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ROBERT J. HART V. WILLIAM A. HARDING ET AL., APPELLEES: HERBERT W. DAVIS, APPELLANT.

FILED JULY 7, 1921. No. 21389.

1. **Vendor and Purchaser:** ABATEMENT IN PRICE. "When a vendor sells real estate that is described in gross for a gross sum and the property is subsequently discovered to be slightly less in quantity than that described in the deed, the purchaser is not entitled to an abatement in the purchase price unless it appears that fraudulent representations were made by the vendor as to quantity that induced the vendee to purchase." *In re Estate of Robinson*, 105 Neb. 1.
2. ———: ———. Where a vendor induces a vendee to enter into a contract of purchase of a tract of land by the following written representation therein: "This farm contains 280 acres and is sold as 280 acres," and "party of the second part agrees to pay $150 per acre"—and thereafter vendor receives from vendee the sum of $42,000 and executes a warranty deed to said premises without reference to acreage, except "according to government survey," vendor prior to the transaction having exhibited to vendee a plat showing the acreage claimed by him according to government survey, which was relied upon by vendee without independent investigation, and where it was afterward discovered that the actual boundaries of the tract were considerably within those shown by the government survey by reason of encroachment of fences and adverse possession in others, whereby there was a deficiency of 11.71 acres in the tract, *held*, the sale was by the acre and the vendee is entitled in equity to recover for such deficiency.
2. **Accord and Satisfaction.** Evidence examined, and *held* not to show a previous accord and satisfaction between the parties.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed in part, and reversed in part.*

Fawcett & Mockett, for appellant.

Charles E. Matson, A. W. Richardson, B. F. Good, Paul F. Good, George A. Adams, Lincoln Frost, Boehmer & Boehmer, John J. Ledwith, T. R. P. Stocker and *R. O. Williams, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., BEGLEY and LESLIE, District Judges.

BEGLEY, District Judge.

The appellant, Herbert W. Davis, being the owner, in November, 1916, conveyed by a deed of general warranty to cross-appellant, Joseph O'Grady, the following described real estate situated in Lancaster county, state of Nebraska, to wit: The northeast quarter and the east half of the northwest quarter and the northeast quarter of the southwest quarter of section 6, in township 8 north of range 7, east of the sixth principal meridian, excepting the A. & N. Railway right of way across said premises.

On December 15, 1917, O'Grady, by warranty deed, conveyed said premises to the defendant and appellee, William A. Bahr, and, after describing the land the same as conveyed to him by Davis, added: "According to the government survey thereof and subject to the railroad right of way." On May 28, 1918, Bahr, by contract, sold said premises to the defendant Harding, agreeing to give warranty deed on March 1, 1919. On June 25, 1918, Harding contracted to sell the land to the plaintiff, Robert J. Hart, agreeing to give warranty deed therefor on March 1, 1919. Shortly before March 1, 1919, it was discovered for the first time by Bahr, Harding and Hart that the boundary fences and trees along the west side of the east half of the northwest quarter and along the west side of the northeast quarter of the southwest quarter, and also the boundary fence along the south side of the last above described tract, were not on the government survey line. By agreement the land was surveyed by the county surveyor, and the survey showed that there was a shortage of 11.71 acres between the land located within the boundary lines and fences and the land as contained within the government survey, and that this 11.71 acres was in the possession or occupancy of the adjoining owners, defendants Tillman, Baker, and the Keels, who claimed said acreage by adverse possession for more than ten years, and claimed that the said fences had been established and

maintained where they then stood for many years. It being thus found that Bahr could not place Harding in possession of the disputed acreage, amounting to 11.71 acres, and that Harding could not place Hart in possession thereof, this action was begun some time before March 1, 1919, by Robert J. Hart against William A. Harding *et al.*, defendants. Harding, by cross-petition, claimed damages from William A. Bahr on account of this shortage of acreage, and Bahr, by a cross-petition, claimed damages from his grantor, Joseph O'Grady, and on account of the claimed shortage in his transfer O'Grady, by cross-petition, brought into the suit Herbert W. Davis. Tillman, Baker and the Keels were brought into the suit as defendants, and each claimed to be the owner of certain parts of the 11.71 acres by adverse possession. The differences existing between Hart, Harding and Bahr were settled and compromised before suit, and the court so found and dismissed them from the case. The court found in favor of defendants Tillman, Baker and the Keels upon the issue of adverse possession of the 11.71 acres in controversy, giving Tillman 8.14 acres, Baker 2.57 acres, and the Keels about 1 acre. On the issues between defendants William A. Bahr and Joseph O'Grady, the court found in favor of Bahr, and that Bahr had been damaged by reason of failure of warranty in the said deed on account of adverse possession of the 11.71 acres in the sum of $1,961.42, for which, together with $100 counsel fees, judgment was awarded in favor of Bahr. On the issue joined between defendant O'Grady and defendant Davis, the court found in favor of O'Grady in the sum of $1,459.06, plus an attorney fee of $100, and divided the costs between the parties; one-third to the defendant O'Grady; one-third to defendant Davis; and the remainder to various other parties. Herbert W. Davis brings the case to this court by appeal and asks for a reversal of the judgment obtained by Joseph O'Grady. Joseph O'Grady, the cross-appellant, is asking for a reversal of the judgment obtained by appellee, William A. Bahr, against him.

