owners of lands so damaged are not entitled to enjoin the prosecution of the work on the sole ground that the damaged lands are not included in the condemnation proceedings.

6. ———: LANDS SUBJECT TO DRAINAGE ACT. Under the statute in question, a district may be formed for the purpose of having

swamp and overflowed lands "reclaimed and protected from the effects of water, by drainage or otherwise." Section 1. To provide a drain to prevent water from flowing onto swamp lands is to protect such lands from the effects of water as contemplated by this statute.

7. Eminent Domain: PETITION: DRAINAGE DISTRICT. The supervisors must file a petition for condemnation "setting forth the location and character of the right of way needed, and describing the lands to be crossed." Section 12. If a petition is filed in county court showing the starting point of the proposed ditch and the lands it will cross, stating the government subdivisions, it is sufficiently definite in that regard to give the county court jurisdiction to appoint the appraisers, and, if the damages assessed by the appraisers and the orders of the court thereon are not appealed from, they are not subject to collateral attack on the ground that the location of the ditch is not sufficiently set forth in the petition.

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

William V. Allen, M. D. Tyler and *William L. Dowling,* for appellants.

A. C. Strong and *R. E. Evans, contra.*

SEDGWICK, J.

These defendants and other citizens of Dakota county applied to the district court for that county to organize a drainage district under the provisions of article IV, ch. 89, Comp. St. 1909. The court made the order organizing the district under the title "Drainage District No. 2 of Dakota County, Nebraska." Afterwards, these defendants were chosen as supervisors of the district, and began condemnation proceedings in the county court of Dakota county to obtain a right of way to their drainage canal across lands of these plaintiffs. The plaintiffs then began this action in the district court for Dakota county to enjoin the defendants from proceeding further to construct the ditch across the plaintiff's land. Upon trial, the court found in favor of the plaintiff Elizabeth Leahy, and

against the plaintiffs O'Neill and Heffernan, and entered a decree dissolving the temporary injunction as to the last two named plaintiffs, and the plaintiffs O'Neill and Heffernan have appealed.

The pleadings are lengthy and involved, and, so far as we can see, contain considerable unnecessary and immaterial matter. A large number of questions are presented and discussed at length by the appellants, but we feel constrained to confine our discussion to the more important ones.

The plaintiffs contend that the drainage district was not regularly organized, and seem to insist that the proceedings were so defective that the court was without jurisdiction, and the district is not even a *de facto* corporation. The objections suggested, however, relate to supposed defects in serving of notice on some of the parties interested in the formation of the district, and other similar matters, none of which is of sufficient importance to affect the jurisdiction of the court or subject its judgment to this collateral attack.

The objection that the order incorporating the district was erroneous because some of the property included in the district was not sufficiently described might have been raised upon the hearing of the petition for the formation of the district, and upon appeal from the order, but cannot be insisted upon in this collateral proceeding.

Another contention of the plaintiffs is that, under our statute, a drainage district is not a public corporation, and that the attempt to give it the power of eminent domain is unconstitutional. The argument upon this point is interesting; but in view of the fact that this question has heretofore been fully considered by this court and determined adversely to the contention of the plaintiffs, and that the legislature has from time to time for many years past established and declared a public policy which is inconsistent with the view that these organizations are purely private corporations, and in view of the fact that other questions presented in this case are not so well

settled and will require somewhat lengthy discussion, we do not consider it advisable to review the grounds of our former decision. *Neal v. Vansickle*, 72 Neb. 105; *Barnes v. Minor*, 80 Neb. 189; *State v. Hanson*, 80 Neb. 724; *Drainage District No. 1 v. Richardson County*, 86 Neb. 355, 365.

The plaintiffs contend that it is not within the power of the legislature to authorize a portion of the property owners in a proposed drainage district to force others in the district to consent to the incorporation and to "bear the burden and liability of such an organization." No authorities are cited upon this proposition, and we doubt whether any can be found. The same objection would apply to the organization of counties, townships, villages, and other similar subordinate public corporations.

It was also objected that there was no lawful attempt by the drainage district to agree with the plaintiffs as to a right of way over their lands before beginning the condemnation proceedings. One of the parties interested in this land testified that the attorney for the district offered $150 an acre for the land appropriated, and "I don't think I accepted it; I think I said I could not accept it. I don't remember what I said." It appears from the plaintiffs' petition and the evidence that the officers of the district were made to understand that these plaintiffs resisted the right of the district to purchase a right of way across the land. None of the parties interested testified that they were ready and willing to grant a right of way. The appraisers appointed by the county court fixed the amount of the condemnation money, and there is no serious objection to the amount so fixed as unjust or unreasonable. The briefs of the plaintiffs do not refer to any evidence of that nature. There is therefore no merit in this objection.

The plaintiffs contend that the condemnation proceedings were void because they do not condemn and take certain lands of the plaintiff O'Neill which would be flooded by the waters of the ditch. If the plaintiffs' lands, other than those taken by the condemnation proceedings,

are damaged by this improvement, the law affords them a remedy, including the right of appeal to the court of last resort. The statute provides that "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 damages and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act." Section 12. The law is well settled in such case by many decisions of this court. When the remedy at law is adequate, the prosecution of the work cannot be delayed by injunction.

Another contention on the part of the plaintiffs is that a drainage district has no power to condemn and take the land of a private citizen for the purpose of constructing a ditch outside of the district, and to "take water before it reached the swamp or submerged lands within the district and carry it across the private property of a private citizen and empty it into a private lake." It is not seriously contended that the proposed ditch will "empty it into a private lake." *Campbell v. Youngson,* 80 Neb. 322, and, upon rehearing, 82 Neb. 743, is cited, but that case construed another statute. The statute controlling in the case at bar provides that a district may be formed for the purpose of having swamp or overflowed lands "reclaimed and protected from the effects of water, by drainage or otherwise." Section 1. This language clearly covers this objection.

It is objected that the application for condemnation did not describe and locate the proposed ditch with sufficient accuracy. The statute requires that, when the supervisors "have agreed upon a location or route for said ditch or ditches and formulated a plan for the other improvements contemplated, then they * * * may present to the judge of the county court of the county in which said land, easements or franchise are situated, a petition setting forth the location and character of the right of way needed and describing the lands to be crossed." Section 12.

The application for condemnation described the proposed right of way over each government subdivision of the lands of these plaintiffs substantially as follows: "A right of way 200 feet in width, being 100 feet on each side of the center line of said Elk Creek Cut-off Ditch as now located, over and across lot 4 or the southeast quarter of the southeast quarter of section 29, township 29, range 8, being 5.8 acres, Henry W. O'Neill, owner." The starting point appears to be definitely stated in the petition. The evidence shows that the line of the proposed ditch was definitely located by the surveyors and was marked with stakes. When the drainage board went over the land the stakes were still in place. Some of them were missing when the appraisers viewed the land. The drawings, which the appraisers had, showed the exact location of the proposed ditch. There is nothing to indicate that the appraisement of damages was in any way affected by any supposed uncertainty as to the location. The county court had power to correct any irregularities in the method of appraisement. If by reason of the difference in the statute from that construed in *Trester v. Missouri P. R. Co.*, 33 Neb. 171, that case is not to be regarded as decisive of the case at bar upon this point, which we do not decide, it seems clear that the application was sufficiently definite to give the county court jurisdiction of the proceedings. Errors, if any, not affecting the jurisdiction of the court should have been corrected in that court or upon appeal.

We have not found any errors in the record requiring a reversal of the judgment of the district court. It is therefore

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

FIRST TRUST COMPANY OF LINCOLN, APPELLEE, V. LANCASTER COUNTY, APPELLANT.

FILED MAY 17, 1913. No. 17,795.

Taxation: ASSESSMENT: MORTGAGES. The act of 1911 (Laws 1911, ch. 105) Comp. St. 1911, ch. 77, art. I, provided that mortgages of real estate in this state should be considered as an interest in the land for purposes of taxation, and should be assessed to the mortgagee, unless the mortgagor agreed in the mortgage to pay the taxes thereon. Under section 56 of the revenue act, such mortgages should be deducted from the value of the capital stock of banks and trust companies, and the remainder assessed as capital stock. Such mortgages are assessed separately from the capital stock of the company whether the tax is paid by the mortgagor or by the mortgagee.

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

Grant G. Martin, Attorney General, George W. Ayres, Frank E. Edgerton, J. B. Strode and *G. E. Hager,* for appellant.

Lincoln Frost and *Walter L. Pope, contra.*

SEDGWICK, J.

The First Trust Company of Lincoln demanded that the amount and value of the real estate mortgages which it held should be deducted from the gross value of its capital stock for purposes of taxation. The assessor refused, and the county board also refused to make the deduction. Upon appeal to the district court for Lancaster county, the action of the county board was reversed, and it was ordered that the petition of the company be granted. From this judgment of the district court the county has appealed.

The petition alleges the value of the capital stock of the company, and the amount and value of the real estate mortgages owned and held by the company, and alleges that the mortgages provided that the mortgagor shall pay

the taxes thereon, and that the taxes were paid by the mortgagors. Section 56, art. I, ch. 77, Comp. St. 1911, provides: "Whenever any such bank, association or company shall have acquired real estate or other tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such association or company." The act of the legislature of 1911 (Laws 1911, ch. 105), entitled "An act to provide for the taxation of mortgages of real property and to prevent double taxation on incumbered property in the state," provides: "A mortgage on real estate in this state is hereby declared to be an interest in real estate for the purposes of assessment and taxation. The amount and value of any mortgage upon real estate in this state shall be assessed and taxed to the mortgagee or his assigns, and the taxes levied thereon shall be a lien on the mortgage interest; and the excess in value of the real estate above the mortgage or mortgages thereon shall be assessed and taxed to the mortgagor or owner of the premises and be a lien on the owner's interest. * * *. And provided, further, that when it is provided and agreed in any mortgage, that the mortgagor shall and will pay the tax levied upon the mortgage, or the debt secured thereby, that such assessor or county clerk shall not enter said mortgage for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the property mortgaged." Comp. St. 1911, ch. 77, art. I, secs. 112*b*, 112*c*.

The first argument of the appellant seems to be that the mortgages are not "assessed separately," within the meaning of section 56, because, since the mortgagors agreed to pay the taxes on the mortgages, they are required by the statute to be assessed with the land. But this of course is not the meaning of the statute. The capital stock is supposed to represent all of the property of the company and the full value thereof. If the company has acquired any property that is assessed separately and independ-

ently of the capital stock, it would be twice assessed if the full value of the capital stock is also assessed. Therefore property that has been assessed separately from the capital stock of the company is deducted from the value of the capital stock, and the remainder only is assessed as capital stock.

If the mortgagor does not agree to pay the taxes upon the mortgage, the tax must be assessed against the mortgagee. The statute expressly makes the mortgage an interest in the real estate for taxation purposes; but, if it were not, it is plainly included in the words, "any other tangible property," so that, if the mortgagee was liable for the taxes upon the mortgage, there could of course be no doubt that such mortgages, being assessed to the mortgagee, and assessed separately from the capital stock, should be deducted from the value of the capital stock in determining the value of the stock for taxation. Does the fact that the mortgagor has agreed to pay the tax on the mortgage interest require a different construction of the statute? The statute regards the mortgage as an interest in the land. The value of the mortgage and the value of the equity of redemption together are the value of the land. When the rate of interest upon a loan is being agreed upon, the man who loans the money inquires who will pay the taxes. Both the lender and the borrower will have the matter of taxes on the loan in mind while negotiating as to the rate of interest. The inducement to loan money is the net income therefrom. If taxes upon the mortgage and other expenses are 1 per cent., both the lender and borrower would, of course, consider it fair that the rate of interest should be 1 per cent. less if the borrower pays taxes and expenses than if the lender pays them. The mortgage being regarded as a part of the land, if full value of the land is assessed to the borrower, and the value of the mortgage is assessed to the lender, and the rate of interest is agreed upon on that basis, the borrower pays taxes upon both, which is double taxation. These mortgages which the company has acquired have

been assessed, and have been assessed separately from the capital stock of the company, and their assessed value should be deducted from the valuation of the capital stock in determining the value of the stock for taxation purposes.

The judgment of the district court is therefore right, and is AFFIRMED.

BARNES, ROSE and FAWCETT, JJ., concur.

REESE, C. J., LETTON and HAMER, JJ., not sitting.

The following opinion on motion for rehearing was filed June 26, 1913. *Rehearing denied:*

1. **Taxation**: ASSESSMENT: CAPITAL STOCK OF BANKS. The law requires the assessor to "determine and settle" the *true value* of the capital stock of "every bank or banking association, loan and trust, or investment company." For that purpose he must require and examine a complete statement of the proper officer, under oath, showing the number of shares of the capital stock and the value of such shares. He must also examine the last report made to the authorities by such institution pursuant to law. And if he has reason to believe that these statements and reports fail in any respect to show the actual value of the assets, he must examine "the officers of such bank, association or company, under oath, in determining and fixing the *true* value of such stock." If the stock has a "market value" he must *consider* that, and must also *consider* "the surplus and undivided profits." He must *consider* these things, but is not concluded by them. He must find the true value of all assets for himself.

2. ———: ———: ———. All property and assets and everything of value is included in this *true value* of the stock, and if any of that property has been assessed separately from the capital stock, it must not be again assessed, but must be deducted and the remainder assessed as capital stock.

SEDGWICK, J.

Upon the motion for hearing, another argument was had and the case was again thoroughly and ably presented.

The principal point argued by defendant is that upon the construction of the statute by our former opinion the plaintiff company will escape taxation. The following is

quoted in the brief from *State v. Karr*, 64 Neb. 514: "The legislature may direct the manner of ascertaining the value of property and franchises; but it cannot prescribe rules that prevent the assessment of the property and franchises of corporations on an equality with property in general in proportion to value." The brief then states this illustration: "Take the case of a bank having say a capital stock of $50,000. It receives deposits to the amount of $50,000 or more. Fifty thousand of its deposits are loaned upon real estate security. In each instance the mortgagor agrees to pay the tax upon the land. The $50,000 of the capital stock of the bank, and in addition thereto its deposits in excess of the $50,000 loaned by it on real estate, it loans out upon chattel or personal security. When it comes to the taxation of the value of its capital stock, if the opinion of this court heretofore rendered in this case is to be followed, it pays no taxes whatever upon same, owing to the fact that the $50,000 loaned by it upon real estate mortgages, upon which it pays no taxes, same being paid under agreement by the various mortgagors, is deducted from the value of its capital stock, which leaves nothing for taxation." If an individual loans $50,000 under the conditions named, he pays no taxes thereon, therefore to hold that a bank should would violate the rule of equality provided by the constitution. If the bank loans the remaining $50,000 on chattel mortgages, such securities are a part of its assets and enter into the value of its capital stock, and are so taxed. Thus no part of the $100,000 of the bank escapes taxation. The statute seems to avoid double taxation on real estate values, but no plan has been devised to avoid double taxation when money is loaned upon chattels. When the bank loans its $50,000 upon chattel securities, it pays taxes on those securities, and the borrower pays taxes upon the chattel property mortgaged and also upon the money borrowed, or such property as he may exchange that money for.

Section 56 of the revenue law is plain and unequivocal.

The proper officers "shall, on the first day of April of each year, make out a statement under oath, showing the number of shares comprising the actual capital stock * * * and the value of said shares on the first day of April. * * * The assessor shall determine and settle the true value of each share of stock after an examination of such statement, and in case of a national bank in (an) examination of the last report called for by the comptroller of the currency; if a state bank, the last report called by the state banking board; and if the county assessor deem it necessary, an examination of the officers of such bank, association or company, under oath, in determining and fixing the true value of such stock, and shall take into consideration the market value of such stock, if any, and the surplus and undivided profits." Comp. St. 1911, ch. 77, art. I, sec. 56. If a bank has any tangible property that is assessed as such and without reference to its capital stock, and the whole value of the capital stock is also assessed, there is double taxation, because this statute requires the assessor to find the true value of the capital stock, and he cannot do that without taking into account everything of value which the bank has. When he has done that, the law does not allow him to assess the full value of the capital stock, because some of the property which goes to make up that value has already been "separately assessed." He is required to assess all of the value of the capital stock that has not been already "separately assessed." It is a mistake to suppose that this does or can result in allowing some property to escape taxation. A little careful study will show that this does not so result. Assessors cannot by violating this law more accurately ascertain the true value of the property of a bank for taxation purposes. It is more likely that a failure on the part of some assessors to understand and obey the law has enabled banks to escape taxation in many cases. The law gives assessors ample means to enable them to do their duty. If they fail to avail themselves of these means, it is the fault of

the assessors or of their advisors, and not the fault of the law. The assessor is not concluded by the statements of the bank as to the amount, character and value of its assets. In all cases of doubt he should investigate those matters fully in determining the true value of the capital stock, and should include all property and assets of every description at its true value, and when the true value is so ascertained he should assess all except the value of tangible property that has been separately assessed. This seems to be a just method of assessment, but whether it is or not, it is the law and must be enforced.

The motion for rehearing is

OVERRULED.

HAMER, J., not sitting.

WILLIAM R. STOCKING ET AL., APPELLEES, V. CITY OF LINCOLN, APPELLANT.

FILED MAY 17, 1913. No. 17,050.

1. **Municipal Corporations:** STREETS: CHANGE OF GRADE: DAMAGES. Where the record contains no competent evidence to show that the grade of a street had been established prior to the time a city grades a street from its natural to a lower grade, the city will be liable to an abutting lot owner for any damage inflicted upon him by such change of grade.

2. ———: ———: ———: ———. And in such a case the removal, or destruction of, or damage to, trees planted by the lot owner or his grantors, and growing upon that part of the street contiguous to his lot, is a proper element of damages so far, as it may affect the difference in the value of the property before and after its change of grade.

3. **Appeal:** INSTRUCTIONS: EVIDENCE. No prejudicial error is found in the instructions given or in the denial of requests for instructions made by counsel for the defendant, and the evidence is examined, and found to support the verdict and judgment.

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

Fred C. Foster, D. H. McClenahan, C. C. Flansburg and *L. A. Flansburg,* for appellant.

George W. Berge and *C. J. Campbell, contra.*

HAMER, J.

This is an action by the owners of lot 20, in block 5, in Vine street addition to the city of Lincoln, for damages to their property caused by the grading of Vine and Twenty-third streets, in said city. The lot in question is on the northwest corner of the intersection of said streets, and the property faces south. Vine street runs east and west along the south end of the property, and Twenty-third street runs north and south on the east side of the plaintiffs' lot. The plaintiffs became the owners of the property on or about the 11th day of September, 1907. The grading in question was done by the city in 1910. The record shows that plaintiffs' trees growing between the curb and the lot line on Vine and Twenty-third streets were dug up and removed, the sidewalk space was lowered from 3 to 5 feet below the surface of the lot, and the plaintiffs sustained other damages by reason of the grading in question. There was a trial to a jury, and a verdict against the city, on which judgment was rendered for the plaintiffs for $425. The city appeals.

It is contended that the evidence is insufficient to sustain the verdict. Ida Leinberge testified that after the excavation was made the lot at the intersection of Twenty-third and Vine streets was about 5 feet higher than the street. Her evidence is sustained by the testimony of William R. Stocking and T. J. Hensley, the street commissioner, the latter fixing the distance at 4½ feet. The testimony concerning the damage done is in direct conflict. An examination of the record fails to disclose any negligence on the part of the city in the manner of doing the work. The grading done seems to have been necessary. It was also necessary to lower the sidewalk. The witness Ida Leinberge testified that, in order to lower the side-

walk, it was necessary to remove the trees. The assistant engineer, Bates, testified on behalf of the city that the grade as made is the proper grade, that the sidewalks were left in good condition after the city completed its work. His testimony as to the grading and cutting down of the sidewalk space does not vary in substance from that given by the witnesses for the plaintiffs.

It is claimed by counsel for the appellant that there was error at the trial, because the court admitted evidence which allowed the jury to consider damages to improvements by reason of the grading of Vine street and Twenty-third street, and the lowering of the sidewalk space, and digging up and removing the trees. It is the defendant's contention that "no damages can be allowed, as the city was the owner of the street in fee, and that the trees were the property of the city." As we understand the matter, it is this: When the grading and lowering of the sidewalk space has been done, what is the damage, if any, to the plaintiffs? Section 21, art. I of the constitution, reads: "The property of no person shall be taken or damaged for public use without just compensation therefor."

In *City of Omaha v. Flood*, 57 Neb. 124, it was held that, where property fronting on a public street is damaged by the method or manner adopted by the authorities of a municipal corporation in permanently grading such street, the corporation is liable to the owner of such property for such damages. In such case the owner's measure of damages is the depreciation in value of his property caused by the construction and permanent maintenance of the grade.

In *Bronson v. Albion Telephone Co.*, 67 Neb. 111, it was held that, where an abutting owner has planted trees along the street adjacent to his property, under the terms of a city ordinance pursuant to statutory provisions, a telephone company which removes, destroys, or injures such trees in erecting poles and wires under its franchise is liable for the resulting damage, even though no unnecessary injury is inflicted. In the body of the opinion

in that case it is said: "The right of an abutting owner to maintain shade trees upon or overhanging the sidewalk is general and well recognized."

In *Slabaugh v. Omaha Electric Light & Power Co.*, 87 Neb. 805, this court held that the electric light company was liable to the abutting lot owner who plants trees in that part of the street contiguous to his lot for all damages accruing to the lot by reason of trimming and injuring the trees. Chief Justice REESE in concurring said: "The trees were rightfully growing on and in connection with plaintiff's property at the time the alleged franchise was granted. According to the usual course of nature, those trees would grow up. As well might defendant have chopped them down in anticipation of their natural upward growth as to wait until they had become more valuable, and then, without consent or payment and by the force and authority of *might,* practically ruin them. The rights of *persons* ought to be held just as sacred as the rights of *property,* and of the single individual as sacred as those of the multitude." LETTON, J., in concurring in the conclusion said, among other things: "I am further of the opinion, to quote the language of the opinion in *Southern Bell Telephone & Telegraph Co. v. Francis,* 109 Ala. 224, 31 L. R. A. 193, that, 'if the city or other corporation vested with the right of eminent domain, acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, and consequential injury results therefrom to such abutting property, the owner will have his appropriate remedy at law to redress the injury.' "

In *Hammond v. City of Harvard,* 31 Neb. 635, this court said: "It was formerly held, in accordance with some part of the instructions given in the case, that, 'when a city, in the reasonable exercise of an authority, under its charter, establishes a grade for its streets, and works them accordingly, there being no provision of law for the payment

of damages, no action will lie.' This was the law in 1873, and was so held in the case of *Nebraska City v. Lampkin*, 6 Neb. 27. But the constitution of 1875, now in force, provided a different rule. The text of section 21 of the bill of rights now is that 'the private property of no person shall be taken or damaged for public use without just compensation therefor.'"

It is proper to remark that not all the states contain that clause of the Nebraska constitution relating to the liability incurred because property is "damaged" by the act complained of.

In *O'Brien v. Philadelphia*, 150 Pa. St. 589, 30 Am. St. Rep. 832, the question of law reserved was: "Whether a plaintiff who has built a house upon his lot in conformity with the existing physical grade of an old and open public highway can recover damages from the city of Philadelphia for depreciation in the value of the property occasioned by changing the *de facto* physical elevation of the highway in front of the lot to conform to a plan regulation legally confirmed after the building of the house, said plan being the first regulation of grade and differing from the *de facto* physical elevation of the old highway in front of the lot." There was judgment for the plaintiff on the verdict. The court said: "If any regard is to be had for the constitutional mandate that 'municipal and other corporations * * * shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements,' we are at a loss to see how the learned judge could do otherwise than decide the reserved question as he did. Nobody conversant with the history of the constitutional provision above quoted can entertain any doubt that it was intended to provide, *inter alia*, for the class of cases of which *O'Connor v. Pittsburgh*, 18 Pa. St. 187, is a conspicuous example. It has uniformly been so regarded from the date of its adoption until the present time. It is a fact conclusively established by the verdict that, as a direct consequence of the elevation of grade immediately

in front of plaintiff's property, its market value was lessened at least to the extent of $240; but it is gravely suggested that 'such a *damnum* is not necessarily in *injuria*;' and hence plaintiff is remediless. That principle has no application to the class of cases to which this belongs. To hold that it has would defeat one of the objects of the constitutional mandate in question, and virtually overrule several well-considered cases. We do not propose to do either. * * * Again, in *New Brighton Borough v. Peirsol,* 107 Pa. St. 280, the claim was by a lot owner for a second change of grade after he purchased the lot. That court, holding that he was entitled to recover, said: 'The claim now is for change of grade made since defendant in error purchased, and for damages sustained by work done since the adoption of the constitution.' In *Ogden v. City of Philadelphia,* 143 Pa. St. 430, the claim was for damages caused by grading North street. After stating the undisputed facts were 'that the first grade * * * was established on the city plan in 1871, but nothing was done on the ground until 1887,' our brother Mitchell says: 'For the establishment of the grade of 1871 there was no right of action. *O'Connor v. Pittsburgh,* 18 Pa. St. 187; *City of Philadelphia v. Wright,* 100 Pa. St. 235. Therefore the statute of limitations could not begin to run from that date. But the constitution of 1874, art. XVI, sec. 8, gave a right to the owners to have compensation for property injured, as well as for property taken, by municipal and other corporations in the construction or enlargement of their works. The right of action which this section gives is clearly for the actual establishment of the grade on the land. The general rule is that the cause of action arises when the injury is complete, and this has been uniformly applied to the taking of property for public use, from the case of *Schuylkill Navigation Co. v. Thoburn,* 7 Serg. & Rawle (Pa.) *411, down to the present day.' "

When the property of an abutting owner is damaged by the establishment of a grade of a street for the first time, changing it from the natural grade, such property is

"damaged" within the meaning of the constitution, as much as it is by reason of lowering the grade of the street as previously established. *Werth v. City of Springfield,* 78 Mo. 107; *Hutchinson v. City of Parkersburg,* 25 W. Va. 226; *Sheehy v. Kansas City Cable R. Co.,* 94 Mo. 574, 4 Am. St. Rep. 396; *Borough of New Brighton v. United Presbyterian Church,* 96 Pa. St. 331; *Hendricks' Appeal,* 103 Pa. St. 358.

Defendant further contends that plaintiffs acquired title to the lot in question since the grade of Vine street was established, and therefore that they cannot recover for damages to their improvements, and, in support of that contention, *City of Omaha v. Williams,* 52 Neb. 40, is cited. As we view the record, the city failed to show by any competent evidence that a grade had been legally established on that portion of Vine street abutting on the plaintiffs' lot at any time prior to the time the grading in question was done. It follows that the rule contended for has no application to the facts of this case.

We have examined the instructions given, as also the requests for instructions which were denied, and the other errors alleged. We are unable to find any alleged error which seems to us to be prejudicial to the rights of the defendant. We are unable to say that the verdict of the jury is wrong. It was upon a conflict of evidence, and apparently the evidence fully sustains it. The judgment of the district court is

AFFIRMED.

SEDGWICK and LETTON, JJ., concur in conclusion.

SCOTT'S BLUFF COUNTY, APPELLANT, V. TRI-STATE LAND COMPANY, APPELLEE.

FILED JUNE 16, 1913. No. 16,828.

1. **Eminent Domain:** ESTABLISHMENT OF HIGHWAYS: DAMAGES. Section 46, p. 130, laws 1879 (Comp. St. 1905, ch. 78, sec. 46), accepting the grant provided by the act of congress of 1866 (Rev. St. U. S. sec. 2477), reserves to landowners the right to recover damages for the opening of public roads on section lines in this state.

2. **Highways:** ESTABLISHMENT: TRESPASS. A county attempting to open a public road on a section line without giving notice or fixing a time for a hearing on the landowner's claim for damages, and without paying or providing for the payment of such damages, is a trespasser.

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

Morrow & Morrow and *R. W. Hobart,* for appellant.

F. A. Wright, contra.

BARNES, J.

This was an action to recover the cost of the construction of a bridge built by the county of Scott's Bluff over and across an irrigation ditch of the defendant. The defendant had judgment, and the county has appealed.

It appears that during the years 1906 and 1907 the defendant was the owner of the northeast quarter of section 7, and the northwest quarter of section 8, in township 22 north of range 54 west, in said county; that during said years it constructed its irrigation canal over and across the section line between sections 7 and 8 aforesaid, about 20 rods south of the north line of said sections; that on the 28th day of May, 1908, the board of commissioners of the plaintiff county, without proceeding as required by law, and without any procedure for the location and establishment of a public highway, ordered a public road to

be opened on said section line. No notice was given and no time was fixed for filing claims for damages sustained by the landowners, and no damages were allowed or paid the defendant as provided by law. Plaintiff caused plans and specifications to be drawn and prepared by a competent engineer for the construction of a bridge across said canal on the section line in question, which were duly approved and placed on file as required by sections 6135, 6136, Ann. St. 1907. Plaintiff notified the defendant to construct a bridge across its canal on said section line, and the overseer of public roads gave the defendant repeated notices to build the bridge in question, but defendant neglected and refused so to do. Plaintiff, to protect itself from damages to the traveling public, entered into a contract to build the bridge, and paid therefor $274.80, for which sum, with interest, the plaintiff prayed judgment.

It appears that the title to the land in question was obtained by homestead entry under the laws of the United States after the year 1879. In the district court plaintiff contended that it was entitled to recover because the act of congress of 1866 (Rev. St. U. S. sec. 2477) granted all section lines for highway purposes; that the legislature of this state accepted the provisions of said grant by the passage of the act of 1879 (laws 1879, p. 130, sec. 46); that, the title to the land on either side of said section line having been acquired since the passage of those acts, the defendant took the land subject to the right of a highway on said section line, and was required to build and maintain a bridge over and across its said canal. The defendant contended that the plaintiff was a trespasser, and could not recover because it had failed to give notice as required by law, had failed to fix a time to file claims for damages, and because defendant's damages by reason of the establishment of said highway had never been paid, nor has payment been provided therefor.

There is thus presented for our determination the effect of the act of congress of 1866, and the legislative act of

this state passed in 1879. It is argued here that the act of congress passed in 1866 was a grant of all section lines as public highways, and that the legislative act of 1879 was an acceptance of the grant; that defendant took its title subject to the easement, and therefore plaintiff should recover in this action. In support of that argument the plaintiff cites many cases from other states where that contention is sustained, among which is *Wells v. Pennington County*, 2 S. Dak. 1, 39 Am. St. Rep. 758. There it appeared that the territorial legislature in 1877 passed an act declaring all section lines to be public highways, and providing that such highways shall be 66 feet wide, and shall be taken equally from each side of the line, unless changed as provided in the preceding section of that act. It must be observed, however, that that act, unlike our act of 1879, makes no provision relating to the payment of damages, and therefore that case can readily be distinguished from the one at bar. The other cases cited in support of plaintiff's contention are: *Van Wanning v. Deeter*, 78 Neb. 282; *Streeter v. Stalnaker*, 61 Neb. 205; *Eldridge v. Collins*, 75 Neb. 65; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.*, 97 U. S. 491; *Railroad Company v. Baldwin*, 103 U. S. 428. Some cases from other states are cited whose legislatures have unconditionally accepted the grant contained in the act of congress of 1866.

On the other hand, defendant contends that by the language of the act of 1879 the right of the landowner to damages for opening section line roads in this state is especially reserved, and such has been the universal holding of this court. *Scace v. Wayne County*, 72 Neb. 162; *Van Wanning v. Deeter, supra; Henry v. Ward*, 49 Neb. 392; *Howard v. Board of Supervisors*, 54 Neb. 443; *Barry v. Deloughrey*, 47 Neb. 354.

In *Beste v. Cedar County*, 87 Neb. 689, it was said: "It is further argued by defendant, in substance: Before plaintiff leased the land taken for a highway, the state had dedicated it to the public for that purpose. Plain-

tiff's leasehold was subject to the superior right which the county acquired by dedication. When the highway was opened the dedication was accepted by the public, and the acceptance related back to the original grant. To establish the dedication defendant relies upon language found in the following enactment of the legislature: 'Section lines are hereby declared to be public roads in each county in this state, and the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey, and cause them to be worked in the same manner as other public roads: Provided, that any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided.' Laws 1879, p. 130, sec. 46; Comp. St. 1905, ch. 78, sec. 46. This statute dispenses with formal, preliminary proceedings in the opening of highways on section lines, but preserves the landowner's right to compensation for property taken or injured. *Scace v. Wayne County*, 72 Neb. 162; *Barry v. Deloughrey*, 47 Neb. 354. If the legislature intended to donate a portion of the school lands to counties for highway purposes, as argued by defendant, the legislative grant was limited by the proviso: 'Any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided.' The enactments to which the proviso refers provide a method of compensating an owner for land taken or damaged for highway purposes. Comp. St. 1905, ch. 78, secs. 18-29. The word 'owner' as used in such statute applies to all persons having an interest in the estate taken or damaged."

If the question were a new one in this state, it might be that we would hold differently, but it has been consistently held by this court that the right to damages for the dedicating of land for section line roads is given to the owner by the act above quoted, and we do not now see our way clear to hold otherwise.

The plaintiff, having failed to award the defendant a hearing on his claim for damages, and having made no provisions for paying the same, was a trespasser when it built the bridge in question, and it cannot recover in this action.

The judgment of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

R. C. ROPER, APPELLANT, V. A. L. MILBOURN, APPELLEE.

FILED JUNE 16, 1913. No. 17,224.

1. **Vendor and Purchaser:** TRANSFER OF OPTION. A contract granting an option to purchase a tract of land, and binding the owner to convey on stated terms, does not, before acceptance by the option-holder, vest in him an estate or interest in the land; but since he has such control of the title that by performance he may compel a conveyance, and secure the land to himself, he may, before the option expires, lawfully make sale of it to a third party.

2. ———: BREACH OF CONTRACT: DAMAGES. In an action for a breach of contract for the sale of real estate, a vendor may recover of the vendee the damages fairly within the contemplation of the parties at the time they made their contract.

3. **Damages:** PROFITS. Profits which are in the contemplation of the parties and certain of ascertainment may be recovered.

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

W. D. Oldham, George C. Gillan and *R. C. Roper,* for appellant.

H. M. Sinclair and *W. A. Stewart, contra.*

BARNES, J.

This case is before us on the ruling of the district court for Dawson county sustaining a demurrer to plaintiff's

petition. The petition alleged, in substance, that on the 31st day of August, 1909, for a valuable consideration, plaintiff became the owner of an optional contract of purchase for the following described real estate, to wit: Section 1, section 11, and the southeast quarter of section 2, of township 12, range 45; and the south half of the southwest quarter of section 23, township 13, range 44, and the southwest quarter of section 6, township 12, range 44, all in Deuel county, Nebraska, consisting of 1,620 acres; 1,000 acres thereof lying on the south and west of the right of way of the Union Pacific railway, and 620 acres lying on the northeast of said right of way; that on or about the 13th day of September, 1909, defendant came to plaintiff and offered him the sum of $30 an acre for all that part of the said tract of land, consisting of 1,000 acres, lying south and west of the said railroad right of way; that plaintiff accepted said offer, and entered into a contract whereby he agreed to convey said premises to the defendant; that by the terms of the contract defendant agreed to pay plaintiff the sum of $200 in cash, which was paid, and promised and agreed to pay the further sum of $3,800 at once on the plaintiff's furnishing to the defendant an abstract showing clear title, and such further sum on the 1st day of March, 1910, as together with said sums of $200 and $3,800 would equal one-third of the total purchase price thereof, amounting to the sum of $6,000, and defendant agreed to pay the balance of the purchase price in five annual payments, the same to draw interest at 6 per cent. per annum; that at the time defendant entered into the contract he was well aware, and informed, of all of the terms and conditions contained in the option contract existing between the plaintiff and one John Naslund for the purchase of the 1,620 acres of land described; that, in pursuance of the understanding and agreement, plaintiff proceeded at once to complete, perform and carry out the terms of his contract with the said John Naslund; that he paid $1,000 to said Naslund to apply upon the purchase price of the land above mentioned

and but for the promise and agreement of the defendant he would not have so paid the same; that on or about the 13th day of September, 1909, plaintiff sent to defendant an abstract of title to the said premises, requesting that defendant examine and cause his attorneys to examine the same, and point out any corrections that might be necessary to be made therein; that defendant kept the said abstract until about the 11th day of December, 1909, and made no objections thereto; that plaintiff demanded of the defendant the payment of the said sum of $3,800, balance of the first payment, according to the terms of his contract, but that defendant failed and neglected to pay the same; that on the 15th day of February, 1910, plaintiff mailed to the defendant, at Overton, Nebraska, a registered letter containing the abstracts of title to the land purchased by the defendant of the plaintiff, which had been brought down to that date, and showed the right of the plaintiff to sell and convey said premises to the defendant upon the payment of the purchase money by the defendant, as agreed in his contract; that defendant never made any objections whatever to the sufficiency of said abstract, nor to the title therein represented, but, on the contrary, stated that the said abstracts were sufficient under the terms of the contract with the defendant, and that he had no objections to make thereto.

It was further alleged that the original tract of land, for which plaintiff obtained said option contract, consisted of 1,620 acres, exclusive of the right of way of the railroad; that according to the terms of said option contract, all of which were fully known to the defendant, both before and after the signing of the contract between the plaintiff and the defendant, the plaintiff agreed to pay the sum of $19 an acre, or $30,780; that after selling to defendant said 1,000 acres, plaintiff still had left 620 acres lying on the opposite side of said railroad right of way; that, if defendant had not defaulted in his contract with plaintiff, said 620 acres of land would have cost plaintiff only the sum of $780; that said 620 acres of

land on the 1st day of March, 1910, was reasonably worth, at its fair market value, the sum of $12 an acre, or $7,440; that the profits which plaintiff would have derived from the contract made with defendant, had he not defaulted therein, would have been the sum of $7,440, less the sum of $780, or the sum of $6,660; that the defendant, when he entered into the contract with the plaintiff, was fully aware of the profit which plaintiff would make from the contract with the defendant, and from the sale of the 1,000 acres, as aforesaid, in event of defendant's performance thereof; that by reason of the default, breach and refusal to perform his contract as aforesaid, the plaintiff was damaged in the sum of $6,660; that by reason of the default, failure, neglect and refusal of the defendant to perform and carry out his contract with the plaintiff, plaintiff was further damaged in the sum of $1,500, no part of which has ever been paid by the defendant; that in pursuance of said contract with defendant, and in preparation to perform the same, and with the knowledge and consent of defendant, plaintiff was compelled to, and did, incur considerable expense, and to that end employed help and assistance to try and get other parties to assist plaintiff in swinging the deal with the said John Naslund, and to assist plaintiff in carrying out his contract aforesaid; that plaintiff hired and employed one S. J. Hyatt for that purpose, and was compelled to pay him, the said Hyatt, for his services, and did pay him therefor, the sum of $345, no part of which has been paid to him by the defendant.

It was further alleged that on February 27, 1910, the defendant notified plaintiff by telephone that he had decided to perform and complete his contract in accordance with the terms thereof; that he desired plaintiff to be ready to perform his part of the agreement, and plaintiff thereupon agreed to meet defendant at Chappell, Nebraska, for the purpose of completing and performing their said contract, and plaintiff notified defendant that he would be there, ready, willing and able to perform his

part of the agreement; that plaintiff went to Chappell, Nebraska, and was there on the 1st day of March, 1910, and until 12:15 o'clock P. M. of the 2d day of March, 1910, ready, able and willing to perform his contract with the defendant; that he had with him at Chappell, at the Commercial National Bank, the place agreed upon for the exchange of papers, all of the necessary deeds, mortgages, contracts and other papers duly prepared and executed and acknowledged, ready to be delivered to defendant in accordance with the terms of the contract; that the said John Naslund and Annie C. Naslund, his wife, were there present at Chappell, Nebraska, with all deeds and necessary papers prepared and executed, ready, able and willing to perform their contract with the plaintiff, and deliver to plaintiff conveyances sufficient to enable him in turn to convey a good and sufficient title to the defendant upon the payment by him of the amount due upon his contract with the plaintiff. Plaintiff then alleged certain special matters of damages, and concluded his petition with a prayer for judgment for $9,755 damages, which he alleged he had sustained by failure of the defendant to perform his contract.

To the petition the defendant filed a general demurrer, which was sustained, and the plaintiff refusing to further plead, and standing upon his petition, his action was dismissed.

It is contended that the district court erred in sustaining the demurrer to the plaintiff's petition and dismissing the action. It was alleged in the petition that the plaintiff was ready, able and willing to perform his contract on his part. On the other hand, it is claimed that the plaintiff had nothing but an option on the land in question, and therefore had nothing which he could convey. It was alleged in the petition, however, that plaintiff was ready, willing and able to convey the premises to the defendant on the 1st day of March, 1910, and this allegation stands admitted by the demurrer.