No complaint is made of the findings of the trial court in favor of Tillman, Baker and the Keels on the issue of adverse possession of the 11.71 acres in controversy, but the action has narrowed down to a controversy between O'Grady and Davis, and an issue between Bahr and O'Grady, for damages for breach of covenant of seisin for failing to deliver possession of the 11.71 acres alleged to be due under the deeds of general warranty.

The question for decision is: Can O'Grady and Bahr recover from their respective grantors on account of the breach of covenant in their respective deeds? To determine this question it is necessary to find whether the sale relied upon was intended to be in gross or by the acre, or, if in gross, whether the estimated number of acres was in fact the controlling inducement and whether the price, though a gross sum, was based upon the supposed area and measured by it. The deed from Davis to O'Grady provided:

"Herbert W. Davis and Sarah C. Davis, husband and wife (grantors), of the county of King, and state of Washington, for and in consideration of the sum of twenty-nine thousand two hundred and fifty dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Joseph O'Grady, grantee, of the county of Richardson, and state of Nebraska, the following described real estate situated in Lancaster county, and state of Nebraska, to wit: northeast quarter (N.E.¼) and east half of the northwest quarter (E.½-N.W.¼) and the northeast quarter of the southwest quarter (N.E.¼-S.W.¼), all in section six (6), township eight (8) north, range seven (7) east of the 6th principal meridian, excepting the A. & N. Railway right of way across the premises described."

The deed further contained the usual covenants of seisin and general warranties. It will be noticed that in this deed there was no representation whatever as to the quanity of the land; it being a conveyance in gross. The lines of the conveyed tract were marked by fences and trees,

and had been recognized by adjoining proprietors for the period of limitation as being on the true line. Before the purchase O'Grady examined and inspected the land, saw the fences dividing subdivisions and the monuments along the same, and purchased the lands within the existing and established lines, relying upon the west boundary as established by said division fences and monuments as being the west boundary line thereof. In such case he is not entitled to an abatement of the purchase price. His action comes clearly within the rule laid down in *In re Estate of Robinson*, 105 Neb. 1:

"When a vendor sells real estate that is described in gross for a gross sum and the property is subsequently discovered to be slightly less in quantity than that described in the deed, the purchaser is not entitled to an abatement in the purchase price unless it appears that fraudulent representations were made by the vendor as to quantity that induced the vendee to purchase."

Appellee Bahr contends that his cause of action arises out of a different state of facts, in that the sale by O'Grady to him was intended to be by the acre. It appears from the evidence that, after O'Grady and Bahr had entered into a written contract for the sale of this land, some doubt arose in the mind of Bahr as to the number of acres contained therein, and Bahr then went to W. T. Fenton, who was a part owner with O'Grady, though not of record, and expressed his doubts to Fenton, who assured him that, with the right of way out, it would still leave 280 acres, and thereupon the parties entered into a new contract of sale, which provided:

"This indenture, made this 2d day of October, A. D. 1917, between W. T. Fenton, party of the first part, and W. A. Bahr, party of the second part, witnesseth: That the party of the first part has this day sold to the party of the second part the following described property, to wit: The northeast quarter (N.E.¼) and the east half of the northwest quarter (E.½-N.W.¼) and the northeast quarter of the southwest quarter (N.E.¼-S.W.¼) of

section six, containing 280 acres, except the railway right of way. This farm contains 280 acres and is sold as 280 acres of section 6, town 8, range 7, in Lancaster county, Nebraska, together with all appurtenances thereto belonging and now therefor, for which the party of the second part agrees to pay the sum of one hundred fifty ($150) dollars per acre."