In *Krhut v. Phares*, 80 Kan. 515, it was held: "A con-

tract granting an option to purchase a tract of land and binding the owner to convey on stated terms does not, before acceptance by the option-holders, vest in them any estate or interest in the land; but since they have such control of the title that by performance they can compel a conveyance, and so secure the land to themselves, they may, before the option expires, lawfully make a sale of it to a third party." This rule is concisely stated in 39 Cyc. 1213, 1983; 29 Am. & Eng. Ency. Law (2d ed.) 608; *Hollifield v. Landrum*, 31 Tex. Civ. App. 187; *Easton v. Montgomery*, 90 Cal. 307; *McNeny v. Campbell*, 81 Neb. 754; *Beck v. Staats*, 80 Neb. 482.

It must be observed that in the case at bar the defendant had knowledge of the terms and conditions of the plaintiff's option, and it is alleged in the petition that defendant understood the fact to be that it was necessary for him to make the first payment in order to enable the plaintiff to secure his option and convey the land in question to the defendant according to his contract. In such a case the plaintiff may recover the damages that are fairly within the contemplation of the parties at the time the contract was entered into. *Pillsbury v. Alexander*, 40 Neb. 242; *Canfield v. Tillotson*, 25 Neb. 857; *Weitzel v. Leyson*, 23 S. Dak. 367; 29 Am. & Eng. Ency Law (2d ed.) 609. Our court has frequently recognized the rule permitting the recovery of special damages which are contemplated by the contract. *Wittenberg v. Mollyneaux*, 55 Neb. 429; *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910; *Hale v. Hess & Co.*, 30 Neb. 42; *Schrandt v. Young*, 2 Neb. (Unof.) 546; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340; *Seaver v. Hall*, 50 Neb. 878; *Beck v. Staats, supra.* The general rule, subject to qualifications hereinafter noted, for the measurement of damages sustained from the breach of the contract limits a party to such damages as arise out of a contract which has been broken, and which follow in the natural course of events from the breach itself, or which were within the contemplation of the parties when making the contract in

question. 13 Cyc. 32; 8 Am. & Eng. Ency. Law (2d ed.) 588; *Hadley v. Baxendale*, 9 Exc. (Eng.) 341, 354; *Griffin v. Colver*, 16 N. Y. 489.

The amended petition brings the case squarely within the above rule. The profits which are in the contemplation of the parties at the time the contract is made may be recovered. 13 Cyc. 36; *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199; Mayne, Damages (8th ed.) 12; *Guetzkow v. Andrews & Co.*, 92 Wis. 214; *Allis v. McLean*, 48 Mich. 428; *Carlson v. Stone-Ordean-Wells Co.*, 40 Mont. 434, 107 Pac. 419; *Emerson v. Pacific Coast & Norway Packing Co.*, 96 Minn. 1; *Wilson v. Wernwag*, 217 Pa. St. 82.

The petition alleged sufficient facts, if true, to constitute a cause of action; and the demurrer admits the truth of all matters well pleaded in the petition. It follows that the judgment of the district court should be, and is, reversed, and the cause is remanded for further proceedings.

REVERSED.

LETTON, ROSE and HAMER, JJ., not sitting.

JESSE F. BLUNT, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JUNE 16, 1913. No. 17,226.

1. **Master and Servant: RELIEF FUND: APPLICATION: FALSE STATEMENTS: WARRANTIES.** The statement contained in an application for membership in the voluntary relief department of the defendant company that the applicant was only 25 years of age is a warranty; and it appearing that the applicant was in fact more than 35 years old when he made his application, that fact being unknown to the company, will render the contract of insurance void.

2. ———: ———: ———: **FRAUD.** The plaintiff, while living at Plattsmouth, had many times participated in the relief fund of the defendant under the name of "Jesse F. Blunt." He after-

wards removed to McCook, Nebraska, changed his name to "Jesse Blount," and represented his age to be 25 years, when, as a matter of fact, he was more than 35 years old, and thus again secured membership in the relief department of the defendant, which otherwise he could not have done. *Held*, That his membership was secured by fraud, and was void.

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

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

Matthew Gering, contra.

BARNES, J.

Action against the Chicago, Burlington & Quincy Railroad Company to recover the sum of $315, alleged to be due the plaintiff from the relief department of the defendant company. A trial in the district court for Cass county resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

It appears from the abstract and bill of exceptions that on the 19th day of September, 1907, the plaintiff, under the name of Jesse Blount, made an application to the relief department of the defendant company for membership therein, in which he stated that his name was Jesse Blount; that he was 25 years of age; that he had been a member of the relief department in 1901 and 1906. In answer to the question, "What long or serious sickness or sicknesses have you had?" he stated, "Not any." In answer to the question, "When were you last unable to work on account of injury?" he stated, "Never hurt." It is conceded that the answers to these questions were untrue, but it is contended that they were not warranties; that they were merely representations which in no way affected the policy of insurance in question.

It appears that plaintiff had previously made several applications to join in the distribution of this fund under the name of Jesse Blunt, and Jesse F. Blunt, and had been accepted, and had on 13 different occasions partici-

pated in the distribution of the fund. His former applications had been made at Plattsmouth, and when he went to McCook he took the name of "Blount," and made the application on which this action is based. It also appears that plaintiff was injured about the 8th day of January, 1908, for which he received $7.50, and the 1st of March, 1908, for which he received $537, and again the last part of that month in 1909; that from the time he received his last injury he drew from the fund $153. On the 13th day of August, 1909, it was ascertained that plaintiff had theretofore applied for membership at different times, and had received benefits under the name of "Jesse Blunt," and thereupon the defendant refused to make further payments.

The question to be determined at the outset of this controversy is: Were the statements made by plaintiff in his application to join the relief department of the defendant company warranties? If so, then the policy of insurance was void, and plaintiff cannot maintain this action.

It is conceded that the statement of the plaintiff as to his age was a warranty. But it is claimed that it was immaterial to the risk; that defendant would have issued the policy notwithstanding the falsity of the statement. We think this argument is not well founded for the following reasons: By stating his age as only 25 years he was put in line for employment as a locomotive fireman, for which he would be entitled to wages at the rate of $75 a month. This made him eligible to the third class in the relief department, and entitled him to draw $1.50 a day from the relief fund in case of sickness or injury, and he was placed in that class. If he had truthfully stated his age, he would have been eligible to the first class, and would have drawn only 50 cents a day.

Again, it is disclosed by the testimony that the plaintiff took the name of "Jesse Blount," instead of his true name, Jesse F. Blunt, for the purpose of deceiving the defendant. He had a record under the name of "Blunt" which would clearly bar him from a participation in the third class of

the relief fund, and by his application under the name of "Blount," and his statement therein contained that he was only 25 years of age when, as a matter of fact, he was over 35 years old, he was able to avoid that record, and did avoid the discovery of his fraud until the 13th day of August, 1909, when the exposure came, and he was denied further payments.

It is contended that the relief department might have known the falsity of the statements, or by the use of ordinary diligence could have ascertained their falsity. But it appears, without dispute, that they never connected the plaintiff with the man who had previously applied for membership under the name of "Blunt" until August 13, 1909, and the reason for the failure is explained by the testimony of Mr. Redfern, who stated that two different numbers were used, one being file number 22,018, and the other being number 121,290, and this explanation, in the absence of any evidence to the contrary, seems conclusive. In view of the foregoing facts, we deem it clear that the statement was a warranty, was material, and the insurance contract was thereby rendered void. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811; *Royal Neighbors of America v. Wallace*, 73 Neb. 409; *Koerts v. Grand Lodge Hermann's Sons*, 119 Wis. 520; *Callies v. Modern Woodmen of America*, 98 Mo. App. 521, 72 S. W. 713; *Cobb v. Covenant Mutual Benefit Ass'n*, 153 Mass. 176; *Thomas v. Grand Lodge, A. O. U. W.*, 12 Wash. 500; *Dunning v. Massachusetts Mutual Accident Ass'n*, 99 Me. 390; *Smith v. Supreme Lodge, K. & L. G. P.*, 123 Ia. 676; *Standard Life & Accident Ins. Co. v. Sale*, 121 Fed. 664.

It is also contended that the insurance contract was rendered void by plaintiff giving his name "Jesse Blount," instead of Jesse F. Blunt, which was his true name. Plaintiff argues, however, that the name was not material to the risk, and therefore should not affect the contract. As we view the case, the plaintiff's name was material. If he had truthfully given his name he would have been at once connected with his former applications and membership.

and it would have been ascertained that he had incorrectly stated his age, and his application would have been denied. In answer it is said that the name was *idem sonans*. We think this contention is also unsound, for Blunt and Blount are two distinct and different names. They do not sound alike, and are not referable to one and the same person. We are therefore of opinion that plaintiff's assumption of the name of "Blount" was material to the risk.

Having determined that in at least two respects the plaintiff's statements on which he obtained the insurance were warranties and were material to the risk, and that they were admittedly false, it follows that the trial court should have directed a verdict for the defendant.

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

REVERSED.

LETTON, ROSE and HAMER, JJ., not sitting.

JOHN H. DAVIS, APPELLANT, V. JAMES HAIRE, APPELLEE.

FILED JUNE 16, 1913. No. 17,239.

1. **Principal and Agent: SECRET PROFITS: LIABILITY OF AGENT.** To enable a principal to recover for secret profits alleged to have been made by his agent in the exchange of properties, it must appear that at the time of the exchange or trade the agent was possessed of some knowledge of the value of the property taken in exchange that was unknown to his principal, and which the agent afterwards used to his own advantage.

2. ———: ———: ———. An agent agreed with a third party to purchase a restaurant taken by such third party in exchange with his principal for other property in case such third party should, after examination, conclude that he did not desire to hold it. The agent afterwards purchased the restaurant according to his agreement, at a price much less than that fixed by his principal in making the exchange, but which was the fair market value of the restaurant. *Held*, That he was not liable to his principal for secret profits.

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

C. E. Spear, F. J. Mack, A. E. Garten and *H. C. Vail,* for appellant.

I. L. Albert and *F. D. Williams, contra.*

BARNES, J.

Action to recover secret profits alleged to have been made by plaintiff's agent in the sale or exchange of certain real estate. A trial in the district court for Boone county resulted in a verdict and judgment for the defendant, and the plaintiff has appealed.

It appears that the plaintiff was the owner of a building situated on a leased lot in Albion, Nebraska, and used as a restaurant, which he desired to exchange for other property, and employed the defendant as his agent to accomplish that purpose. Some time thereafter the defendant informed the plaintiff that he had an offer to exchange some Holt county land for the restaurant and stock contained therein. Thereupon, plaintiff and defendant went to Holt county, where they met a party by the name of Morgan, who had the Holt county land for sale or exchange. The plaintiff looked at the land, which Morgan priced to him at $4,500. After some negotiations Morgan agreed to take the plaintiff's restaurant, at a valuation of $3,000, and $1,200 for the Holt county farm, the plaintiff to pay Morgan Brothers a commission of $100. A contract to that effect was made between the plaintiff and Morgan. At that time neither the plaintiff nor the defendant knew the owner of the Holt county land, nor had any information as to the cash price for which it could be purchased.

It also appears that, in order to induce Morgan to make the trade, defendant agreed that if he, Morgan, did not want the plaintiff's restaurant after examining it, he would purchase it for $1,200. The trade as thus agreed upon

was made, and when the papers were exchanged it was ascertained that the owner of the Holt county farm only asked $2,300 in cash for it. Plaintiff, however, accepted the deed, and executed a mortgage of $1,200 on the land, and thus obtained the title, which he still holds. Morgan, not wishing to keep the restaurant after he had examined it, sold it to the defendant for $1,100, and plaintiff paid Morgan a commission of $85 in lieu of $100 as was at first agreed upon. Thereafter plaintiff brought this suit to recover from his agent what he alleged to be secret profits, amounting to $2,000, and the trial resulted in a verdict for the defendant, as above stated.

Complaint is made of the giving of instructions numbered 5, 9, 10, 11 and 12, which, in effect, told the jury that if the defendant caused the exchange to be made, and acquired the restaurant property himself at less than its fair market price or value, then in such case alone would the defendant be liable. But, if he obtained the restaurant even by misrepresentation of the facts at not more than its fair market value, there could be no recovery, and the burden of proof was on the plaintiff to show that the defendant obtained the restaurant property for less than its market value. As we view the evidence, the instructions complained of were proper, and correctly measured the defendant's liability to the plaintiff. It seems clear that this was an exchange of property in which the plaintiff fixed the price at which his property was to be taken by Morgan Brothers in exchange for the Holt county farm, the sale of which was controlled by them, and Morgan Brothers fixed the price of the farm. The plaintiff, at the time the trade was made, saw the land and knew as much as did the defendant as to its real value. The defendant was possessed of the same knowledge that the plaintiff had, and no more. In order to facilitate the trade, defendant stated that, if Morgan Brothers did not want the restaurant after they had seen it, he would purchase it from them for $1,200. They afterwards concluded to accept the offer. With the money thus obtained, and the mort-

gage of $1,200, Morgan Brothers paid for the Holt county land, which was conveyed to the plaintiff, and the conveyance accepted by him.

The case of *Leonard v. Omstead*, 141 Ia. 485, cited by the plaintiff, is not an authority in this case. There defendant having been plaintiff's agent in negotiations for an exchange of the plaintiff's land, which he was putting in at a cash value of $70 an acre, for land of C., which C. was putting in at a cash value of $25 an acre, having discovered that C. was willing to sell his land at a net cash price of $14 an acre, and not having disclosed this to the plaintiff, as was his duty, but having arranged with C. that, after C. had exchanged with plaintiff, the defendant would buy the land of C. at a price which would net $14 an acre for the land which he had exchanged with the plaintiff, it was held that defendant must account to plaintiff for the profit he made on the land which he resold at $75 an acre, though it was not worth even $70 an acre. In the case at bar it appears, without dispute, that defendant had no knowledge as to who owned the Holt county land, or what it could be purchased for in cash, and, in order to facilitate the trade, he agreed to take the restaurant himself at $1,200 if Morgan Brothers did not desire to keep it. Neither are *Wiruth v. Lashmett*, 82 Neb. 375, *Durward v. Hubbell*, 149 Ia. 722, nor *Varner v. Interstate Exchange*, 138 Ia. 201, in point.

In the case at bar the plaintiff knew the terms of the trade, and that he was not getting $3,000, nor any other sum in cash, for his restaurant. He went in person to examine the land, and knew exactly what he was getting. The defendant concealed nothing from him, and there is no evidence to show that he suffered any damages by reason of any concealment of the facts. The defendant made no secret profits. He bought the restaurant property after his agency had determined, and then at what the evidence abundantly shows was its fair market value.

It therefore seems clear that the district court correctly instructed the jury, and, the verdict having been given the

defendant, we do not see our way clear to disturb it. The judgment of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

M. R. EMBERSON, APPELLANT, V. ADAMS COUNTY, APPELLANT; U. S. ROHRER, APPELLEE.

FILED JUNE 16, 1913. No. 17,311.

1. **Counties:** POWERS OF COMMISSIONERS. County commissioners are clothed not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law.
2. ———: ———: EMPLOYMENT OF ASSISTANTS. Such board has the power to employ and pay for clerical assistance to the county attorney where such clerical assistance is necessary for the purpose of enabling that officer to properly perform the duties devolving upon him in conducting the business of his office. *Berryman v. Schalander*, 85 Neb. 281.

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

John M. Ragan, M. A. Hartigan and *J. W. James*, for appellant.

John Snider, contra.

BARNES, J.

The plaintiff in this action was employed in the office of the county attorney of Adams county in the performance of clerical work which was necessary in order to enable the county attorney to properly perform the duties of his office. She presented a bill for her services to the county board amounting to $25 for the month of November, 1910. The bill was audited and allowed, and one U.

S. Rohrer, as a taxpayer, appealed to the district court, where a trial resulted in a judgment for the appellant rejecting the plaintiff's claim, and she has brought the case here by appeal.

The question involved is the power of the county board to furnish and pay for clerical help in the county attorney's office. The district court found that the services were performed, and were necessary to enable the county attorney to properly perform his duties, but further found that the board had no power to pay for such services.

In *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87, it was said: "The direction of county affairs is entrusted by law to the county board, and not to the courts. Neither are infallible. It is probable that, where no sinister influences are shown to exist, county affairs may in the long run be best administered by the men chosen by the people for that express purpose. While the intervener and other citizens of the county may be possessed of business acumen which would prevent them making such a contract, we are of opinion that it is not void for want of consideration."

Berryman v. Schalander, 85 Neb. 281, was a case where the county attorney filed a claim for $21.84 for expenses necessarily incurred in performing the duties of his office. The district court held that plaintiff could not recover. On appeal to this court it was said: "Section 4440, Ann. St. 1907, in defining the powers of a county, gives the county power 'to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers.' In construing this provision of the statute and determining the meaning of the word 'necessary' therein, in *Lancaster County v. Green*, 54 Neb. 98, we held: '(1) A board of county commissioners, in addition to the powers specially conferred by statute, has such other powers as are incidentally necessary to enable such board to carry into effect the powers granted. (2) The word "necessary" considered, and, in respect to the implied powers of boards

of county commissioners, *held* to mean no more than the exercise of such powers as are reasonably required by the exigencies of each case as it arises.' In the opinion (p. 103) we said: 'The county commissioners, therefore, are clothed not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law. It was not practicable in advance to enumerate all the powers which the board of county commissioners might be permitted to exercise. To cover all contingencies very general language was employed, and from this consideration it necessarily results that the question whether or not the board has exceeded its powers must be determined upon the circumstances of each case as it arises.' We do not think the question of the power of the county board to contract in advance for expenditures of the kind in controversy is involved here. The simple question involved is: Did the board have the power to pay the necessary expenses of the county attorney incurred while prosecuting the business of his office in a manner which was saving to the county large sums of money each year? To hold that it did not have such power would not only be a strained construction of the statute, but would, we think, be against public policy. The action of the board in allowing plaintiff's claim, the reasonableness of which is not questioned, was a lawful exercise of the discretionary powers of such board, regardless of any prior agreement in that behalf."

In *Christner v. Hayes County*, 79 Neb. 157, it was held: "County officers have by implication such powers as are necessary to enable them to perform the duties expressly enjoined upon them. A county attorney, who is required by law and by the order of the county board to institute actions for the benefit of the county, may bind the county to pay the reasonable and necessary expenses incident thereto." *State v. Barton*, 88 Neb. 576; *Shepard v. Easterling*, 61 Neb. 882; *Roberts v. Thompson*, 82 Neb. 458.

In the case at bar it was established beyond question

that the services were necessary in order to properly enable the county attorney to perform the duties of his office, and that the services were performed. Therefore we decline to take so narrow a view of the powers of the county board as would prevent them from paying a small compensation for such service. By furnishing the county attorney a small amount of clerical help he was enabled to perform the duties of his office more effectually, and thus better serve the county in prosecuting criminal cases and performing the other duties devolving upon him in his official capacity.

We are therefore of opinion that the county commissioners had the power to allow plaintiff's claim. The judgment of the district court is therefore reversed, and the cause is remanded, with directions to render a judgment for the plaintiff.

REVERSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

STATE, EX REL. WILLIAM RAKOW ET AL., APPELLEES, V. E. H. ALLEN ET AL., APPELLANTS.

FILED JUNE 16, 1913. No. 17,333.

Appeal: FINDINGS: PRESUMPTIONS. Where the district court makes general and special findings, and omits therefrom some fact conclusively established by the evidence essential to the decree, such fact, on appeal to this court, will be treated as found by the court.

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

J. J. McCarthy, for appellants.

Kingsbury & Hendrickson, contra.

BARNES, J.

Action in mandamus to compel the defendants to move

the schoolhouse in district No. 31, Dixon county, Nebraska, to its former site. A trial in the district court resulted in findings and a judgment for the relators, and the defendants have appealed.

It appears that at the annual school district meeting held in school district No. 31, in the year 1910, there was submitted to the voters there assembled the question of moving the schoolhouse from its present site to one alleged to be nearer the center of the district. A vote on that question was taken, and resulted in 14 for and 10 against removal. According to the provisions of section 11537, Ann. St. 1911, the motion was declared lost. It further appears that within a few days thereafter E. H. Allen, H. B. Carr, two members of the school board, together with certain other persons, proceeded to remove the schoolhouse to another site. Thereupon this action was commenced to require the defendants Allen, Carr and others to replace the schoolhouse in its former position. Issues were joined, and the cause was tried to the court. who made certain general and special findings of the facts, and awarded the plaintiffs the writ of mandamus prayed for, restoring the schoolhouse in question to its former site.