Afterward it was discovered by Bahr, at the time of examining the abstract in the fall of 1918, and before anything whatever was known of the claims of Tillman, Baker and the Keels, that according to the abstract the tract fell short some four acres of 280 acres, after deducting the right of way; whereupon negotiations on this matter were had by B. F. Good, attorney for Bahr, on the one hand, and W. T. Fenton, and Bruce Fullerton, his attorney, on the other. The plat was produced and it was ascertained that the tract, according to the government survey, contained 286.97 acres, and that the right of way took out 10.81 acres, leaving a net acreage in the tract, according to the government survey, of 276.16 acres, or a shortage of 3.84 acres less than the 280 acres contracted to be sold. Bahr insisted upon a deduction of four acres at $150 an acre, which was shown to have been taken by the railroad right of way, and this was objected to by Fenton, but through the efforts of the attorneys it was finally settled by deducting two acres and the payment of $300 by Fenton to Bahr. Thereafter O'Grady and wife executed and delivered to Bahr a warranty deed to said premises with the usual covenants of seisin and general warranties, with the following description:

"Know all men by these presents that Joseph O'Grady and Mamie R. O'Grady, husband and wife, of the county of Richardson and state of Nebraska, for and in consideration of the sum of forty-two thousand and no/100 dollars, in hand paid, do hereby grant, bargain, sell, convey and confirm unto William A. Bahr, of the county of Cass and state of Nebraska, the following described real estate situated in Lancaster county, and state of Ne-

braska, to wit: Northeast one-fourth (N.E.¼) and the east half of the northwest one-fourth (E.½-N.W.¼) and the northeast one-fourth of the southwest one-fourth (N.E.¼-S.W.¼), all in section six (6), township eight (8) range seven (7) in said county, according to the government survey, and subject to the railroad right of way, possession to be given on March 1, 1918."

O'Grady contends that the settlement between the parties and the payment by him of the sum of $300 to Bahr was a full settlement and accord and satisfaction of any representation as to acreage, and that, the deed having been given without reference to the acreage, the sale should be considered as a sale in gross. An accord and satisfaction is only a settlement as to the matters contemplated by the agreement. 1 C. J. 523, sec. 2. At the time of the controversy no knowledge being had by either party as to the location of the boundary fences and the same not being a subject of dispute, it cannot be held to have been included in the settlement. The only matter adjudicated was the acreage in the right of way, which was left open for settlement in the original contract. There was no change regarding the price per acre nor any waiver of the original contract, both parties accepted the government survey line as correct and relied upon the number of acres shown therein.

There is no question but what under the contract of sale the land was represented as 280 acres and sold as 280 acres at an agreed price of $150 an acre. Bahr was induced to purchase the land upon this representation and paid therefor the sum of $150 an acre. While the deed does not refer to the acreage, yet it incorporates the government survey, which furnishes a true description of the property to be conveyed, and the contract can be resorted to for the purpose of finding the real intent and understanding of the parties.

In *Caughron v. Stinespring*, 132 Tenn. 636, L. R. A. 1916C, 403, the court said: "If a sale is by the acre and there is a deficiency, then the purchaser can recover for

such deficiency at the agreed price per acre. For where the price is by the acre, if there is a misrepresentation made by the vendor and relied upon by the vendee as to acreage, producing a loss, such misrepresentation, whether intended so or not, has all the essential elements of legal fraud or mistake. It is not absolutely essential, in order to recover for a misrepresentation as to the quantity of land conveyed, that the acreage should be stated in the deed, but this may be shown by extrinsic evidence. Likewise the amount of the consideration may be shown by parol testimony. The deed is only an execution of the contract, and the real contract and understanding between the parties in this respect will govern on the question."

In *McComb v. Gilkeson,* 110 Va. 406, it was said: "Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it, but in the interpretation of such contracts the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre, wherever it does not clearly appear that the land was sold by the tract, and not by the acre."

In *Epes v. Saunders,* 109 Va. 99, the court held: "If parties enter into an agreement for the payment of a gross sum for a tract of land, upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre, and not a sale in gross, unless the contract plainly indicates a sale in gross, and this presumption can only be overcome by clear and cogent proof."

In *Hays v. Hays,* 126 Ind. 92, 11 L. R. A. 376, it is held: "Even where the sale has been in gross, and not by the acre, if it appear that an estimated number of acres was, in fact, the controlling inducement and that the price, though a gross sum, was based upon the supposed area and measured by it, equity will interfere to grant relief,

and rescind the contract on the ground of gross mistake."

For the reasons stated, the judgment of the district court is reversed and the cause dismissed as to the appellant, Herbert W. Davis, and is affirmed as to the appellee, William A. Bahr, and against cross-appellant, Joseph O'Grady.

AFFIRMED IN PART, AND REVERSED IN PART.

STATE, EX REL. J. G. MCCORMICK ET AL., APPELLANTS, V. ORON B. BOWER ET AL., APPELLEES.

FILED JULY 7, 1921. No. 21526.