The appellants contend that, the court having failed to find that there was a demand made upon the respondents to restore the schoolhouse to its former location, the judgment of the district court should be reversed. In *Lynch v. Egan,* 67 Neb. 541, it was said: "In a suit in equity, where the court makes special findings, and omits therefrom some fact, conclusively established by the evidence essential to the decree, such fact, on appeal to this court, will be treated as though found by the court."

It appears that respondent Allen told R. H. Cross, his fellow school district director, that he could not replace the schoolhouse on its former site. And Allen testified himself that he was present and hired Mr. Reed to move the schoolhouse from its former location; that he at that time was acting as a director of the school district. We therefore conclude that there was sufficient evidence to

sustain a finding of the refusal of the respondents to replace the schoolhouse in its former position.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

IN RE ESTATE OF J. M. STRAHAN.

FRANK E. STRAHAN ET AL.; MARY W. STRAHAN, APPELLANT, V. WAYNE COUNTY, APPELLEE.

FILED JUNE 16, 1913. No. 17,912.

1. **Taxation:** INHERITANCE TAX: LIMITATIONS. Where a petition is filed in a proceeding in the county court to recover the inheritance tax due from the heirs of a deceased person, and notice thereof is given to the persons interested within five years from the death of the decedent, a plea of the statute of limitations as a defense is of no avail.

2. ———: ———: INTEREST OF SURVIVING SPOUSE. Chapter 23, Comp. St. 1911, abolishing the estates of dower and curtesy, gives to the surviving spouse of a deceased person an enlarged estate of the same kind and nature as that of dower or curtesy, and such estate, like dower, is not subject to an inheritance tax. *In re Estate of Sanford*, 91 Neb. 752.

APPEAL from the district court for Wayne county: ANSON A. WELCH, JUDGE. *Reversed and dismissed as to Mary W. Strahan.*

Kingsbury & Hendrickson, for appellant.

A. R. Davis and *F. S. Berry, contra.*

Field, Ricketts & Ricketts, Lincoln Frost, W. L. Pope, S. L. Geisthardt and *Tibbets, Anderson & Baylor, amici curiæ.*

BARNES, J.

Appeal from a judgment of the district court for Wayne county, fixing the amount of an inheritance tax due from the estate of one J. M. Strahan, deceased. It appears that Strahan, a resident of the state of Iowa, died intestate on the 14th day of August, 1907, and left surviving him Mary W. Strahan, his widow, two adult sons, and three married daughters, hereafter designated as the heirs. At the time of Strahan's death he was the owner of certain real estate in Wayne county, Nebraska, valued at $133,570, and an interest in the First National Bank of Wayne represented by 210 shares of its capital stock, valued at $29,190. On the 19th day of July, 1912, the county attorney filed a petition in the county court of Wayne county, as provided by law, claiming the inheritance tax in question, and alleging that no part of said tax had been paid. On the filing of the petition the county court appointed an appraiser to value the said estate, and on the same day the appraiser gave notice, as provided by law, to the widow and the heirs that he would proceed to take testimony concerning the value of the estate, at his office in the First National Bank building in the city of Wayne, Nebraska, on August 3, 1912, at 10 o'clock A. M. The evidence was taken at the time and place stated in the notice. The appraiser duly filed his report in the county court on August 7, 1912, fixing the value of the estate at the sums above mentioned. On that day the widow and the heirs made a general appearance in the action, and requested the court to withhold its decree on the report filed by the appraiser until September 16, 1912, in order that they might file objections to the report. The request was granted. The widow and the heirs filed their objections, and a hearing was had on the 16th day of September, 1912, at which time the tax in question was assessed. The widow and the heirs prosecuted an appeal to the district court for Wayne county. The cause came on for hearing on the 20th day of November, 1912, and re-

sulted in a finding that the total value of the estate was $163,111.36. The court further found that the interest of the widow therein was $40,752.84; that she was entitled to exemptions in the sum of $10,000, leaving a balance of $30,752.84 subject to the inheritance tax; that the interest of each of the heirs in the remainder of the estate was $24,451.70, less an exemption of $10,000 each, leaving the interest of each of them subject to the inheritance tax in the amount of $14,451.70; that no part of the said inheritance tax had been paid, to all of which findings the widow and the heirs excepted. It was thereupon ordered, adjudged and decreed that an inheritance tax be assessed against the interest of the widow in the sum of $307.52, with interest at 7 per cent. from August 14, 1907, and $144.51, with interest at 7 per cent. from August 14, 1907, was assessed against the interest of each one of the heirs of the deceased. No appeal was taken by the heirs, but on the 22d day of November, 1912, the widow filed a motion for a new trial, which was overruled, and she thereupon prosecuted this appeal.

Three questions are presented by the record: First. Was the bank stock assessable? Second. Is the tax barred by the statute of limitations? Third. Is the widow's interest assessable?

1. Appellant contends that the tax was barred by the statute of limitations because more than five years had elapsed after the tax accrued, and therefore it was conclusively presumed to have been paid. The record discloses that the proceeding to collect the inheritance tax was commenced within the five-year period above mentioned; that notice was given the widow and the heirs, as provided by law, within that period; that they each voluntarily made a general appearance in the action within said period, to wit, on August 7, 1912. It therefore follows that this contention is without merit.

2. Appellant further contends that her distributive share of the bank stock was not subject to an inheritance tax, for the reason that, being personal property, its situs

was fixed by law at the place of the residence of her deceased husband, which was at the time of his death in the state of Iowa. This reason may not be decisive of the question, and therefore need not be considered. There is another reason, however, why appellant's interest in the bank stock was not subject to the inheritance tax, as we shall presently see.

3. Finally, appellant contends that none of her distributive share of her husband's estate, either real or personal, was subject to an inheritance tax under the laws of this state. Chapter 49, laws 1907, called the "King Inheritance Law," abolishes the estates of dower and curtesy, and in lieu thereof provides (sec. 1): "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed, by the husband and wife while residents of this state, or by the deceased, while the husband or wife was a non-resident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead, in the manner following: First. One-fourth part to the husband or wife." By section 3 of the act it is further provided that the personal estate of the deceased shall be distributed in the same proportions to the same persons as prescribed for the descent of real estate. Comp. St. 1911, ch. 23, secs. 1, 176. It thus appears that the appellant, as the widow of her deceased husband, by operation of law became the owner of one-fourth of the real estate and bank stock in question, upon her husband's death. Under the present law the interest of the wife in the personal property of her husband is similar to that of a silent partner. The husband is, in effect, the managing agent and has control of the property. He can sell and dispose of it, or he may exchange it for other property. But at his death her interest

therein comes to her in her own right. It does not pass to her by will, or by the intestate laws of the state. The husband cannot deprive her of that right. *Gaster v. Estate of Gaster*, 92 Neb. 6.

Many of the courts of last resort in this country have declared that the property of the widow, which comes to her by law, or by what has been designated as the "wife right," is immune from the payment of an inheritance tax. In *In re Estate of Sanford*, 91 Neb. 752, this court held: "The dower interest of the widow in the estate of her deceased husband, whether taken under his will or by operation of law, is not subject to an inheritance tax."

It is argued by counsel for the appellee that, the legislature having abolished the estates of dower and curtesy, that rule has no application to the present controversy. It appears, however, upon an examination of the authorities, that the legislature of the state of Iowa in 1873 passed an act abolishing estates of dower and curtesy, and giving to the surviving spouse a fee simple interest in one-third of the estate of the deceased. The provisions of our present inheritance law are, in effect, the same as those of the Iowa statute, with the exception that in this state the surviving spouse, under certain conditions, takes a fee simple interest in one-fourth of the estate of the deceased, both real and personal. Construing the Iowa statute, the supreme court of that state, in *Purcell v. Lang*, 97 Ia. 610, said: "A wife is entitled to dower in land alienated by her husband, in the deed of which she did not join, according to the law in force at the time of such alienation, notwithstanding his death takes place after the passage of Iowa Code 1873, section 2440, declaring the estates of dower and curtesy abolished, and giving the surviving spouse a fee-simple interest in one-third of the estate of the deceased, as such act merely abolishes the use of the words 'dower' and 'curtesy' as descriptive of the enlarged estate."

It has been held by the great weight of authority that dower is not immune because it is dower, but because it, like the right to the homestead, and to the distributive

share of the widow of the estate of her deceased husband, belonged to her inchoately during his life, and vested fully in her at his death. The widow's share of the estate of her deceased husband, by the present inheritance law, is given to her in lieu of dower, and it follows that the interest of the appellant in her deceased husband's estate, both real and personal, comes within the test of immunity.

Under the present statute the wife takes her interest in the estate of her deceased husband by operation of law. She cannot be deprived of that interest by his will. It is something which belongs to her absolutely and independently of any right of inheritance or succession. Strictly speaking, the widow's share should be considered as immune, rather than exempt, from an inheritance tax. It is free, rather than freed, from such tax. It is not excepted from the taxable class because it never was in such class. Like all debts, taxes, costs, expenses and other similar items, it is deducted before any inheritance tax is assessed. The share of the realty and personalty, which under our law go to the widow independent of any will or act of the husband, is not, so to speak, a part of his estate, and is no more liable to a succession tax at his death than is her individual property derived from her own ancestors and held in her own name, though the husband may have had the management and control of the estate during his lifetime.

The effect of our decedent law is practically the same as the law of community of property, and the courts of those states which have adopted that law have held, with but a single exception, that the wife is not liable, upon the death of her husband, to pay an inheritance tax on her one-half of the community property, for the reason that the property does not pass to her by will or by the intestate laws of the state. *Kohny v. Dunbar*, 21 Idaho, 258, 121 Pac. 544; *Succession of Marsal*, 118 La. 212. As we view the question, this rule should be applied to the facts under consideration. It is sustained by the greater weight of authority, and the more recent decisions of the courts of last

resort in this country, and to our minds correctly disposes of the main question in this case.

It follows that the district court erred in assessing the amount of $307.52 against the appellant as an inheritance tax upon her distributive share of her deceased husband's estate. The judgment of the district court is therefore reversed in so far as it affects the rights of the appellant, and as to her the action is dismissed.

REVERSED.

ROSE, J., dissenting.

FAWCETT, J., not sitting.

SEDGWICK, J., concurring.

Whether the personal property of the decedent to which the surviving spouse succeeds under the act of 1907, ch. 49, is subject to an inheritance tax is a question which is perhaps not clear from the wording of the statute, and which has provoked much discussion and required of the court unusual consideration. It is said in the brief: "In the reason of the rule, therefore, there is no distinction between realty and personalty, and such personalty as comes within the reason of the rule must be likewise immune from the tax." This proposition is ably presented and the position fortified by the collection of numerous authorities. The act of 1907 is a comprehensive act and is complete in itself; it repeals many sections of the former statutes which are inconsistent with its general provisions, and those which appear to be inconsistent with the purpose and spirit of the new act. The act of 1907 took several distinct and important rights that had existed under the former statute away from the surviving spouse, and, as all agree, intended to give something better in their place. It repealed dower and curtesy. The former statute provided that if the husband exchanged land for other lands the widow should not have dower in both, and that statute is repealed. The former statute provided that if the husband mortgaged his land before marriage the wife should

not have dower as against the mortgagee, but against all other persons, and if the husband purchased land during marriage, and at the same time mortgaged it for the purchase money, the widow should not have dower as against the mortgagee, even if she did not sign the mortgage, and if such mortgaged lands were sold upon the mortgage after the husband's death the widow should have only an income of one-third part of the surplus, and if the heirs or other persons claiming under the husband paid the mortgage the amount so paid should be deducted from the land, and the widow should have only one-third of the rents. The old statute provided that if the husband had deeded land in his lifetime, and the lands had enhanced in value afterwards, the widow should have dower only in the value at the time they were alienated. The old statute also provided that when the husband died seized of land in several counties the widow's dower might be assigned in land in either county, and where the estate could not be divided, whether in one or more counties, the dower might be assigned in the rents, issues and profits. The old statute provided that any woman residing out of the state should have dower in the land of which her husband should die seized. All these provisions were repealed. There were other provisions in the old statute which were repealed by the new. The new statute provides simply that the surviving spouse shall have the same portion of personal property as of real property. In case there is only one child the surviving spouse gets one-half of the property, real and personal. Under the old statute, if there was no child, the wife took the whole property. Under the new statute apparently she only takes one-half. This applies to personal property as well as real. In view of all these changes, and in view of the fact that the rule under the new statute is the same for personal property as it is for real, it is not inconsistent to suppose that the legislature intended that the surviving spouse takes both by the same right, that is, by right and because of the marriage relation, and not by inheritance. Such construction is plain, and avoids many complications that might otherwise arise.

The title of the present act is, "An act to provide for succession to the estates of decedents and to repeal (sections named)." Under this act the husband and wife are placed upon exact equality as to the rights of each in the property of the other. The surviving spouse "succeeds" to the rights which the statute gives in the property that was held in the name of the decedent. It does not "pass by will or by the intestate laws of this state." It therefore is not within the letter of the inheritance tax law, which by express terms provides only that property which so passes "shall be and is subject to a tax." Comp. St. 1911, ch. 77, art. VIII, sec. 1. If, therefore, a tax is imposed upon property to which the surviving spouse succeeds by virtue of this act of 1907, it must be by construction as a necessary implication from the general purpose and spirit of the act. It is true that there is no reference in this later act to the inheritance tax law; but no such reference was necessary, for that law was purposely and necessarily so framed as to adapt itself to any changes that might be made in the law of wills and the law of devolution of estates of decedents. The provision that all property "which shall pass by will or by the intestate laws of this state" contemplates that such laws may be changed from time to time, and is so worded as to apply to property which so passes under the law at the time. Our object of course is to ascertain and declare the intention of the lawmakers. It seems to me that the scope and purpose of the new legislation indicates that the legislature acted advisedly when avoiding any language that could be construed literally so as to impose a tax on property that passes from one spouse to the other. They use a new expression in the title of the act; it is "succession to the estates of decedents," an expression broad enough to include both inheritance and conjugal rights. The former act provided that the wife should take as a child, which was naturally construed to make her an heir. But now the husband succeeds to property of his deceased wife as the wife does to property of her deceased husband. The policy

of our law, as developed by legislation from time to time, has been more and more to place husband and wife upon an equality as to their property, and to regard each as interested in the property held in the name of either. It may have been considered that the marital relation is of great importance to the state, and generally covers the active life of both parties. Their fortunes are made together, and by their mutual help and contribution. When their property descends to their children it is taxed. In some states only such property is taxed as goes to collateral heirs for want of children to inherit. Whatever may be just in that regard, it seems clear that it is not unreasonable that such property as the surviving spouse takes as a matter of right, not by the will of the decedent or the intestate laws, and without regard to whether decedent was testate or intestate, should be taxed, if at all, only when that surviving spouse passes it on to his or her children. Thus the whole property, not used by those who produced it, is once taxed, which may very well be thought the reasonable intention of the legislature.

Douglas County v. Kountze, 84 Neb. 506, has no application. Herman Kountze died in 1906, before the present statute fixing the rights of the surviving spouse in the personal property of the decedent, and if it is true that the statute gives the right by virtue of the marriage, and not by inheritance, then *Douglas County v. Kountze* is not in conflict with the present opinion.

LETTON, J., dissenting as to personal property.

I am unable to concur in the holding that personal property inherited by a surviving husband or wife is not subject to the provisions of the inheritance tax law.

The opinion takes the broad ground that no personal property of a surviving spouse is taxable as being derived by inheritance. The inheritance tax statute provides that when any property *shall pass by inheritance* to husband or wife from the other the tax shall be 1 per cent. on the market value of all property received above $10,000, while

a larger tax is assessed on persons related in a remoter degree. The opinion of the majority repeals this statute with respect to personal property without action by the legislature.

An examination of the only changes made by the law of 1907 in the inheritance of personal property shows that there is no basis for the theory that it in anywise affected or repealed the inheritance tax law in this regard. Prior to the enactment of the law of 1907, if the intestate left no children, all his real estate went to his widow for life, and at her death to his father. If he left a widow and no kindred, all his estate descended to his widow. The husband took nothing but his curtesy and homestead rights. By the 1907 law the surviving husband was also given the right to inherit, which was one of the most radical changes made. The share of both husband and wife was fixed at the same proportion, and the inheritance of the real estate was not made to depend upon the contingency of there being no children, but was taken in various proportions, depending upon the parentage of the children. As to personal property, however, under the new law the widow may in some cases receive identically the same amount of property as she would have received under the child's share provision of the old law. This inheritance was taxable before the law of 1907, and I am unable to see why it is not still taxable. The title to the act is, "An act to provide for succession to the estates of decedents and to repeal sections 4901," etc., and the act has nothing to do with taxation. If it is to be held that an act which merely creates a new class of inheritors and fixes the shares they shall take repeals the provisions of another statute relating to the taxation of inheritances, then we have in truth opened a wide door for evasions of the provisions of the constitution preventing surreptitious legislation. Moreover, there is no repugnancy between the new law and the taxing law, and consequently, there is no repeal by implication.

It is also worthy of mention that this holding is un-

solicited. No one has had the hardihood to argue that the shares of stock are not subject to the inheritance tax on account of any change made by the law of 1907. The appellant's claim is that the situs of personal property is at the residence of the owner, which was in Iowa, and that the shares are not within the jurisdiction of this court. The opinion, therefore, decides a point not presented or argued in the briefs. It also overrules *Douglas County v. Kountze*, 84 Neb. 506, without mentioning that case, which is directly in point as to the taxation of shares of stock.

The effect of the opinion will be that vast estates, consisting in large degree of personal property, such as involved in the *Kountze* case, and where the property is left either to the surviving husband or wife, will be relieved from taxation, which certainly was not in the legislative mind when the succession act was passed.

I also dissent from the opinion of Judge SEDGWICK, which has been furnished me since the foregoing was written. The use of the word "succession" in the title of the act seems to me to indicate the very reverse of what it is construed to mean by Judge SEDGWICK. In a large number of instances the words "inheritance" and "succession" are used interchangeably. It has been said that a "succession tax" "is one upon the privilege of acquiring property by inheritance." *Wallace v. Myers*, 38 Fed. 184. Speaking of the Iowa inheritance tax law, Judge Deemer says: "Such taxes as are imposed by the act under consideration have been almost universally denominated succession taxes, and they have been upheld on the theory that the right to succeed to property upon the death of the owner is the creation of law, and that the state, which creates this right, may regulate it." *Ferry v. Campbell*, 110 Ia. 290. See, also, the definition of "inheritance" and "succession," in Words and Phrases, and 37 Cyc. 1553.

There can be no argument, therefore, predicated upon the use of the word "succession" instead of the word "inheritance" in the inheritance statute of 1907. If the act can be construed to mean that property passing to one

spouse on the death of the other passes "by virtue of the marital relations," and not by inheritance, as Judge SEDGWICK suggests, why does not property which passes from parent to child under the same act pass "by virtue of the parental relation," and not by inheritance. The argument based upon the use of the word "succession" instead of the word "inheritance" is equally as sound in one case as in the other, and is equally without merit.

The inheritance tax law makes all property taxable "which shall pass by will or by the intestate laws of this state." The succession law of 1907 is indubitably "the intestate law of this state." In fact, it is now the only intestate law there is in this state, and is clearly included within the terms of the taxing statute.

The quotation from the brief in the opinion by Judge SEDGWICK is incomplete. It is followed by language which shows that it is only certain classes of personalty that the writer considers to be immune from the tax, "the courts universally holding that her allowances for support pending administration, her right to certain specific articles of personalty, such as household furniture, wearing apparel, and the like, in fact, all personalty which by statute goes to her at his death regardless of any attempt by him to dispose of it by will, is immune from inheritance tax." This is the view the writer takes in this respect. Counsel nowhere contends that all personalty going from one spouse to the other is exempt, which is what the majority opinion holds, and the question is decided without argument.

INDEX.

Abatement.

An action on a contract in one county in which the court acquired no jurisdiction will not abate an action in another county on the same contract. *Rakow v. Tate*..... 198

Accord and Satisfaction.

The defense of accord and satisfaction is not sustained without allegations and proof of a substantial difference between the parties as to the amount due, and that the accord and satisfaction was in settlement thereof. *Wilder v. Millard*.. 595

Acknowledgment.

The certificate of an officer having authority to take acknowledgments cannot be impeached by showing merely that his duty was irregularly performed. *Bode v. Jussen*..... 482

Action. See PARTNERSHIP.

1. Under the code practice the substance of the issue presented and tried must be considered to determine whether an action is legal or equitable. *Lashmett v. Prall*..... 184
2. Where no issue is taken on the essential facts answered by a garnishee, and a petition in intervention is filed in which the legal title to the fund is shown to be in the intervener, and plaintiff relies on an equitable right to the fund, the issue is equitable. *Lashmett v. Prall*..... 184
3. A cause of action on contract of agency and one on a third person's guaranty of performance thereof cannot be joined. *Schultz v. Wise* 718

Adverse Possession.

1. Where one originally entered land without color of title or claim of right, and his acts were consistent with a mere intention to trespass until interfered with by the true owner, his uncorroborated evidence is not sufficient to establish title by adverse possession. *Delatour v. Wendt* 175
2. Possession of defendant *held* not shown to be adverse. *Dringman v. Keith* 189

Appeal and Error. See CRIMINAL LAW. DAMAGES, 3. NEGLIGENCE, 5, 7. PLEADING, 2-4. SALES, 3. TRIAL.

1. Where the district court has erroneously vacated a former

Appeal and Error—*Continued.*

judgment and granted a new trial, the former judgment will be reinstated on appeal and affirmed. *Sutphen v. Joslyn*... 45

2. A statement in an instruction defining the issues, that an undenied, immaterial allegation may be regarded as a fact, is not ground for reversal, where prejudice is not affirmatively shown. *Ritchie v. Steger*..... 63

3. Findings by the court on examination of witnesses in open court will not be reversed, unless, on consideration of the whole case, they are clearly wrong. *In re Connor*..... 118

4. An order granting or refusing a license to sell real estate to pay debts of a deceased person is a final order reviewable on appeal. *In re Estate of Broehl* 166

5. Wholesome rules of practice which guard the essential rights of the parties must be enforced, but technicalities which tend to defeat justice will not be regarded. *Lashmett v. Prall* 184

6. Where the record on appeal contains no bill of exceptions, the judgment, if sustained by the pleadings, will be affirmed. *Aronson v. Carlson* 317

7. On appeal in foreclosure, where the only error is in the rate of interest the decree shall bear after its rendition, the decree will be corrected and affirmed. *Patterson v. Cox*.. 318

8. Issues presented by appeal in equity must be tried *de novo*, and a proper decree entered or directed. *Tate v. Kloke*.... 382

9. Where, in a suit to determine priority of liens and foreclose the same, appellant did not insist on an accounting and objected to the appointment of a referee, the cause will not be reversed because the account was not taken; but an accounting may be had before sale of the property. *Stannard v. Orleans Flour & Oatmeal Milling Co*..... 389

10. The naming of "Mattie A. Elliott" as plaintiff, instead of "Mattie A. Elliott, administratrix," *held* not ground for reversal in view of the record. *Elliott v. General Construction Co.* 453

11. It is not reversible error to strike an amended answer which does not tender any defense not provable under the original answer. *Maine v. Hill* 466

12. After a cause has been submitted on its merits, the reviewing court may decline to render a decree conforming to a subsequent stipulation of the parties, where the effect will be to reverse the judgment. *Jones v. Hudson*..... 561

13. It is the duty of the clerk of the district court, on receiving in due time a proper transcript from the county court, to file it and docket the appeal. *Green v. Hoops*..... 571

Appeal and Error—*Continued.*

14. Where the clerk of the district court receives a proper transcript from the county court and files it, he cannot defeat jurisdiction of the district court by refusing to docket the appeal on the ground that the fees remain unpaid; no demand therefor having been made. *Green v. Hoops*..... 571

15. Where there were several distinct issues in an equity suit, the supreme court need determine only those presented by the appeal. *Northwestern Mutual Life Ins. Co. v. Mallory*.. 579

16. Where defendant alleged a mistake in a note sued on, plaintiffs had a right to have the question tried by the court without a jury, but they waived the right by trying it to a jury. *Alter v. Skiles* 597

17. Under sec. 1011 of the code, providing that appellee on appeal from county court may file a transcript in district court and obtain dismissal of the appeal or a judgment similar to that rendered in the county court if appellant fails to perfect his appeal, the appellee by thus proceeding does not enter a general appearance or waive appellant's delay. *Cooper v. Hickman* 731

18. The district court did not err by refusing to entertain an appeal from county court, where the failure to file a transcript in time was due to the mistake of appellant's attorney. *Cooper v. Hickman* 731

19. To obtain a review of alleged errors in a law action, the record must show that the errors were presented to the trial court in a motion for new trial, and a ruling had thereon. *Beels v. Globe Land & Investment Co*..... 733

20. In a case submitted on abstracts, an alleged error in overruling a supplemental motion for new trial will not be considered, unless the abstract contains the substance of the motion and affidavit in support thereof. *Beels v. Globe Land & Investment Co* 733

21. A verdict supported by competent evidence will not be set aside because the appellate court might have reached a different conclusion. *Beels v. Globe Land & Investment Co*.. 733

22. To obtain a review of a ruling permitting an amendment of a pleading on the ground that the amendment changes the issues, the record must show the change in such issues. *Bullock v. Buettner* 761

23. Where the district court makes general and special findings and omits a fact conclusively established and essential to the decree, such fact will be treated as found. *State v. Allen* 826

24. A verdict on conflicting evidence will not be set aside. *Taylor v. American Radiator Co*..... 24

Appeal and Error—*Concluded.*

25. Findings of the court on conflicting evidence will not be disturbed, unless clearly wrong. *Inness v. Meyer*..... 43
26. Judgment in a law case tried to the court on conflicting evidence will not be reversed, unless clearly wrong. *American Case & Register Co. v. Catchpole* 276
27. A verdict on conflicting evidence will not be set aside, unless clearly wrong. *Rathjen v. Woodmen Accident Ass'n*..... 629
28. Rulings of the supreme court on admissibility of evidence become the law of the case, and will be adhered to on a subsequent appeal, unless clearly wrong *Piper v. Neylon*..... 51
29. On appeal in a suit in equity, the supreme court must try the case *de novo* on the evidence in the record. *McNamara v. McNamara* 190
30. In determining whether the evidence is sufficient to support the judgment, the supreme court will not regard errors in admitting evidence, if it appear from the whole record that no other conclusion could be arrived at than the one reached. *In re Willard* 298
31. Where the evidence is conflicting, the question of the authority of an attorney to enter an appearance for a party is for the jury. *Lipps v. Panko* 469
32. Rejection of evidence upon a point well established by evidence admitted is not ground for reversal. *Macrill v. City of Hartington* 670
Bulger v. Prenica 697
33. Instructions correctly stating the law applicable to the issues cannot be successfully assailed on the ground that they are inapplicable to evidence tending to support a defense not pleaded. *Ritchie v. Steger* 63
34. Harmless error in an instruction is not ground for reversal. *De Wolf v. Retzlaff* 449
35. Errors in instructions not called to the attention of the trial court will not be reviewed. *Meadows v. Bradley & Co.*, 694
36. Excessive recovery is not ground for reversal, where the amount of the verdict is not challenged below by an available assignment of error. *Ritchie v. Steger* 63
37. A judgment will not be reversed as excessive, where it is not challenged on that ground. *Still College and Infirmary v. Morris* 328
38. That a verdict is excessive will not be considered, unless assigned in the motion for new trial. *Bulger v. Prenica*.... 397
39. Where the verdict is not questioned as excessive in the motion for new trial, excess in amount is not reviewable. *De Wolf v. Retzlaff* 449

Appearance.

Where summons is served on a party to a suit other than the principal defendant, and such person appears and by cross-petition demands affirmative relief, the question of jurisdiction over him will not arise. *Kakow v. Tate*..... 198

Attorney and Client. See MONEY RECEIVED, 1.

1. Where the attorney general authorized attorneys to appear for him in a suit to establish a bequest to a public charity, and their services resulted in an increase and preservation of the fund, they are entitled to compensation out of the fund. *In re Estate of Creighton*..... 90
2. Where a party has discharged his attorney, and has stipulated with his adversary for a decree disregarding the rights of minors not parties to the suit, the attorney, as a friend of the court, may properly suggest facts necessary to their protection. *Jones v. Hudson* 561

Banks and Banking. See CONSTITUTIONAL LAW, 1.

1. Sec. 5239, Rev. St. U. S., affords the exclusive rule by which to measure damages from national bank directors on a loss resulting from their violation of a duty imposed by the act. *Jones Nat. Bank v. Yates* 121
2. Under sec. 5239, Rev. St. U. S., providing that, if directors of a national bank knowingly violate or permit a violation of the act, they shall be liable, mere negligence, without proof of an intentional violation, will not create liability. *Jones Nat. Bank v. Yates*..... 121
3. Where directors of an insolvent national bank claim immunity under sec. 5239, Rev. St. U. S., as to the rule of liability to be applied to them, the state courts may not create another rule, nor disregard the rule provided by the act. *Jones Nat. Bank v. Yates*..... 121
4. The civil liability of national bank directors, as to making and publishing reports of the condition of the bank, is based solely on the duty enjoined by the national bank act. *Jones Nat. Bank v. Yates* 121
5. A director of an insolvent national bank is not liable to a depositor for fraud and deceit of its officers, as at common law, unless he had knowledge of, approved, or participated in, the fraudulent acts. *Jones Nat. Bank v. Yates*..... 121

Bills and Notes.

1. In an action on a past-due negotiable note, the court should direct a verdict for plaintiff, where the uncontradicted evidence shows that he is a *bona fide* holder for value, without knowledge of any infirmity therein. *Piper v. Neylon*..... 51
2. The sale, indorsement, and delivery of a note does not neces-

Bills and Notes—*Concluded.*

sarily constitute the purchaser a *bona fide* holder; and, in an action thereon, he must allege and prove that he is such, or the note will be subject to equities. *Stannard v. Orleans Flour & Oatmeal Milling Co.* 389

3. One who takes promissory notes as a gift takes only the right of the donor therein. *Holladay v. Rich*..... 491
4. Reservation in a mortgage of an option to pay part of the debt before maturity does not destroy the negotiability of the note secured. *Fisher v. O'Hanlon* 529
5. Holder of note "in due course" defined in sec. 52, ch. 41, Comp. St. 1911. *Fisher v. O'Hanlon*..... 529

Boundaries.

In an original action in the supreme court, additional evidence on the second trial as to the location of a boundary *held* to require a finding and judgment for defendant. *State v. Ball*, 358

Brokers. See VENDOR AND PURCHASER, 2.

1. Under sec. 10856, Ann. St. 1909, a contract in writing, authorizing an agent to sell land, which fails to state the amount of the agent's commission, is void, if such contract is made and is to be performed in Nebraska. *Howell v. North* 505
2. An agent's contract for the sale of land in Colorado, which is to be there performed and is valid under the laws of that state, may be enforced in Nebraska. *Howell v. North*..... 505
3. To recover on a contract between real estate brokers for division of commissions, where the second party was to have all the commission if first party did not aid in the sale, the burden is on first party to show that he aided in the sale. *Johnson v. Payne Investment Co*..... 652
4. In an action for division of commissions, evidence *held* to sustain judgment for plaintiff. *Johnson v. Payne Investment Co.* 652
5. Where a broker's contract provided that, if he should not accompany or arrange with the general agent to accompany the purchaser, he should receive only one-half the commission, and where there was evidence that one O. was authorized to act for the general agent and that he agreed to accompany the purchaser, *held* that the question of O.'s authority and whether he made such agreement were for the jury. *Hanan v. McLeod* 783

Carriers.

1. In an action for personal injury caused by defendant's negligence, plaintiff must prove that the negligence was the proximate cause of the injury. *Painter v. Chicago, B. & Q. R. Co.* 419

Carriers—*Concluded.*

2. Where plaintiff in an action for personal injury fails to prove that defendant's negligence was the proximate cause of the injury, the court should direct a verdict for defendant. *Painter v. Chicago, B. & Q. R. Co*..... 419

3. Where uncontradicted evidence shows that plaintiff's injuries were not caused by the negligence of the carrier, and that he was injured after he ceased to be a passenger within sec. 3, art. I, ch. 72, Comp. St. 1911, the court should direct a verdict for defendant. *Painter v. Chicago, B. & Q. R. Co*.. 419

4. Evidence *held* to show that plaintiff had ceased to be a passenger within sec. 3, art. I, ch. 72, Comp. St. 1911. *Painter v. Chicago, B. & Q. R. Co*..... 419

5. Sec. 5, ch. 90, laws 1907, required carriers to file with the state railway commission rates in effect January 1, 1907, and subd. c, sec. 15, prohibited changes until the commission granted permission, and the commission having refused to allow an increase in rates between certain points, *held* that the rates in effect January 1, 1907, controlled, and that a shipper could recover an overcharge. *Katz-Craig Contracting Co. v. Chicago, St. P., M. & O. R. Co*..... 674

Chattel Mortgages.

1. A description in a chattel mortgage which will enable a third person, aided by inquiries which the instrument suggests, to identify the property is sufficiently definite. *Farmers & Merchants State Bank v. Sutherlin*..... 707

2. Where a mortgagor removes property from another state into this state without consent of the mortgagee, and the mortgage is duly recorded and valid in the former state, the removal does not invalidate the record, nor necessitate recording it again in this state. *Farmers & Merchants State Bank v. Sutherlin* 707

Compromise and Settlement.

After an agreement to compromise and settle an actual controversy, the original matter in dispute is not a proper subject of suit or defense, where fraud, mistake or duress in procuring the contract is not pleaded. *Springfield Fire & Marine Ins. Co. v. Peterson*..... 446

Constitutional Law. See LICENSES, 1-5. STATUTES, 1, 2.

1. Invalidity of the proviso to sec. 45 of the banking law, as amended by ch. 8, laws 1911, and of the proviso to the repealing clause of that act, *held* not to affect the validity of the remainder of the act. *State v. Farmers & Merchants Bank* 1

2. Act of April 10, 1911 (laws 1911, ch. 1), creating a stallion registration board, *held* violative of secs. 1, 26, art. V of the

Constitutional Law—*Concluded.*

constitution, which specify who shall constitute the executive department of the state, and provide that no other executive state office shall be continued or created. *Iams v. Mellor* 438

Continuance. See CRIMINAL LAW, 6.

Contracts. See VENDOR AND PURCHASER, 1-4.

1. An oral contract for personal services, after full performance, *held* not within the statute of frauds. *Taylor v. American Radiator Co.* 24
2. Effect must be given to a written memorandum and deed executed pursuant thereto as one transaction, in the light of the facts as they existed at the time of the execution and delivery of the deed. *Tate v. Kloke*..... 382
3. Where the evidence is conflicting, whether a contract partly written and partly in parol was executed by one of the parties is for the jury. *Lipps v. Panko*..... 469
4. The interpretation given contracts by the parties before any controversy has arisen will ordinarily be enforced by the court. *Cady v. Travelers Ins. Co*..... 634
5. A contract for excavation of a ditch providing that, when one-fourth of the work is completed according to the terms of the contract, 75 per cent. of the price shall be paid, *held* not to require actual completion to the bottom of the ditch of one-fourth of its lineal distance, but the removal of one-fourth of the dirt as required by the plans. *Burt County v. Lewis.* 690
6. To avoid a contract for fraud, the facts constituting the fraud must be pleaded and proved. *Fetzer & Co. v. Johnson & Nelson* 763

Corporations. See LIENS, 1. TRUSTS, 6, 7.

1. A director of a corporation is a fiduciary and is treated in equity as a trustee. *Nebraska Power Co. v. Koenig*..... 68
2. Where a director of a nonresident corporation, authorized to acquire water rights for an electric power plant, asserts such rights on behalf of the corporation, he is estopped to deny it has such authority, when called to account as a fiduciary for making applications in his own name for adverse water rights. *Nebraska Power Co. v. Koenig*..... 68
3. Prosecution of a suit by a foreign corporation is not transacting business within secs. 126, 215, ch. 16, Comp. St. 1911, requiring foreign corporations to file articles with the secretary of state before transacting business. *Nebraska Power Co. v. Koenig* 68
4. A director of a nonresident corporation cannot urge its

Corporations—*Concluded.*

statutory disability to hold real estate in Nebraska to procure a personal advantage, where it is authorized to do so by its articles of incorporation. *Nebraska Power Co. v. Koenig*, 68

Counties and County Officers.

1. The liability of adjoining counties for repairs of a bridge over a stream between them is fixed by statute, and depends upon the statute in force when the liability is incurred. *Buffalo County v. Hull* 586
2. County commissioners possess not only powers expressly conferred by statute, but such as are requisite to the discharge of their official duties. *Emberson v. Adams County*.. 823
3. The county board has power to employ clerical assistance to the county attorney necessary to enable him to perform the duties of his office. *Emberson v. Adams County*..... 823

Courts. See LICENSES, 7.

1. In a proceeding in a state court against directors of a national bank to enforce personal liability under sec. 5239, Rev. St. U. S., the interpretation of the statute by the United States supreme court must be adopted by the state court. *Jones Nat. Bank v. Yates* 121
2. State courts are bound by the construction of the extradition laws adopted by the supreme court of the United States. *In re Willard* 298
3. State courts will not review the decision of the governor on a question of fact which the law makes it his duty to decide, and on which there was conflicting evidence. *In re Willard* 298

Criminal Law. See FOOD. FORGERY. HOMICIDE. INDICTMENT AND INFORMATION.

1. Under sec. 465 of the criminal code, one jointly indicted with others for felony is entitled to a separate trial as a matter of right, if the request is made in due season. *Reed v. State*, 163
2. One cannot predicate error on an instruction when he has requested an instruction substantially to the same effect. *Pruyn v. State* 237
3. Where the evidence is conflicting, but that on behalf of the state is amply sufficient to sustain a conviction, the supreme court will not interfere. *Pruyn v. State* 237
4. If, during a trial for a misdemeanor, the magistrate orders a complaint for a felony to be filed, and proceeds, under sec. 327 of the criminal code, to sit as an examining magistrate, and binds the accused over, the fact that the trial for the misdemeanor was begun is not a bar to the information for the felony. *Larson v. State* 242

Criminal Law—*Continued.*

5. An instruction that "defendant has introduced evidence tending to establish what is known as an alibi" is not a disparagement of that defense, and is not subject to criticism. *Rownd v. State* 427
6. Where the adverse party admits that witnesses would testify as stated in an affidavit for a continuance, and the party presenting the affidavit reads it as evidence to the jury, the refusal of a continuance is not ground for reversal. *Rownd v. State* 427
7. It is not a sufficient objection to the testimony of a witness that his name indorsed on the original information was spelled Schmidt, while on the substituted copy it was spelled Schmitt. *Rownd v. State* 427
8. Alleged misconduct of the prosecuting attorney and sheriff in furnishing statements to reporters relating to the crime is not ground for a new trial, unless the items published were brought to the notice of the jurors, or prevented accused from having a fair trial. *Rogers v. State.* 554
9. Where there is no evidence to justify a conviction of manslaughter, an instruction thereon which is incomplete is not ground for reversing a conviction of murder in the second degree. *Rogers v. State* 554
10. The appellate court may decline to review an instruction not challenged in the motion for new trial. *Forbes v. State*.... 574
11. The indeterminate sentence law does not apply to felonies committed before it went into effect. *Forbes v. State*..... 574
12. The indeterminate sentence law does not repeal or change statutes defining crimes and prescribing penalties. *Forbes v. State* 574
13. Defendants who committed burglary before the indeterminate sentence law went into effect, but who were convicted afterward, *held* properly sentenced under the criminal code as it existed when the crime was committed. *Forbes v. State*, 574
14. It is error to appoint as assistant prosecutor an attorney who has been employed by another person suspected of the crime of which defendant was accused, and for whom he has appeared in a former trial of the accused. *Flege v. State*.. 610
15. Under sec. 468 of the criminal code, one who has read the testimony of witnesses and formed or expressed an opinion thereon as to the guilt or innocence of the accused is incompetent as a juror. *Flege v. State* 610
16. Evidence which tends to inflame the passions of the jury, and which throws no light upon any material inquiry in the case, should be rejected. *Flege v. State*..... 610

Criminal Law—*Concluded.*

17. Expert evidence as to matters on the border line between general and expert knowledge is not conclusive, but upon questions involving a highly specialized art the court and jury must depend on such evidence. *Flege v. State*..... 610

18. An instruction that the jury should acquit if they "believe the defendant not guilty, and that he did not shoot and kill" the decedent, is erroneous. *Flege v. State*..... 610

Curtesy. See MORTGAGES, 9.