Elections: CANVASS OF VOTES: MANDAMUS. It is the settled law of this state that the duties of canvassing boards in canvassing the returns of an election are purely ministerial. They perform the act of tabulating the votes of the different precincts as returned to them, and have no power to hear evidence or determine any question as to the validity of the election or the votes cast, or to change such returns. *Held*, therefore, that mandamus will not lie to compel a county board to reconvene as a canvassing board and to go behind the returns of a special school bond election, held pursuant to section 6832, Rev. St. 1913, and to reject therefrom illegal votes cast against said proposition and declare the same carried.

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

Charles C. Larsen, H. R. Busse and *Beeler, Crosby & Baskins,* for appellants.

Halligan, Beatty & Halligan and *G. E. Junge, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., BEGLEY and LESLIE, District Judges.

BEGLEY, District Judge.

Action in mandamus instituted by relators, who are the regents of Deuel county high school district of Deuel county, Nebraska, against the respondents, who are the county commissioners of Deuel county, Nebraska, to com-

pel said county commissioners to reconvene as a canvassing board and to go behind the returns of a special school bond election held in Deuel county, Nebraska, and to reject therefrom 99 illegal votes alleged to have been cast against said proposition, and to declare the same carried.

The relators in their petition allege that on May 18, 1919, the respondents, pursuant to a legal petition filed requesting the same, called a special election of the electors of said county having the qualifications prescribed in section 6833, Rev. St. 1913, as amended, submitting to such electors the question of issuing bonds in the amount of $100,000 for the purpose of purchasing a site for a county high school, erecting suitable buildings thereon, and for levying a tax for payment of the principal and interest; that on July 8, 1919, an election was held pursuant to legal notice as required by law; that on May 12, 1919, the school board of school district No. 19 of Deuel county, Nebraska, filed a certificate in the office of the county clerk setting forth that said school district was maintaining, and would maintain for the ensuing year, a twelve-grade high school, and that thereby the electors of said school district No. 19 became disqualified from voting upon said proposition, but, nevertheless, they were permitted to vote and did cast 99 votes against said proposition; that the board of county commissioners met at the courthouse in Deuel county, Nebraska, on July 28, 1919, resolved itself into a canvassing board and canvassed the returns; that two legal electors appeared before the board and filed a petition protesting against the counting of 99 illegal votes cast by the electors of school district No. 19 and demanded that they be excluded from the count, but, notwithstanding, they were counted by the board, and said board declared that there had been cast 563 votes for said proposition and 442 votes against the same, and that said proposition had not received 60 per cent. of the total votes cast, and declared the same defeated; whereas in truth and fact there were cast in favor of said proposition 563 legal votes and against same 343 legal votes, and that

the proposition to issue the bonds was carried by a majority of more than 60 per cent. of the legal votes cast at said election. The relators then allege that there is no remedy provided by law in which to obtain the relief asked for, which is that the county board of Deuel county, Nebraska, be required to reconvene as a canvassing board for the purpose of canvassing the returns of said special election; that it be compelled to deduct 99 illegal votes cast and returned by the election board of Big Springs precinct against said proposition, and that said board be compelled to enter upon the election records of Deuel county, Nebraska, that there were cast at said special election a total of 906 legal votes; that there were cast in favor of issuing said bonds and in favor of levying a tax to pay same 563 legal votes, and that there were cast against the same 343 legal votes, and that the legal votes so cast in favor of said proposition are more than 60 per cent. of all the legal votes cast at said special election, and that said board of county commissioners be compelled to carry out officially the expressed will of the legal and qualified electors of the county high school district of Deuel county, Nebraska, and issue the bonds.

The respondents filed a demurrer to the petition, on the ground that relators had no legal capacity to sue, and that the petition fails to state facts sufficient to constitute a cause of action. The demurrer was sustained, respondents electing to stand upon the demurrer, the action was dismissed, and the matter appealed to this court.

Section 6823, Rev. St. 1913, as amended by chapter 70, Laws 1919, gives the board of regents general control and supervisory powers over high school districts and is sufficient to permit the relators here to maintain this action.

The contention that the petition fails to state facts sufficient to constitute a cause of action against respondents is based on the fact that the district court has no power by mandamus to compel boards of canvassers to go behind the returns as made by the election officers and reject illegal votes. It is a settled law of this state that

the duties of canvassing boards in canvassing the returns of an election are purely ministerial. They perform the act of tabulating the votes of the different precincts as returned to them and have no power to hear evidence or determine any question as to the validity of the election or the votes cast, or to change such returns. *State v. Ramsey,* 8 Neb. 286; *State v. Hill,* 10 Neb. 58; *State v. Stearns,* 11 Neb. 104; *State v. Peacock,* 15 Neb. 442; *State v. Hill,* 20 Neb. 119; *State v. Wilson,* 24 Neb. 139; *State v. McFadden,* 46 Neb. 668; *State v. Van Camp,* 36 Neb. 91; *State v. Roper,* 46 Neb. 724.