Damages. See LIBEL AND SLANDER. WATERS, 1, 2.

1. There is no conclusive presumption of law that the present earnings of an able-bodied and intelligent man, 25 years of age, will not be increased, and the court will not reverse as excessive a judgment for damages, resulting from his death, solely on the ground that his present earnings are small. *Armstrong v. Union Stock Yards Co*..... 258

2. The measure of damages for destruction of an alfalfa crop is the difference between the value of the land before and after destruction of the crop. *McKee v. Chicago, B. & Q. R. Co.* 294

3. In case of permanent injury, it is not error to admit in evidence the Carlisle table of expectancy. *Macrill v. City of Hartington* 670

4. In an action for breach of contract, profits which are in the contemplation of the parties and certain of ascertainment may be recovered. *Roper v. Milbourn* 809

Dedication. See MUNICIPAL CORPORATIONS, 9-11.

Deeds.

1. The burden of proving mental incapacity of a grantor as ground for cancelation of a deed is upon the party alleging the incapacity. *Brugman v. Brugman* 408

2. Evidence *held* to show that the grantor in a deed was mentally competent to execute it. *Brugman v. Brugman*..... 408

3. A conveyance by a wife to her husband for a nominal consideration may raise a presumption of undue influence; but, if it is shown that the conveyance was just and for her own good, the burden then rests on the one attacking the conveyance to establish undue influence. *Brugman v. Brugman*... 408

4. Undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. *Brugman v. Brugman* 408

5. A deed to husband and wife as "joint tenants, with right of survivorship," clearly expresses the intent to create a joint tenancy, and the survivor takes full title on the death of the other. *Sanderson v. Everson* 606

Deeds—*Concluded.*

6. A deed for an insignificant consideration secured by fraudulent misstatements and concealment may be canceled, where the grantor was justified in relying on the acts constituting the fraud, and did so in good faith. *Armstrong v. Randall* 722
7. In a deed to L. and "her heirs," the words, "her heirs," *held* to be technical words of inheritance merely, and not words of purchase. *McNeer v. Patrick* 746

Depositions. See EVIDENCE, 2.

Dismissal.

1. The district court may, in its discretion, permit plaintiff to dismiss after motion to direct a verdict has been submitted and not determined. *Nelson v. Omaha & C. B. Street R. Co.*, 154
2. The dismissal of an action for want of prosecution, without notice, may, after the term, be set aside in equity, where the circumstances call for equitable relief. *Abbott v. Johnston* 726

Divorce.

1. Condonation of acts of cruelty by a husband against his wife is conditioned on subsequent good conduct, and cannot constitute a defense to a suit for a divorce, if the husband is guilty of cruelty after the alleged condonation. *McNamara v. McNamara* 190
2. A false and malicious accusation of adultery by a husband against his wife is cruelty, and if, knowing it to be unfounded, he makes such accusation, and is guilty of other acts of cruelty while her suit for divorce is pending, such conduct will be considered as aggravating former acts of cruelty. *McNamara v. McNamara*..... 190
3. A decree of divorce will be affirmed if a cause of action alleged in the petition is supported by the evidence, though the trial court based the decree on another alleged cause of action not established by the evidence. *McNamara v. McNamara* 190
4. Evidence *held* to sustain decree of divorce. *McNamara v. McNamara* 190
5. Decree for alimony and custody and support of children modified. *McNamara v. McNamara* 190
6. Where a husband, having sufficient ability, without just cause refuses to support his wife, the court may grant her a divorce. *Svanda v. Svanda* 404
7. Evidence *held* to sustain decree awarding custody of child to the mother. *Mackey v. Frenzer* 584
8. Evidence in suit for divorce *held* not of such a character

Divorce—*Concluded.*
as to justify a review of the decree of divorce. *Clute v. Clute* 756
9. In awarding alimony, property of the parties, accumulated by their joint efforts, should be treated as joint property in equal shares. *Clute v. Clute* 756
10. Where the joint possession and use of property have been terminated by decree of divorce for the wrong-doing of defendant, in whom the title rests, he should account to plaintiff for the reasonable value of her share. *Clute v. Clute*..... 756
11. After decree of divorce in plaintiff's favor, land in another state, recently inherited by plaintiff from her father, should not be included in an accounting of property rights. *Clute v. Clute* 756

Dower.
Under the statutes in force in 1891, a widow was not entitled to dower in an equitable interest in lands held by her husband under an executory contract. *Moran v. Catlett*..... 158

Drains. See EMINENT DOMAIN, 2.
1. For the purpose of organizing a drainage district, verified articles conforming to statutory requirements and containing a prayer for incorporation, and objections by interested landowners, may take the place of formal pleadings in a summary proceeding under art. IV, ch. 89, Comp. St. 1909. *Drainage District v. Wilkins*..... 567
2. The existence of swamps or overflowed lands and a purpose to drain them by a feasible drainage system are necessary to the legal organization of a drainage district, under art. IV, ch. 89, Comp. St. 1909. *Drainage District v. Wilkins*.. 567
3. In articles for the incorporation of a drainage district, defects in statements which are not required may be corrected by averments in objections filed in the summary proceeding authorized by art. IV, ch. 89, Comp. St. 1909. *Drainage District v. Wilkins* 567
4. A drainage district may be organized to provide a drain to prevent water from flowing onto swamp lands. *O'Neill v. Leamer* 786
5. Where the proceedings under art. IV, ch. 89, Comp. St. 1909, to establish a drainage district are sufficient to confer jurisdiction, the district supervisors cannot be enjoined from proceeding with the work. *O'Neill v. Leamer*..... 786
6. A drainage district organized under art. IV, ch. 89, Comp. St. 1909, is a public corporation. *O'Neill v. Leamer*..... 786
7. The legislature has power to provide for incorporation of a drainage district by a part of the inhabitants and property owners therein without the consent of all. *O'Neill v. Leamer*, 786

Drains—*Concluded.*

8. Plaintiffs *held* not entitled to enjoin condemnation proceedings and the work thereunder. *O'Neill v. Leamer*..... 786

Ejectment.

Where the life estate of a mortgagor was sold at foreclosure sale, the remainderman, on the mortgagor's death, can sue in ejectment for possession. *Currier v. Teske*..... 7

Eminent Domain.

1. Owners of lands not taken by condemnation proceedings which are damaged by the improvement, having an adequate remedy at law, cannot enjoin the prosecution of the work. *O'Neill v. Leamer* 786
2. Proceedings for condemnation of lands for a drainage ditch *held* not subject to collateral attack on the ground that the location of the ditch was not sufficiently set forth. *O'Neill v. Leamer* 786
3. Sec. 46, ch. 78, Comp. St. 1905, accepting the grant of lands for highways provided by sec. 2477, Rev. St. U. S., reserves to landowners the right to recover damages for land taken on the opening of such highways. *Scott's Bluff County v. Tri-State Land Co.* 805

Equity. See ACTION, 2. TRUSTS.

1. Where equity has jurisdiction over the subject matter and all the parties to a suit, it is the court's duty to adjudicate all questions, in order to do full justice to all parties. *Rakow v. Tate* 198
2. A purely equitable case should be determined according to the procedure and practice in equity. *Schultz v. Wise*..... 718

Estoppel. See CORPORATIONS, 2, 4.

Where a surety has given a bond for a liquor license, and damages have accrued, the surety is estopped to plead that there was no valid ordinance in force when the license was issued. *Bulger v. Prenica* 697

Evidence. See DEEDS, 1, 2. INSURANCE, 2, 4, 10. INTOXICATING LIQUORS, 1-5. LIBEL AND SLANDER, 4. NEGLIGENCE, 1-3, 5-10. RAILROADS, 4. SALES, 2, 3. STREET RAILWAYS.

1. A properly authenticated copy of a liquor dealer's bond is sufficient *prima facie* proof of the existence of the bond and of its proper execution. *Bulger v. Prenica*..... 697
2. Objection may be made to competency and materiality of evidence in a deposition without filing objections under sec. 390 of the code. *In re Estate of Lyle*..... 768
3. In proceedings to establish heirship, a photograph offered in evidence *held* to have been improperly excluded. *In re Estate of Lyle* 768

Evidence—*Concluded.*

4. A document, reciting that it is an "extract entry of birth," and signed "Hugh Pearce, Registrar," without other authentication or explanation, *held* properly excluded. *In re Estate of Lyle* 768

5. The question of the competency of the declarations as to family pedigree and history is for the court, and not the jury. *In re Estate of Lyle*..... 768

6. Declarations as to pedigree and history must relate to family relatives of decedent to be competent. *In re Estate of Lyle* 768

7. When, in determining next of kin, the issue is as to the identity of decedent with the ancestor of those claiming heirship, it is error to charge that such identity must be established before declarations as to the ancestor can be considered. *In re Estate of Lyle* 768

Executors and Administrators. See MONEY RECEIVED, 2.

1. The use of the body of the personal estate by the widow *held* authorized by the terms of the will. *In re Estate of Nichols* 80

2. Evidence *held* to show that a claim was properly rejected on its merits. *In re Estate of Hinrichs* 551

3. Where the personal assets are sufficient to pay all debts, a sale of the real estate cannot be made for that purpose. *In re Estate of Sasse* 640

Extradition.

In extradiction, the governor must determine whether the person demanded is charged with a crime, and whether he is a fugitive from justice. *In re Willard* 298

Food.

Under secs. 8, 22, ch. 33, Comp. St. 1911, where syrup is put up by a wholesaler and sold under a label stating that each half-gallon can contains a brand composed of cane syrup and maple syrup, there must be a statement showing the proportion of each. *State v. Paxton & Gallagher Co*..... 216

Forgery.

1. An information charging that accused did "knowingly" utter a forged check sufficiently avers guilty knowledge that the instrument was forged. *Rownd v. State*..... 427

2. Evidence *held* competent to identify accused as the person who uttered the forged instrument. *Rownd v. State*..... 427

3. Evidence *held* to identify accused and to establish guilty knowledge on his part. *Rownd v. State*..... 427

4. Evidence *held* competent to connect accused with the commission of the crime charged against him. *Rownd v. State*, 427

Forgery—*Concluded.*

5. Evidence *held* to sustain verdict. *Rownd v. State*..... 427

Fraud. See MASTER AND SERVANT, 6, 7.

Fraudulent Conveyances.

It is a defense to a suit to set aside conveyances as in fraud of a judgment that plaintiff is indebted on simple contract to the judgment debtor in an amount equal to the judgment. *Lashmett v. Prall* 184

Garnishment.

The indebtedness of the maker upon a note before maturity is not liable to garnishment. *Fisher v. O'Hanlon*..... 529

Guaranty.

1. Guaranties of performance and of payment are controlled by the same principles of law. *Schultz v. Wise*..... 718
2. The liability of a guarantor does not extend beyond the terms of his guaranty. *Schultz v. Wise*..... 718

Guardian and Ward. See TAXATION, 15.

1. Sec. 2, ch. 34, Comp. St. 1911, confers on the probate court of each county jurisdiction to appoint a guardian to a minor who is an inhabitant or resident in the same county, or who has property in the county and resides in another state. *In re Connor* 118
2. The courts of Kansas have no jurisdiction to appoint a guardian for a minor whose domicile and property are in Nebraska. *In re Connor* 118

Habeas Corpus.

1. In habeas corpus by one held under warrant in extradition, if the return sets forth the warrant, and its recitals, together with the allegations of the application for habeas corpus, show facts justifying the detention of the accused, the return is sufficient. *In re Willard* 298
2. When requisition papers for extradition clearly show the county in which it is alleged the crime was committed and the proceedings begun, and the governor of this state has ordered the return of the defendant, the fact that the request for extradition names a different county will not require the court, in habeas corpus, to discharge the prisoner. *In re Willard* 298
3. When it appears, in habeas corpus, on what showing the governor acted in granting extradition, it is a question of law whether the accused has been charged with a crime against the demanding state. *In re Willard* 298
4. Evidence *held* to sustain judgment denying writ of habeas corpus to one held for extradition. *In re Willard*..... 298

Heirs. See EVIDENCE, 3-7. WITNESSES, 4.

In proceedings to establish heirship, it was error to charge that petitioners must prove that they are the only next of kin of decedent, the only issue being as to the identity of decedent with petitioners' ancestor. *In re Estate of Lyle*.. 768

Highways. See EMINENT DOMAIN, 3. NEGLIGENCE, 10.

A county attempting to open a public road on a section line without notice or fixing a time for a hearing on the landowner's claim for damages is a trespasser. *Scott's Bluff County v. Tri-State Land Co*..... 805

Homestead. See MORTGAGES, 3.

Homicide. See CRIMINAL LAW, 9, 18.

1. Evidence *held* to sustain conviction of manslaughter. *Pruyn v. State* 237
2. Evidence *held* to sustain conviction of murder. *Rogers v. State* 554

Husband and Wife. See DEEDS, 3, 5. MORTGAGES, 6-9.

1. The property of a married woman not being liable for necessaries until after execution against the husband has been returned unsatisfied, a wife may enjoin a levy on her lands on a judgment not showing that it was rendered for necessaries, or where there is no return of execution against the husband unsatisfied. *Scott v. House* 325
2. A married woman may make a valid contract to pay tuition for a course in osteopathy, though she has no separate estate. *Still College and Infirmary v. Morris*..... 328
3. A married woman may mortgage her separate estate to secure the individual debt, or to indemnify the sureties upon an official bond, of her husband. *Bode v. Jussen*..... 482

Indictment and Information.

An information for receiving stolen property does not state facts constituting an offense, where the property is described only as "the personal property of John Lightfoot of the value of $48, then lately before stolen;" and, after verdict of guilty, it was error to overrule a motion in arrest of judgment. *Korab v. State* 66

Infants. See JUDGMENT, 1-4.

1. Under sec. 5371, Ann. St. 1911, the disabilities of a female, as a minor, are ended when she becomes 18 years of age, and she may thereafter sue and transact business in her own name. *Kiplinger v. Joslyn* 40
2. A court of equity should, on its own motion, protect the rights of minors involved in litigation to which they are not parties. *Jones v. Hudson* 561

Injunction. See DRAINS, 5, 8. EMINENT DOMAIN, 1. HUSBAND AND WIFE, 1. MUNICIPAL CORPORATIONS, 14. SCHOOLS AND SCHOOL DISTRICTS.

1. One may enjoin repeated trespasses on his land, though the trespasser is solvent. *Ayres v. Barnett*..... 350
2. An owner of land is not required to permit devastation of his timber land by a trespasser and seek relief at law for damages, but he may prevent the trespass by injunction. *Ayres v. Barnett* 350
3. In a suit to enjoin trespass, evidence *held* to sustain decree for plaintiff. *Ayres v. Barnett* 350

Insane Persons. See MARRIAGE.

Insurance.

1. A misstatement of fact in the proof of loss, made after the parties settled the damages in dispute, is not a proper subject of suit or defense, where the insurer did not rely upon the misstatement, and it was made without fraudulent intent. *Springfield Fire & Marine Ins. Co. v. Peterson*..... 446
2. Where the physician who treated assured for an accidental injury has shown himself competent to testify as an expert, and has fully described the nature of the injury and the symptoms, he may state what in his opinion caused the death of the assured. *Rathjen v. Woodmen Accident Ass'n*..... 629
3. In an action on an accident policy, an instruction as to the cause of death *held* proper. *Rathjen v. Woodmen Accident Ass'n* 629
4. Where the question of waiver of conditions of a policy by letters notifying assured of default in payment of premiums is to be submitted to the jury, it is error to exclude any part of the correspondence. *Cady v. Travelers Ins. Co*..... 634
5. Where a contract for paid-up term insurance is unambiguous and the parties have agreed as to the date when the policy will lapse, there can be no recovery on death of assured after that date. *Cady v. Travelers Ins. Co*..... 634
6. Notice to the assured that a premium on his policy was past due, with request for payment, did not change the contract as to the date of its conversion into a paid-up policy of term insurance. *Cady v. Travelers Ins. Co*..... 634
7. Requirements in a policy of health insurance as to notice of disability *held* not unreasonable. *Blunt v. National Fidelity & Casualty Co.* 685
8. Compliance with requirements as to notice of sickness *held* essential to recovery in a suit on a health policy, in absence of waiver or estoppel. *Blunt v. National Fidelity & Casualty Co.* 685

Insurance—*Concluded.*

9. Notice of the commencement of sickness to a health insurance company *held* a sufficient compliance with the policy. *Blunt v. National Fidelity & Casualty Co* 685

10. Evidence, in an action on a health policy, *held* to be so defective as to justify directing a verdict for defendant. *Blunt v. National Fidelity & Casualty Co* 685

Intoxicating Liquors. See ESTOPPEL.

1. Where, on appeal from a judgment affirming the action of a village board in granting a liquor license, the record is silent as to whether the license was authorized by an existing ordinance, there is no presumption that there was no such ordinance. *Maxwell v. Steen* 29

2. Allegation in remonstrance to liquor license *held* an admission that the signers to the petition were freeholders; and, there being no evidence of bad faith, the license was properly issued. *Maxwell v. Steen* 29

3. In order to defeat an application for a liquor license because the applicant has sold liquor to minors in violation of ch. 50, Comp. St. 1911, the burden is on remonstrator to establish that fact by a preponderance of evidence. *In re Phillips* 152

4. Evidence *held* to show that applicant for liquor license had violated ch. 50, Comp. St. 1911, by sales to minors during the previous year. *In re Phillips* 152

5. In an action on a liquor dealer's bond, testimony of a medical expert as to the effect of intoxicants upon the human system, and as to his personal knowledge of the impaired physical condition of deceased due to excessive drinking, *held* properly received. *Bulger v. Prenica* 697

6. Liquor dealers are liable in damages for all legitimate and proximate consequences of their traffic, and, if they induce habitual drunkenness in a sober and industrious man, they are liable for a dissipated career followed by him after they have ceased to furnish him liquors. *Bulger v. Prenica*..... 697

7. The constitutionality of ch. 61, laws 1881, regulating the sale of intoxicating liquors, having been repeatedly decided, will not be re-examined. *Bulger v. Prenica* 697

Joint Tenancy. See DEEDS, 5.

1. The right to create title in real estate by joint tenancy, with right of survivorship, has not been abridged in Nebraska. *Sanderson v. Everson* 606

2. If the purpose to create a joint tenancy is clearly expressed in a deed, the intent of the parties will control, and a joint tenancy with right of survivorship will be created. *Sanderson v. Everson* 606

Judgment.

1. Decree quieting title to real estate *held* conclusive as to defendants who were minors. *Sutphen v. Josyln*..... 34
2. Where suit to quiet title was brought by agreement between vendor and purchaser, *held* that such agreement did not render the decree invalid as constructively fraudulent as to certain defendants who were minors. *Sutphen v. Joslyn*.... 34
3. To entitle a female, on arriving at her majority, to sue, under secs. 602, 609 of the code, to vacate an order or decree and for a new trial, suit must be commenced within two years after removal of her disability. *Kiplinger v. Josyln*.. 40
4. To entitle a female to sue under sec. 442 of the code, the suit must be commenced within one year after she arrives at full age. *Kiplinger v. Joslyn* 40
5. A judgment of a court of competent jurisdiction on questions directly involved in one suit is conclusive as to those questions in a subsequent suit between the same parties. *Upstill v. Kyner* 255
6. Ordinarily a judgment lien extends only to the interest and rights of the judgment debtor in the property at the date of the lien, or acquired during its existence. *Stannard v. Orleans Flour & Oatmeal Milling Co*..... 389
7. A judgment granting relief outside of the pleadings and evidence is erroneous. *Peterson v. Hartford Fire Ins. Co*..... 448
8. One not served with process, and who does not appear, is not bound by the judgment rendered. *Lipps v. Panko*..... 469
9. A judgment on constructive service *held* void. *Nelson v. Sughrue* 480
10. The provisions of sec. 602 of the code for vacating judgments are concurrent with independant equity jurisdiction. *Abbott v. Johnston* 726

Jury. See CRIMINAL LAW, 15.

A law action is not triable without a jury because there are issues incidental to the main one which are equitable in their nature. *Alter v. Skiles* 597

Justice of the Peace.

The rule that an order of a justice granting a change of venue on an *ex parte* hearing and before return day of summons is void has not been changed by secs. 958, 958*a* of the code, as amended in 1905 (laws 1905, chs. 180, 181). *Adams v. Anderson* 416

Landlord and Tenant.