The relators contend that this leaves them without a remedy, and that the law in some way ought to furnish them a remedy for the wrong committed against them. If this be true, it is the fault of the legislature, and not the fault of the respondents as a board of canvassers, nor the courts. In *State v. Minor,* 105 Neb. 228, the court said: "It has been said often enough that in the division of the powers of government the judiciary shall not usurp the function of the legislature. To do so would be judicial legislation, an insidious judicial offense, and one which may in time, if indulged, imperil the perpetuity of our institutions."

The order of the district court sustaining the demurrer is therefore correct, and is

AFFIRMED.

ORA FORD V. STATE OF NEBRASKA.

FILED JULY 7, 1921. No. 21829.

Criminal Law: WITNESSES: CROSS-EXAMINATION. It is incompetent in a criminal case, for the purpose of affecting the credibility of a witness, to ask him on cross-examination if he is not the defendant in a criminal action and has entered a plea of guilty in that case, as the entry of a plea of guilty without judgment or sentence is not a conviction within the meaning of section 7906, Rev. St. 1913.

Ford v. State.

ERROR to the district court for Chase county: CHARLES E. ELDRED, JUDGE. *Reversed.*

C. W. Meeker and *Stewart, Perry & Stewart,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., BEGLEY and LESLIE, District Judges.

BEGLEY, District Judge.

Plaintiff in error was convicted upon an information charging him and George Ford with having unlawfully and feloniously stolen and carried away a load of wheat consisting of about 29 bushels, of the value of $73, the property of Glenn Maddux and Wilfred Maddux. He was sentenced to the penitentiary under the provisions of the indeterminate sentence law of the state. He prosecuted error to this court, and assigns a number of errors, but only one need be considered.

The real controversy in this case is over the identity of a load of wheat. The evidence of the state shows that Ora Ford, plaintiff in error, and George Ford are the minor sons of Thomas Ford, and aged 18 and 12 years, respectively, and that they resided at the home of their father in Chase county, Nebraska. Glenn Maddux and Wilfred Maddux resided about 10 miles distant and were the owners of a quantity of wheat stored in a bin upon their premises; that on May 26, 1920, they discovered a quantity of wheat missing and further discovered wagon tracks leading from the bin; that they followed these tracks to the home of Thomas Ford, where they found Thomas Ford's wagon missing, and Wilfred Maddux then proceeded to the village of Madrid, Nebraska, where he found that Ora Ford and George Ford had just marketed a load of wheat consisting of 31 bushels and had received therefor the sum of $73.16. Plaintiff in error, when confronted by Wilfred Maddux, admitted the wheat belonged to Maddux, turned over to him the sum of $65.65,

and offered to make settlement for the remainder.

The defendants attempted to show that the load of wheat was the property of Thomas Ford; that it was part of two loads purchased by him for seeding purposes in the year 1919, and that this load represented the remainder left in the bin from said purchase, and that on May 25, 1920, he and certain members of his family loaded this wheat upon the wagon, and under his direction it was hauled to Madrid on May 26 by his sons, George and Ora Ford. Ora Ford claimed he made confession falsely, under threats of arrest. Evidence was offered by members of the Ford family accounting for the whereabouts of the plaintiff in error and his brother George during the evening and night of May 25, 1920, and also by the testimony of one Ernest Knotwell. Knotwell testified that he came to the Ford home about 8 o'clock p. m., May 25, 1920, and remained there until 8 o'clock the following morning; that plaintiff in error and his brother George were there all evening, as well as the other members of the family, and that a load of wheat stood near the granary; that the next morning the plaintiff in error and his brother George started to Madrid with the same; that he had seen the wheat in the bin previous to this date. On cross-examination, over the objections of defendant's counsel, he was asked: "Q. You are the same C. E. Knotwell that is a defendant in a criminal action here in this court? A. Yes, sir. Q. You entered a plea of guilty in that case, did you not? A. Yes, sir."

The admission of this evidence was error. It does not show conviction of a crime, but merely an arrest and plea of guilty thereto. In *Marion v. State*, 16 Neb. 349, it was held: "When in a prosecution for murder the defendant on his trial becomes a witness in his own behalf, it is incompetent on cross-examination, for the purpose of affecting his credibility as a witness, to ask him if he had not pleaded guilty to a penitentiary offense in another state; the entry of a plea of guilty without judgment or sentence not being a conviction within the meaning of

section 338 of the Civil Code of Nebraska."