A lease may be made to secure liabilities existing and to be incurred; and, when the conditions and subsequent conduct of the parties show that such was its purpose, it will be so construed. *Stannard v. Orleans Flour & Oatmeal Milling Co.*, 389

Libel and Slander.

1. If the published words are libelous *per se*, it is not necessary by innuendo to explain their meaning, nor to allege special damages. *Callfas v. World Publishing Co*..... 108
2. If the published words are ambiguous, or *prima facie* innocent, plaintiff must specifically allege and prove the defamatory meaning, and must allege and prove special damages. *Callfas v. World Publishing Co.* 108
3. Where the publication makes general charges against plaintiff, an answer in general terms that the charges are true is insufficient, but, if the facts are specifically stated in the charge, a general allegation that they are true is sufficient. *Callfas v. World Publishing Co*..... 108
4. The defendant in an action for slander cannot, in mitigation of damages, prove the truth of the alleged defamatory charge under a general denial. *Murten v. Garbe*..... 589
5. Where a publication was not obviously defamatory, and there was no allegation and proof of facts showing special damages, judgment for defendant was right. *Callfas v. World Publishing Co.* 108

Licenses.

1. It is not the purpose of the fourteenth amendment, constitution of the United States, to prevent states from classifying the subjects of legislation and making different regulations as to the property of individuals differently situated. *Norris v. City of Lincoln* 658
2. Sec. 1, art. IX, constitution of Nebraska, does not forbid reasonable classification of persons for the purpose of taxation. *Norris v. City of Lincoln*..... 658
3. Where a city charter authorizes an occupation tax, the municipal authorities may classify the different occupations and impose a different amount of tax upon the different classes, provided the classification is reasonable. *Norris v. City of Lincoln* ..... .658
4. A city ordinance providing an occupation tax, and placing persons lending money upon chattel security in a different class from chartered banks and negotiators of loans on realty, is not void as providing an arbitrary classification. *Norris v. City of Lincoln* 658
5. An ordinance providing a fine and imprisonment to enforce a license tax does not violate sec. 3, art. I, of the constitution of this state. *Norris v. City of Lincoln*..... 658
6. The penal provisions of an occupation tax ordinance providing for its enforcement by a fine *held* valid. *Western Union Telegraph Co. v. City of Franklin*..... 704

Licenses—*Concluded.*

7. Where an ordinance provides that refusal to pay an occupation tax shall render the person in default liable to a fine, and that suit may be brought in the name of the state by warrant and arrest or by common summons, the police court has jurisdiction to render judgment for the fine, whether defendant is brought into court by warrant and arrest or by service of summons. *Western Union Telegraph Co. v. City of Franklin* 704

Liens. See APPEAL AND ERROR, 9.

1. Where one advanced money to a corporation for improvements with the consent of a judgment creditor, who was a stockholder, and with the understanding that he should be reimbursed out of the property, his claim for the money advanced will be preferred to the lien of the judgment. *Stannard v. Orleans Flour & Oatmeal Milling Co*..... 389
2. In a suit to determine priority of liens and foreclose the same, an account should be taken of the profits and expenses of a lien-holder in possession, and the net profits applied on his lien. *Stannard v. Orleans Flour & Oatmeal Milling Co.* 389

Life Estates. See MORTGAGES, 1-3. WILLS, 5, 6.

Limitation of Actions. See TAXATION, 27.

1. Where the life estate is sold under foreclosure, limitations do not begin to run against the remainderman until the mortgagor's death. *Currier v. Teske* 7
2. A mere reference to a note, though implying no disposition to question its binding obligation, is not an acknowledgment of debt under sec. 22 of the code. *France v. Ruby*.... 214
3. To toll the statute of limitations, there must be an unqualified and direct admission of a present, subsisting debt on which the party is liable. *France v. Ruby*..... 214
4. Where V. verbally assigned corn to H. to market and pay certain of V.'s debts, and pay the remainder to V., and V. made no demand for a settlement for more than 25 years, the claim was barred by limitations. *In re Estate of Hinrichs* 551
5. Where husband and wife executed a mortgage on her estate to secure his debt, the relation of debtor and creditor did not arise between them until sale of the property under a decree foreclosing the mortgage. *Northwestern Mutual Life Ins. Co. v. Mallory* 579

Marriage.

1. Fraudulent conspiracy between the wife's father and friends to induce one to marry his daughter will not authorize an-

Marriage—*Concluded.*
nulment of the marriage, unless the husband was an idiot or insane at the time of the marriage. *Svanda v. Svanda*.. 404

2. Weakness of mind is not ground for annulment of marriage, unless it amounts to idiocy or insanity. *Svanda v. Svanda* 404

3. Mere weakness of mind will not invalidate a marriage, unless it produces derangement that destroys the power to consent. *Adams v. Scott* 537

4. A marriage will not be annulled on the ground of insanity or idiocy, unless there is such want of understanding as to render the party incapable of assenting thereto. *Adams v. Scott* 537

Master and Servant. See NEGLIGENCE, 1-4.

1. Where an employer, knowing the dangerous conditions of the work, orders an employee to perform the work notwithstanding his protest, and enforces the order with threats of discharge, he cannot maintain that the employee assumed the risk or was guilty of contributory negligence. *Thomsen v. Jobst* 375

2. Where a master requires an implement to be used in a manner and under conditions more dangerous than the usual method, he may be guilty of negligence in so doing. *Thomsen v. Jobst* 375

3. An employee does not ordinarily assume risks arising from conditions beyond his knowledge. *Elliott v. General Construction Co.* 453

4. The master *held* liable for death of an inexperienced servant whom he had put to work in a hazardous position among electric power wires carrying dangerous currents of electricity. *Elliott v. General Construction Co*..... 453

5. In an action for money advanced to an employee, evidence *held* insufficient to sustain judgment for defendant on counterclaim for salary. *Omaha Folding Machine Co. v. Striplin* 740

6. A statement in an application for membership in a voluntary relief association that applicant was only 25 years of age is a warranty, and, he being more than 35 years old, rendered the contract of insurance void. *Blunt v. Chicago, B. & Q. R. Co.* 815

7. Where plaintiff by changing his name and misrepresenting his age secured membership in the relief department of defendant company, *held* that his membership was secured by fraud. *Blunt v. Chicago, B. & Q. R. Co*..... 815

Mechanics' Liens.

1. In a suit to foreclose a mechanic's lien, nonresidence of defendant, on whom plaintiff attempted to make service by publication, is a question of fact, when put in issue by the pleadings. *Bradford Lumber Co. v. Creel*..... 573
2. A subcontractor who furnished at different times materials for a house under a single contract is entitled to a lien, where he filed a proper statement with the register of deeds within the statutory period. *Bradford Lumber Co. v. Creel*, 573

Money Received.

1. Where money is paid to an attorney upon a claim of a third party, he cannot withhold it on the ground that he is also a creditor of the person paying it. *Wilder v. Millard*, 595
2. Where defendant received a note from executors, he could not resist payment of the amount collected thereon on the ground that their letters testamentary were not properly sealed. *Wilder v. Millard* 595
3. To recover the value of property from one who has disposed of it under plaintiff's authority, plaintiff must prove that defendant agreed to pay him the purchase price, or the market value thereof. *Coulter v. Cummings*..... 646

Mortgages. See HUSBAND AND WIFE, 3. PARTITION.

1. A foreclosure sale conveys only the interest of the mortgagor, and where he owns only a life estate that is all that is conveyed. *Currier v. Teske* 7
2. Where a foreclosure sale of a mortgagor's life estate satisfied the mortgage debt, the purchaser acquired no right in the interest of a remainderman not a party to the suit. *Currier v. Teske* 7
3. The life estate of a surviving spouse in the homestead may be mortgaged, and the purchaser on foreclosure will take the life estate. *Pulver v. Connelly* 188
4. Where a mortgage purports to convey the whole property, an after-acquired interest of the mortgagor by descent on the death of her son becomes subject to the mortgage immediately on the son's death. *Pulver v. Connelly*..... 188
5. An indebtedness secured by a chattel mortgage is sufficient consideration for a mortgage of land. *Pulver v. Connelly*.. 188
6. A married woman who mortgages her separate estate or homestead to secure a debt of her husband may have the lien canceled in a suit to foreclose, where she was induced to execute the mortgage by mortgagee's threats to imprison her husband. *Hoellworth v. McCarthy*..... 246
7. A mortgage executed by a wife on her separate property to indemnify a surety on an official bond of her husband, who

Mortgages—*Concluded.*

has misappropriated the funds, in the hope of saving him from imprisonment, is not void for want of consideration. *Bode v. Jussen* 482

8. A mortgage by a wife to save her husband from imprisonment *held* not void as having been obtained under duress. *Bode v. Jussen* 482

9. Where M. and wife executed a mortgage on the wife's estate to secure a loan by a bank to M., and the wife died, leaving children surviving her, and thereafter the mortgage was foreclosed, but before sale M. conveyed his curtesy interest to a codefendant, *held* that the purchaser took only such interest as his grantor had, and that the amount of the mortgage should be deducted from such curtesy interest. *Northwestern Mutual Life Ins. Co. v. Mallory*..... 579

Municipal Corporations.

1. Where separate buildings for different departments of city administration were erected on the same site under one general plan, *held* that each building was authorized by a vote conferring power to issue bonds "to purchase a site and erect a city hall thereon." *Champion Iron Co. v. City of South Omaha* 56

2. The installation of cells in a city hall to be used in connection with a police court held in the building, is incidental to, and not inconsistent with, the general purpose thereof. *Champion Iron Co. v. City of South Omaha*..... 56

3. The erection of cells in a police court building *held* to form a part of a general plan for a city hall, and the cost properly payable out of money appropriated by a vote for bonds for a city hall. *Champion Iron Co. v. City of South Omaha,* 56

4. Under subd. IV, sec. 67, art. I, ch. 13*a*, Comp. St. 1893, the mayor and council of the city of Lincoln had authority to vacate streets and alleys, and the vacated portions reverted to owners of adjacent lots. *State v. Chicago, R. I. & P. R. Co.* 263

5. City ordinance *held* to vacate the portion of a street occupied by a railroad company as its station and switching grounds, and that, the company being the owner of the adjacent lots, the vacated portion became its property. *State v. Chicago, R. I. & P. R. Co*..... 263

6. The city of Lincoln cannot compel a railroad company to construct a viaduct over its property where there is no public way or street. *State v. Chicago, R. I. & P. R. Co*.... 263

7. When a city engages in a purely business enterprise, it acts in a private capacity, and is bound by the rules of law

Municipal Corporations—*Continued.*

applicable to any other corporation or person engaged in like enterprise. *Henry v. City of Lincoln*..... 331

8. Sec. 126, art. I, ch. 13, Comp. St. 1911, requiring the filing of a notice with the city clerk within 30 days after a right of action for an unliquidated claim accrues, applies to claims arising out of performance of its corporate duties, but not to those arising out of the conduct of a private business enterprise. *Henry v. City of Lincoln*..... 331

9. Land cannot be dedicated to the public for a street by deed, unless the deed is executed by the owner. *Morning v. City of Lincoln* 364

10. Where liens on land deeded to the public for a street ripen into title, an attempted dedication by the owner, without consent of the lien-holder, is futile. *Morning v. City of Lincoln* 364

11. Where a deed of dedication of land, subject to liens, to the public is not recorded, user by the public will not estop a lien-holder without notice to deny that he consented to the dedication. *Morning v. City of Lincoln*..... 364

12. Where a city charter required that ordinances be published in a newspaper published in the city, and there is no paper printed therein, publication in a newspaper printed outside the city, but circulated in the city, *held* sufficient. *Hadlock v. Tucker* 510

13. Where a bid for paving slightly exceeded the engineer's estimate as to one item, and the excess was eliminated from the contract, the contract was not void. *Hadlock v. Tucker* 510

14. Payment for street improvements will not be enjoined in a suit by a taxpayer, who, with full knowledge of the progress of the work, did not act until after the completion of the contract. *Hadlock v. Tucker* 510

15. In a city of the first class having more than 5,000 and less than 25,000 inhabitants, a three-fifths majority of the abutting owners in a paving district may determine the material to be used, but all details of construction are left to the city council. *Lanning v. City of Hastings*..... 665

16. Publication of notice of the time of meeting of city council to equalize assessments for paving *held* to comply with sec. 83, art. III, ch. 13, Comp. St. 1911. *Lanning v. City of Hastings* 665

17. The power given the city council of a city of the second class, under sec. 8905, Ann. St. 1911, to remove a city treasurer cannot be exercised until specific charges have been

Municipal Corporations—*Concluded.*
preferred and notice and opportunity given him to be heard in defense thereof. *State v. Strever* 762
18. A city *held* liable to an abutting lot owner for any damage from grading a street from its natural to a lower grade. *Stocking v. City of Lincoln* 798
19. The removal of trees *held* a proper element of damages from grading a street. *Stocking v. City of Lincoln*..... 798

Negligence. See CARRIERS, 1-3. RAILROADS.
1. The employers' liability act (Comp. St. 1911, ch. 21) does not affect the power of a court to determine the legal sufficiency of evidence of negligence or of contributory negligence. *Disher v. Chicago, R. I. & P. R. Co*..... 224
2. Under the employers' liability act, where the existence of negligence or contributory negligence is an issue, the court may direct a verdict where the lack of evidence of negligence, or the undisputed evidence as to more than slight contributory negligence in comparison with that of defendant, is so clear that reasonable minds cannot differ as to its legal effect. *Disher v. Chicago, R. I. & P. R. Co*..... 224
3. Where the evidence shows both negligence and contributory negligence, the duty to make the comparison required by ch. 21, Comp. St. 1911, rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is so clearly shown that the court would set aside a verdict for plaintiff. *Disher v. Chicago, R. I. & P. R. Co.* 224
4. In an action under the employers' liability act, *held* that the comparative negligence of plaintiff and defendant was for the jury. *Disher v. Chicago, R. I. & P. R. Co*..... 224
5. In an action for death, caused by a car being switched, evidence *held* to sustain the finding that defendant was negligent. *Armstrong v. Union Stock Yards Co*..... 258
6. There is a presumption that one in his right mind and in possession of his faculties will take ordinary precaution to avoid danger and injury. *Armstrong v. Union Stock Yards Co.* 258
7. Evidence of contributory negligence *held* not so conclusive as to require an appellate court to hold as a matter of law that the presumption of ordinary caution was overcome, and contributory negligence established. *Armstrong v. Union Stock Yards Co.* 258
8. Negligence cannot be established by inference and conjecture in contradiction to the testimony of competent and unimpeached eye-witnesses. *Painter v. Chicago, B. & Q. R. Co.* 419

Negligence—*Concluded.*

9. Negligence in the construction and use of electric wires carrying dangerous currents of electricity is a question for the jury, where the evidence is conflicting. *Elliott v. General Construction Co.* 453

10. Owner *held* not liable for damages to others on a highway by his team running away without his fault. *Brooks v. Kauffman* 682

Newspapers. See MUNICIPAL CORPORATIONS, 12.

New Trial.

Affidavit *held* insufficient to excuse delay in filing motion for new trial. *Murten v. Garbe*..... 589

Parent and Child.

The right of action for earnings of an unemancipated minor is in the parent, where the contract of employment was made by the parent. *Inness v. Meyer* 43

Partition. See WILLS, 4.

1. In a suit to sell land devised, certain defendants sought partition, and a mortgagee asked foreclosure, *held* that, the court having acquired jurisdiction of the subject matter and parties, it was proper to direct a sale to satisfy the mortgage and distribution of the surplus. *Knauf v. Mack*..... 524

2. In a suit for the sale of land devised, the owner of a mortgage, executed by the testator, was made a party and asked a foreclosure, and a decree was entered without objection foreclosing his mortgage, *held* without error. *Knauf v. Mack* 524

Partnership.

1. Where partners transfer their stock to a committee of their creditors to conduct the business, pay all indebtedness, and return the remainder of the property to the partners, the partners alone cannot, before the claims have been paid in full, maintain an action at law against the committee for conversion of stock sold in bulk in violation of their duties as trustees. *Edwards v. Hatfield* 712

2. In an action by partners for conversion of partnership property, individual partners cannot recover to the exclusion of the others. *Edwards v. Hatfield* 712

Paupers.

1. Where a physician is employed by an overseer of the poor to aid a destitute person, the fact that the overseer has not made a written report to the county board will not defeat the liability of the county. *Meyers v. Furnas County*..... 313

2. The averment in a petition that a person had fallen sick,

Paupers—*Concluded.*
under circumstances showing destitution and inability to procure assistance, is a sufficient allegation of dependence on the county as against a demurrer. *Meyers v. Furnas County* 313

3. Under sec. 14, ch. 67, Comp. St. 1911, if any person, not a pauper, shall fall sick within any county, not having money to pay for board, nursing, and medical aid, it is the duty of the overseers of the poor to furnish such assistance. *Meyers v. Furnas County* 313

Pleading. See BILLS AND NOTES, 2. CONTRACTS, 6. LIBEL AND SLANDER, 1-3, 5. PAUPERS, 2. SCHOOLS AND SCHOOL DISTRICTS, 2. TAXATION, 11, 13.

1. Where one party alleges that a note has not been paid, and no objection is made to the allegation and description of the note, and no plea of payment, and proof is admitted showing the ownership of the note and that it is unpaid, these facts must be considered as established. *Lashmett v. Prall*, 184

2. Where a demurrer to a petition on *quantum meruit* was sustained, and an amended petition on an express contract was held demurrable, *held* not error to refuse to permit an amendment setting up a cause of action on *quantum meruit*. *Patterson v. Steele* 209

3. Permission or refusal to permit plaintiff to amend an amended petition, after commencement of trial, will be sustained, unless there has been an abuse of discretion. *Patterson v. Steele* 209

4. Where there was no motion to require a more complete statement of facts in an answer alleging fraud in procuring a signature to a note, the answer will be liberally construed to support the judgment. *American Case & Register Co. v. Catchpole* 276

5. In an action to recover money, an answer that the money was not due when the action was commenced is not demurrable. *Gergens v. Gergens* 546

6. Where a general demurrer *ore tenus* is made, after commencement of trial, the pleading will be liberally construed, and, if possible, sustained. *Macrill v. City of Hartington*.. 670

7. Misjoinder of causes of action apparent on the face of a petition may be challenged by demurrer. *Schultz v. Wise*.. 718

Principal and Agent.

1. A principal cannot deprive an agent of his right to an accounting by improperly joining a cause of action on the contract of agency with a cause of action on a third person's guaranty of performance thereof. *Schultz v. Wise*.... 718

Principal and Agent—*Concluded.*

2. An agent who binds himself by a contract containing the terms of his agency does not increase his liability by signing a mere guaranty of performance on his part after it has been executed by a third person. *Schultz v. Wise*..... 718

3. To entitle a principal to recover for secret profits made by his agent in exchange of properties, it must appear that the agent possessed knowledge of the value of the property taken that was unknown to his principal, and which the agent used to his advantage. *Davis v. Haire*..... 819

4. Agent *held* not liable to his principal for secret profits alleged to have been made in exchange of properties. *Davis v. Haire* 819

Principal and Surety. See ESTOPPEL. WILLS, 2.

Extension of time of a contract, the performance of which is secured by a bond providing that any departure from the terms of the contract shall not invalidate the bond, does not release the sureties on the bond. *Burt County v. Lewis*.... 690

Process.

1. An affidavit for constructive service on unknown heirs, under sec. 83 of the code, must be made by the plaintiff himself, if an individual, and not by his attorney, and must be verified positively. *Moran v. Catlett*..... 158

2. Under sec. 148 of the code, service of summons on a defendant, sued by the initial letters of her name, by leaving a certified copy at her place of residence, is void. *Henze v. Mitchell* 278

Quieting Title. See JUDGMENT, 1, 2.

1. A suit to quiet title to land must be brought in the county in which the land is situated. *Rakow v. Tate*..... 198

2. Where suit to quiet title is brought in the county where the land is situated, summons may be served on the principal defendant in any county of the state, and thereupon on any other necessary or proper defendant; and it is not essential that summons be served on any one within the county where the suit is pending. *Rakow v. Tate*..... 198

3. Disclaimer by the principal defendant in a suit to quiet title after another defendant has appeared and asked affirmative relief will not defeat jurisdiction. *Rakow v. Tate*.... 198

4. A written contract to sell land, recorded in the office of register of deeds and not canceled when the contract is abandoned, casts a cloud on vendor's title, authorizing a suit to quiet title. *Rakow v. Tate* 198

5. Though a part of the land described in a written agreement to sell land constitutes the homestead of the vendor, and

Quieting Title—*Concluded.*

though the wife did not sign the agreement, the vendor may sue to remove the cloud created by the recording of the agreement. *Rakow v. Tate* 198

6. In a suit by the owners of the fee to quiet title, a defendant, who transferred his interest in the land and the improvements and surrendered possession before action was commenced, is not entitled to relief under the occupying claimants' act. *Moreland v. Berger* 724

7. Evidence *held* to sustain decree quieting title to land. *Rakow v. Tate* 198

8. Evidence *held* to sustain former decree. *Holladay v. Rich*.. 491

Railroads. See MUNICIPAL CORPORATIONS, 5, 6. TRIAL, 3.

1. Evidence *held* to sustain verdict against a railroad company for destruction of crops by fire from its engine. *McKee v. Chicago, B. & Q. R. Co.* 294

2. It is not negligence for a railway company to operate a passenger train at the rate of 50 miles an hour, during a clear day, in the open country, where there are no obscure crossings. *White v. Chicago, B. & Q. R. Co.*..... 736

3. That an animal is killed upon the public highway at a railroad crossing is no evidence of negligence of the railroad company. *White v. Chicago, B. & Q. R. Co.* 736

4. Negligence cannot be established by inference or conjecture in contradiction to the testimony of a competent and unimpeached eye-witness. *White v. Chicago, B. & Q. R. Co.*... 736

5. The duty of an engineer and fireman to keep a lookout for animals on the track is only such as is consistent with their other duties. *White v. Chicago, B. & Q. R. Co.*..... 736

Remainders. See EJECTMENT. LIMITATION OF ACTIONS, 1.

Sales. See TRIAL, 6.

1. A contract for the exclusive sale of a special line of merchandise may be rescinded, where the vendor sells to the purchaser's competitors. *Bride v. Riffe* 355

2. Where a machine is purchased under a written warranty that it is of good materials and workmanship, evidence that it failed to do good work is not sufficient proof that it was not intended nor adapted to do the work for which it was sold. *Fetzer & Co. v. Johnson & Nelson*..... 763

3. Where, in an action for goods sold, no breach of warranty was shown, evidence as to damages therefor was properly excluded. *Fetzer & Co. v. Johnson & Nelson*..... 763

4. Where, in an action for goods sold, a failure of warranty of the goods is not sufficiently pleaded and proved, it cannot

Sales—*Concluded.*

be relied on as a defense of failure of consideration. *Fetzer & Co. v. Johnson & Nelson* 763

5. It is not a defense to an action for goods sold that the vendor knew that the purchaser was conducting an illegal business, when the vendor did no act in furtherance thereof. *Darling v. Kipp* 781

Schools and School Districts.

1. A resident taxpayer of the district may maintain a suit to to prevent the removal of a schoolhouse by the district officers, where its removal, if unauthorized, would involve an unwarrantable expenditure of public funds. *Lindeman v. Corson* 548

2. In a suit to enjoin district officers from removing a schoolhouse, an allegation that the schoolhouse was built and is supported by taxes levied upon the taxable property of the school district sufficiently avers that the district owns the schoolhouse. *Lindeman v. Corson* 548

Statute of Frauds. See CONTRACTS, 1.

Statutes. See CONSTITUTIONAL LAW. JUSTICE OF THE PEACE.

1. Sec. 11, art. III of the constitution, relating to amendments of statutes, requires that the amended section shall contain all that is substituted for the original section, and that the original section shall be repealed. *State v. Farmers & Merchants Bank* 1

2. So much of ch. 53, laws 1907, as authorizes county boards of counties having more than 100,000 inhabitants to contract with the lowest bidder for feeding prisoners in the county jail is violative of sec. 11, art. III of the constitution. *State v. McShane* 46
McShane v. State 54

3. Where a statute creates a duty and prescribes a penalty for its nonperformance, the rule prescribed is the exclusive test of liability. *Jones Nat. Bank v. Yates* 121

Stipulations.

In a suit to enjoin trespass, *held* that, under the stipulation of the parties, plaintiff was not required to show ten years' adverse possession to entitle him to recover. *Ayres v. Barnett* 350

Street Railways.

1. Where, in an action for injuries, plaintiff testified that the car which struck him was running from 25 to 35 miles an hour, *held* that, though the evidence was not competent to show the speed of the car, it was admissible to support the allegation that the motorman failed to reduce its speed

Street Railways—*Concluded.*
while passing another car. *Zancanella v. Omaha & C. B. Street R. Co.* 774

2. Photographs showing the location of an accident are not necessarily to be excluded because the situation is capable of verbal description. *Zancanella v. Omaha & C. B. Street R. Co.* 774

3. It was error to submit the question whether the conductor of a street car was negligent in not warning a passenger of danger in crossing a parallel track, there being no evidence that the conductor knew he intended to cross it. *Zancanella v. Omaha & C. B. Street R. Co.* 774

4. Testimony of plaintiff that he did not see or hear the approaching car is not sufficient to prove that there was no headlight on it, nor bell sounded. *Zancanella v. Omaha & C. B. Street R. Co.* 774

Taxation. See LICENSES.

1. Questions of valuation, and of the amount and value of money or other personal property to be assessed cannot be determined under secs. 162, 163 of the revenue law, but must be presented to the proper board of equalization. *Darr v. Dawson County* 93

2. Assessment, levy, and collection of taxes are not equitable proceedings, but are governed by special rules, which must be complied with by the taxing powers and taxpayers. *Darr v. Dawson County* 93

3. A taxpayer is entitled to a copy of the assessment when completed, but he may waive this and ascertain the amount of his assessment from the records before the meeting of the board of equalization. *Darr v. Dawson County*..... 93

4. Where a taxpayer, dissatisfied with his assessment, fails to appeal to the board of equalization, he cannot avail himself of the special remedies provided by secs. 162, 163 of the revenue law. *Darr v. Dawson County* 93

5. Where a tax has not been assessed without authority or for an illegal or unauthorized purpose, its collection cannot be enjoined; but secs. 162, 163 of the revenue law provide a remedy in other cases in which injunctions were formerly allowed. *Darr v. Dawson County*..... 93

6. The remedy provided for a taxpayer by subd. 1, sec. 162 of the revenue law, is available only when property has been wrongfully assessed, either because exempt or because the tax had already been assessed and paid. *Darr v. Dawson County* 93

7. The remedy given by subd. 1, sec. 162 of the revenue law,

Taxation—*Continued.*

is not available to correct overvaluation, or mistake in estimating money of the taxpayer on hand liable to assessment or the value thereof. *Darr v. Dawson County*..... 93

8. Under a claim that a tax has been assessed for an illegal or unauthorized purpose, or for any reason not specified in sec. 162 of the revenue law, the taxpayer's remedy, under subd. 2, is to pay the tax, make demand for its return within 30 days, and, if payment is refused, sue for its recovery. *Darr v. Dawson County* 93

9. Where, after expiration of the time for assessment, plaintiff shipped to a member of a corporation sample buggies for exhibition, which were stored with the corporation, a levy and sale of the buggies for delinquent taxes of the corporation was wrongful, and the treasurer was liable for their value. *Parry Mfg. Co. v. Fink*..... 137

10. Where return of property for taxation was made by a corporation May 29, 1906, and the corporation never had any property of plaintiff in its possession, though certain property of plaintiff was held by a member of the corporation as plaintiff's agent, a levy on such property for taxes of the corporation for the year 1906 was without authority, and rendered the treasurer liable for its value. *Parry Mfg. Co. v. Fink* 137

11. The land not having been made a party to a suit to foreclose a tax lien, the court ordered that it be made a party, but no amendment was made to the petition or title, nor was the land described as a party in the published notice. *Held*, that the land was not brought in, and that the action was not *in rem*. *Moran v. Catlett* 158

12. Where the last day to redeem land sold for delinquent taxes falls on Sunday, the owner's right of redemption exists during all of the next day. *Counselman v. Samuels*..... 168

13. Allegation in petition to redeem land from tax sale that plaintiff is owner of the land is a sufficient allegation of ownership to resist a demurrer. *Counselman v. Samuels*.. 168

14. By sec. 10941, Ann. St. 1909, the state board of equalization and assessment has power to fix the proper county in which to list personal property for taxation in any case in which the statute is silent or uncertain. *Nemaha County v. Richardson County* 171

15. The legislature having failed to provide in which of two counties property of one under guardianship shall be listed, where the residence and property of the ward are in one county and the residence of the guardian in another, the state board of equalization and assessment may determine the question. *Nemaha County v. Richardson County*..... 171

Taxation– *Continued.*

16. In a suit to foreclose a tax sale certificate on lands of record in the name of "John E. Toumey," the petition named as defendant "John E. Townry," and the affidavit and notice for service by publication designated the defendant as "John E. Towrny," *held* that the proceedings were void. *Delatour v. Wendt* 175

17. Before the repeal of the act authorizing dower, the wife could sue before her husband's death to redeem his lands from a tax sale, where he neglected to redeem. *Henze v. Mitchell* 278

18. Where, in a suit to redeem from a tax lien, the owner of the lien admits that the land belonged to plaintiff's husband at the time of the foreclosure sale, and that the wife had a dower right, she may redeem. *Henze v. Mitchell*..... 278

19. Where, in a suit to foreclose a tax lien, no sufficient service was had on defendant's wife, who had a dower interest, she may redeem. *Henze v. Mitchell* 278

20. Under sec. 4, art. V, ch. 77, Comp. St. 1899, an action *in rem* may be brought against the land in tax foreclosure where the owner is not known, or where the action is against one who disclaims ownership; and, to confer jurisdiction on the first ground, the petition must allege that the owner is not known, and naming him as unknown in the title is insufficient. *Miller v. Boardman* 321

21. In tax foreclosure against the land, the requirements of the statute and all conditions precedent must be strictly complied with to confer jurisdiction. *Miller v. Boardman*..... 321

22. All property and assets and everything of value is included in the "*true value*" of the capital stock of a trust company, under ch. 105, laws 1911. *First Trust Co. v. Lancaster County* 795

23. Real estate mortgages *held* properly assessed separately from the capital stock of plaintiff, whether the tax is paid by mortgagor or mortgagee. *First Trust Co. v. Lancaster County* 792

24. Real estate mortgages should be deducted from the value of the capital stock of trust companies for purposes of taxation. *First Trust Co. v. Lancaster County*..... 792

25. Method of assessing the capital stock of a trust company stated. *First Trust Co. v. Lancaster County*..... 792

26. Ch. 23, Comp. St. 1911, abolishing estates of dower and curtesy, gives to the surviving spouse an enlarged estate of the same kind, and such estate, like dower, is not subject to an inheritance tax. *In re Estate of Strahan*..... 828

Taxation—*Concluded.*

27. Where a petition, in a proceeding to recover an inheritance tax, is filed and notice thereof given to the persons interested within five years from the death of the decedent, a plea of limitations is of no avail. *In re Estate of Strahan*.. 828

Trespass. See HIGHWAYS. INJUNCTION. STIPULATIONS.

Trial. See BILLS AND NOTES, 1. BROKERS, 5. CARRIERS, 2, 3. CONTRACTS, 3. CRIMINAL LAW. EVIDENCE, 7. HEIRS. INSURANCE, 3, 4, 10. MECHANICS' LIENS, 1. NEGLIGENCE, 1-4, 9. STREET RAILWAYS, 3.

1. In an action for personal services, instruction as to amount of recovery *held* not prejudicial to defendant. *Taylor v. American Radiator Co.* 24
2. Matters inhering in the verdict of a jury cannot be assailed by affidavits of jurors. *Ritchie v. Steger*..... 63
3. In an action against a railroad company for flooding lands, *held* that a verdict should have been directed for defendant. *Conn v. Chicago, B. & Q. R. Co*..... 83
4. The trial court need not submit a case to the jury, unless the evidence supporting it would warrant the jury in basing a verdict thereon. *Conn v. Chicago, B. & Q. R. Co*..... 83
5. Where the jury under the evidence could have properly rendered the verdict complained of by following the instructions, an assignment that the jury disregarded the instructions is not available. *Peden v. Platte Valley Farm & Cattle Co.* 141
6. In an action on a contract, where defendant alleged breach of warranty, evidence *held* to justify direction of verdict for plaintiff. *Garry Iron & Steel Co. v. Omaha Coal & Building Supply Co.* 367
7. If the trial court would be required to set aside a verdict for defendant, a verdict for plaintiff should be directed. *Garry Iron & Steel Co. v. Omaha Coal & Building Supply Co.* 367
8. Where, under the law and the evidence, plaintiff is not entitled to recover, it is error to refuse to direct a verdict for defendant. *Cady v. Travelers Ins. Co*..... 634
9. Where the evidence will not sustain a verdict for plaintiff, the court should direct a verdict for defendant. *Coulter v. Cummings* 646
10. It is error to submit issues on which there is no evidence. *Zancanella v. Omaha & C. B. Street R. Co*..... 774

Trover.

Trover will not lie for the disposition of property which the plaintiff has authorized. *Coulter v. Cummings*..... 646

Trusts. See CORPORATIONS.

1. Rules of equity which determine the consequences of acts of a fiduciary extend to all cases where confidence is reposed, and knowledge or authority or influence arises from the fiduciary relation. *Nebraska Power Co. v. Koenig*..... 68

2. A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid. *Nebraska Power Co. v. Koenig*..... 68

3. A fiduciary cannot, by abandoning his trust and assuming a hostile attitude toward the beneficiary, change the legal consequences of former relations and conduct. *Nebraska Power Co. v. Koenig* 68

4. Means and knowledge acquired by a fiduciary in performing the duties of his trust cannot be used by him to gain a personal advantage at the expense of the beneficiary. *Nebraska Power Co. v. Koenig* 68

5. Outside of proper compensation and expenses, any advantage gained by a trustee in performance of his duty or in betrayal of his trust inures to the benefit of the beneficiary. *Nebraska Power Co. v. Koenig* 68

6. The benefit arising from an application by a director of a corporation, formed to acquire power sites, to divert water from a stream for power may be restored in equity to the corporation, if acquired and held by the director in his own name. *Nebraska Power Co. v. Koenig* 68

7. A director of a corporation, engaged to establish water rights, cannot acquire and hold for himself new, adverse rights, and justify his conduct by asserting that prior holdings of the corporation were subject to forfeiture. *Nebraska Power Co. v. Koenig* 68

8. Equity has jurisdiction to decree that a trustee filed in his own name for a beneficiary an application to divert water from a river, though he asserts he acted for himself, and instituted a contest before the state board of irrigation to cancel prior application to the beneficiary. *Nebraska Power Co. v. Koenig* 68

9. Where land in Nebraska was purchased with the proceeds of Kentucky land in accordance with the terms of a trust deed, *held* that the right of *cestui que trust* to the Nebraska land must be determined by the laws of Kentucky at the time the trust deed was executed. *McNeer v. Patrick* 746

10. A trust created solely to protect the subject of the trust during coverture terminates when the parties are divorced. *McNeer v. Patrick* 746

Vendor and Purchaser.

1. A contract for the sale of real estate is not binding on the vendor, unless signed and delivered to the vendee. *Smith v. Severn* 148
2. A real estate broker cannot bind the vendor by an unauthorized delivery of a contract of sale. *Smith v. Severn*..... 148
3. Where a contract for the sale of land provided for payment of money, delivery of a check to the vendor's broker, payable to the broker, was not a compliance with the terms of the contract. *Smith v. Severn*..... 148
4. Where a contract for the sale of land provided for payment of money, the vendor may refuse a check and decline to proceed until money is tendered. *Smith v. Severn*..... 148
5. Where purchase money is deposited with a third person, to be paid when the land is surveyed and a plat and a certificate of title furnished, the burden is on the vendor to show substantial compliance with the agreement to entitle him to the deposit. *Graham v. Hanson* 394
6. Where a purchaser seeks to prevent the payment of a deposit, on the ground that the land has no potential existence, the burden is on him to establish such defense. *Graham v. Hanson* 394
7. Evidence, in action by vendor for a deposit, *held* insufficient to establish defense that the land bargained had no existence. *Graham v. Hanson* 394
8. One who purchases land to be paid for in the future is not an innocent purchaser for value as against the rights of a third party, of which the purchaser has notice before making payment. *Holladay v. Rich*..... 491
9. Though one having an option to purchase has no estate or interest in the land, he may, before the option expires, sell it to a third person. *Roper v. Milbourn* 809
10. In an action for breach of contract, a vendor may recover of the vendee damages fairly within the contemplation of the parties at the time they made their contract. *Roper v. Milbourn* 809
11. Petition *held* to state cause of action for breach of contract. *Roper v. Milbourn* 809

Venue. See QUIETING TITLE, 1, 2.

Waters.

1. An irrigation corporation unlawfuly preventing the holder of a water contract from using water for irrigation is liable in damages. *Peden v. Platte Valley Farm & Cattle Co*..... 141
2. The measure of damages for breach of a contract to furnish water for irrigation is the value of the use of the right

Waters—*Concluded.*

during the time water is withheld. *Peden v. Platte Valley Farm & Cattle Co* 141

3. Evidence in an action for damages for breach of a contract to furnish water for irrigation *held* to sustain judgment for plaintiff. *Peden v. Platte Valley Farm & Cattle Co* 141
4. In a suit to enjoin the reconstruction of a dam, evidence *held* not to sustain any allegation in plaintiff's petition not covered by a former adjudication between the parties. *Upstill v. Kyner* 255
5. Under sec. 28, art. II, ch. 93*a*, Comp. St. 1901, to subject lands to assessment for irrigation, the boundaries of the district must be sufficiently definite to identify the land to be irrigated, and the amount thereof. *Baker v. Central Irrigation District* 460
6. Any meander lines of an irrigation district should be definitely described in the petition for the organization of the district; but a description by metes and bounds, which would be sufficient in an ordinary deed, is sufficient. *Baker v. Central Irrigation District* 460
7. In the survey of an irrigation district, a certain call in one of the main lines or courses *held* insufficient. *Baker v. Central Irrigation District* 460
8. Where, in a suit to restrain enforcement of an assessment made by an irrigation district, it appears that plaintiff has used water from defendant's ditch upon certain lands, an injunction will be refused as to such lands, though plaintiff's lands generally are not taxable in the district by reason of uncertainty in the description of the boundaries of the district. *Baker v. Central Irrigation District* 460

Wills. See EXECUTORS AND ADMINISTRATORS, 1.

1. Will construed, and *held* to vest in testator's widow the use of the personalty for life, with the right to consume the body thereof, if necessary, to protect the real estate, and for the support of herself and children. *In re Estate of Nichols*, 80
2. Where parties agreed in writing to become sureties for the payment of a certain sum to the contestant of a will on relinquishment of her claim, the fact that the beneficiary refused to pay the sum stipulated will not release the sureties. *Lipps v. Panko* 469
3. Will construed, and interest of legatee in estate determined. *Knauf v. Mack* 524
4. Will construed, and partition denied certain legatees. *Knauf v. Mack* 524
5. Legatee *held* not liable for damages caused by cutting

Wills—*Concluded.*

hedges during the life and possession of the life tenant. *Knauf v. Mack* 524

6. Legatee *held* not entitled, as against the other legatees, to compensation for repairs on land during the lifetime of the life tenant in possession. *Knauf v. Mack*..... 524
7. To ascertain the intention of a testator, the entire will should be examined. *Jones v. Hudson* 561
8. It will be presumed that the testator intended to dispose of his entire estate, unless the contrary appears. *Jones v. Hudson* 561
9. Will construed, and *held* to provide a fund sufficient to pay all debts of the testator. *In re Estate of Sasse*..... 640

Witnesses.

1. Under sec. 50, ch. 40, Comp. St. 1911, witnesses before the board of commissioners of insanity are entitled to the same fees as witnesses in the district court, and to have them allowed and paid out of the county treasury. *Otoe County v. Brown* 235
2. A husband has a direct interest in the result of a suit by his wife for specific performance of a contract to convey real estate within the meaning of sec. 329 of the code. *Holladay v. Rich* 491
3. In a suit to set aside a deed, defendant *held* to be the representative of his deceased grantor, within the meaning of sec. 329 of the code. *Holladay v. Rich*..... 491
4. Witnesses *held* competent to testify to the fact that boys of a certain age were admitted into the British army, though they did not know whether they were legally admitted. *In re Estate of Lyle* 768