Section 7906, Rev. St. 1913, provides: "A witness may be interrogated as to his previous conviction of a felony. But no other proof of such conviction is competent except the record thereof." It has been frequently held by this court that a witness may not be interrogated as to his previous conviction of a crime below the grade of a felony. *Young Men's Christian Ass'n of Lincoln v. Rawlings*, 60 Neb. 377; *Leo v. State*, 63 Neb. 723; *Reed v. State*, 66 Neb. 184; *Keating v. State*, 67 Neb. 560; *Johns v. State*, 88 Neb. 145. The matter is thoroughly discussed and the method of propounding questions relating to a previous conviction set forth in *Leo v. State, supra*. The questions here, as in that case, can hardly be regarded as for any other purpose than to engender in the minds of the jury the belief that the witness was addicted to criminal acts. They are wholly collateral to the matters at issue and a noncompliance with the statutory provisions and prejudicial to the rights of the defendant. Knotwell was the only witness, aside from the members of the Ford family, who testified as to the whereabouts of the defendants, and as to the fact of the ownership of the wheat, and it cannot be denied that his testimony, if believed, was a powerful factor in their defense.

The case is, therefore, reversed and remanded for further proceedings for error in admission of this evidence.

REVERSED.

ROSA MAE THOMAS, APPELLEE, V. LLOYD RASMUSSEN ET AL., APPELLANTS.

FILED JULY 7, 1921. No. 21604.

1. **Highways: MOTOR VEHICLES: STATUTE REGULATING SPEED.** The provision of section 28, ch. 222, Laws 1919, requiring the speed of a motor vehicle on a public highway to be reduced to, and maintained at, a rate not exceeding 15 miles an hour when approaching any of the various objects therein mentioned, has no application to a case where one motor vehicle overtakes and passes another

traveling in the same direction, such passing being governed by the provisions of section 29 and the general limitations of speed found in section 28 of said chapter.

2. Evidence examined and found insufficient to sustain the verdict against defendant Pederson.

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

I. J. Nisley and *Cook & Cook,* for appellants.

Hainer, Craft & Edgerton and *T. M. Hewitt, contra.*

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS and MORNING, District Judges.

CLEMENTS (E. J.), District Judge.

This is an action to recover damages for an injury to plaintiff's person sustained in an automobile accident, which, it is alleged, was caused by the negligence of defendants. From a verdict and judgment for plaintiff, defendants appeal.

The following facts are established by the pleadings and undisputed evidence, to wit: On September 11, 1919, at about 10 o'clock p. m., the plaintiff, at the invitation of her brother-in-law, Fred Troxel, was riding in a Buick automobile owned by said Troxel and being driven by him westward on the Lincoln highway about one mile east of Cozad, Nebraska. At that place said highway extends east and west, and is a graded road having two traveled tracks about three or four feet apart. Said automobile was then traveling in the left-hand or south one of said tracks at a speed of about 20 miles an hour. The defendant, Ferdinand Pederson, driving a Dodge automobile, and the defendant, Lloyd Rasmussen, driving a Ford, were also traveling westward on said highway at that time and place, the Dodge being a short distance ahead of the Ford, at a speed estimated by plaintiff's witnesses at from 30 to 35 miles an hour and by defendants' witnesses at from 20 to 30 miles an hour. Pederson passed said Buick car on the north and right-hand side without in any manner

touching it. Rasmussen also attempted to pass on the north side, but in doing so the left side of his Ford, near the rear, came in contact with the bumper of the Buick, the Buick car tipped over and plaintiff was thereby injured. When they overtook the Buick car neither of the defendants indicated to its driver by sound or call that he desired to pass.

The plaintiff alleged, and introduced evidence to prove, that at the time of the accident defendants were racing; that defendant Rasmussen, while passing the Buick car on the north side, turned to the left and attempted to run in ahead of it at a less distance than 30 feet therefrom, and in so doing collided therewith and thereby overturned it. Defendants deny this, and contend, and have introduced evidence to prove, that Rasmussen did not turn to the left or run into the Buick car, but that said car was driven into the rear of his Ford while he was traveling in the north track.

At the close of plaintiff's case, and after all evidence was in and both parties had rested, each of the defendants moved the court to direct a verdict in his favor, for the reason that the evidence is not sufficient to sustain a verdict against him, which motions were overruled, and each defendant contends that said ruling against him was erroneous.

A careful reading of the record shows that the evidence introduced by plaintiff supports her allegations that defendant Rasmussen, in attempting to pass on the right-hand side, negligently turned his Ford to the left and drove it against the car in which plaintiff was riding, thereby overturning it and injuring plaintiff. This evidence, if believed by the jury, which it evidently was, fully justifies and sustains the verdict against said defendant Rasmussen. Therefore the trial court did not err in overruling his motion for a directed verdict.

Where a person is injured by the racing of two or more other parties on a public highway, all engaged in the race are liable, although only one of the vehicles came in con-

tact with the injured person or the vehicle in which he is riding. Berry, Automobiles (2d ed.) sec. 184. Plaintiff seeks to hold defendant Pederson liable under this rule. As his automobile did not come in contact with the Troxel car, Peterson cannot be held liable, unless plaintiff's allegation that defendants were racing is proved by a preponderance of the evidence; and this question was raised by his motion for a directed verdict.

Racing, as defined by Webster, is a running in competition, a contest of speed. Is there sufficient evidence to support a finding that defendants were running in competition or engaged in a contest of speed? The only competent evidence in the record bearing upon this question shows that defendants were driving on a well-traveled highway, outside of a city or village, at a speed variously estimated at from 20 to 35 miles an hour; that both were driving on the same and right side of the road in the same track, Rasmussen a short distance behind Pederson. It is true that several of plaintiff's witnesses said defendants were racing, but this assertion was a mere conclusion. None of said witnesses saw either of defendants or knew or pretended to know how they were driving until they were within a short distance of the place of the accident; and the only facts or circumstances disclosed by the record on which such conclusion was based are as above stated. The defendant Pederson testified that he did not try to prevent any car from passing him; that when he passed the Buick he did not know that there was another car behind him and did not know that Rasmussen was in the neighborhood until after the accident. Defendant Rasmussen testified that he drove behind Pederson's car several miles and made no effort to pass same; that there was no rivalry as to who could drive the faster. We therefore feel compelled to hold that there is not sufficient evidence to sustain a verdict against the defendant Pederson, and that the court erred in overruling his motion for a directed verdict.

In defendant's brief it is argued that the trial court

erred in giving each of instructions Nos. 1, 7, 8, 9, 12, 13, 14 and 18. The objections urged against instructions Nos. 1, 7 and 9 will be considered together.

For a statement of the issues in the instructions, the trial court substantially copied the pleadings of the parties. Instruction No. 1 is almost a verbatim copy of plaintiff's petition. This method of stating the issues has been repeatedly condemned by this court. *Tobler v. Union Stock Yards Co.*, 85 Neb. 413. And if it results in prejudice to the complaining party it is sufficient grounds for reversal. *Hanna v. Hanna*, 104 Neb. 231.

In plaintiff's petition so copied, it is alleged that when defendants approached plaintiff they did not "reduce their speed to a rate not exceeding 15 miles an hour, but negligently and unlawfully maintained a much greater speed than 15 miles an hour in passing plaintiff." In instruction No. 7 the court quoted from section 28, ch. 222, Laws 1919, the following, to wit:

"No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, nor in any case at a rate of speed exceeding thirty-five miles per hour. * * * Upon approaching an intersection of highways or a bridge, or a sharp curve, or a steep descent, or another vehicle, or an animal, or person, outside of any village or city, the person operating a motor vehicle shall reduce the speed of such vehicle to a rate not exceeding fifteen miles an hour and shall not exceed such speed until entirely past such intersection, bridge, curve, descent, vehicle, animal, or person."

A part of section 31 of said chapter, which requires an automobile to be equipped with brakes, signals and lights, was also copied in said instruction. In instruction No. 9 the court told the jury that it is competent to consider said statutes as affecting the question of defendants' negligence.

In section 29 of the same chapter it is provided: "Whenever any person traveling with any vehicle or conveyance on any road in this state shall overtake another vehicle or conveyance traveling in the same direction and shall by sound or call indicate to the driver thereof his or her desire to pass, it shall be the duty of the driver of the vehicle or conveyance in front, if the nature of the ground or the condition of his load will permit, to promptly turn to the right of the center of the road, and the driver of the vehicle or conveyance behind shall then turn to the left of the center of the road and pass without interfering or interrupting, and the driver of said vehicle or conveyance passing shall not return to the center of the road until at least thirty feet ahead of the vehicle or conveyance passed."

The provisions of said sections 28 and 29 above quoted supersede the common-law rules of the road as to matters covered by them. To determine the correct meaning and interpretation of said provisions they must be considered and construed together. Effect must be given, if possible, to every word, clause and sentence, so that no part of said provisions will be inoperative, superfluous, void or insignificant; and they must be construed, if possible, so they will not be inconsistent and one destroy another. 2 Sutherland, Statutory Construction (Lewis', 2d ed.) sec. 380.

The statutory provisions above quoted clearly recognize the right of a person to drive a motor vehicle on a public highway, outside of a city or village, at a rate of speed not exceeding 35 miles an hour, where such a rate would be reasonable and not endanger the life or limb of any person, and to pass another vehicle traveling in the same direction; and the rules governing the action of the parties, which should be observed by them in such passing, are specifically laid down. It seems improbable and incredible that the legislature intended that such rights can be exercised only when the vehicle to be passed is traveling at a speed of less than 15 miles an hour. If such were

the law, then it would be lawful for all motor vehicles traveling in the same direction on a public highway to travel 35 miles an hour in case they all maintained that speed; but if the car in the lead should maintain a speed of 15 miles an hour, then all others would be compelled to remain behind it and travel at no greater speed, or violate the law. We think that such a construction would render these provisions inconsistent and contradictory, the law impracticable and unreasonable, and would violate the above well-established and familiar rules of statutory construction. We therefore hold that the part of said section 28 requiring the speed of a motor vehicle to be reduced to, and maintained at, a rate not exceeding 15 miles an hour has no application to a case, like the one at bar, where one automobile overtakes and passes another which is being driven in the same direction. This is the construction placed on a similar statute of Kansas in *State v. Pfeifer*, 96 Kan. 791, and we have found no authority which announces a contrary doctrine. It follows that the court erred in giving instructions Nos. 1, 7 and 9, in which the jury were directed to consider said provision of section 28 in determining whether the defendants were negligent.

The giving of instruction No. 12 was also error, for it permitted the plaintiff to recover against the defendant Pederson, if the jury found he was racing, and we have hereinbefore held that there was not sufficient evidence to justify the submission to the jury of the issue of whether the defendants were racing.

In instruction No. 13 the court charged the jury that, if it found that the defendant Rasmussen had violated the provisions of the statute therein specified and plaintiff sustained injury thereby, said defendant is liable for the damages resulting from said injury. This is equivalent to saying that the violation of such statutory provisions is negligence as a matter of law, which is the doctrine announced in *Walker v. Klopp*, 99 Neb. 794, and which was expressly disapproved by this court in the later case of *Stevens v. Luther*, 105 Neb. 184. The giving of said in-

structions was therefore error.

We find no material error in any of the other instructions complained of.

Because of the errors hereinbefore pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FERN BOLICH, APPELLEE, V. HARRY ROBINSON, APPELLANT.

FILED JULY 7, 1921. No. 21700.

1. **Bastardy**: DEFENSE: ALIBI: INSTRUCTION. A proceeding under the bastardy act is a quasi-criminal proceeding, and an alibi is a legitimate defense and should not be disparaged by the trial court; the weight or sufficiency of the evidence for that purpose being a question for the consideration of the jury. It is error for the trial court to discredit such defense by instructing the jury that "an alibi is capable of being manufactured and is sometimes manufactured," and that "it is incumbent upon the jury to scan the evidence thereof with caution and care."
2. **Courts**: JUDGMENT: SCOPE. When the district court acquires jurisdiction of an action, it retains it for the purpose of the entry of any judgment that may be proper under the pleadings and the evidence.
3. **Bastardy**: ADOPTION OF CHILD: RELIEF. In a bastardy proceeding, a mother may, after the adoption of the child during the pendency of the action, recover in that action her lying-in expenses.
4. ———: ———: ———: ABATEMENT. The adoption of a bastard child during the pendency of a bastardy action relieves the mother from liability for its support and charges the adopting parents with that responsibility, and that part of her cause of action for its support and maintenance is abated; but that part of her cause of action which permits her to recover lying-in expense is not abated, the rule being that, before an action is abated, there must be a complete termination of the action, and that as to any undetermined matter in issue the action as to that is not abated.

APPEAL from the district court for Cuming county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

F. D. Hunker and *George A. Eberly,* for appellant.

A. R. Oleson and *J. C. Elliott, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., DICKSON and TROUP, District Judges.

DICKSON, District Judge.

This is a bastardy proceeding commenced in the county court of Cuming county, Nebraska, by Fern Bolich, appellee, and against Harry Robinson, appellant; the parties being hereinafter designated as plaintiff and defendant.

The plaintiff charged in her complaint that she was pregnant with a bastard child and that the defendant was the father. A hearing in the county court resulted in the binding over of the defendant to the district court; there a trial was had and the defendant found guilty and was, by the court, adjudged to be the father of the plaintiff's child, and required to pay $1,800 for its maintenance. Defendant appeals from this judgment to this court, and assigns many reasons why the judgment of the district court should be reversed.

The plaintiff testified to two acts of sexual intercourse in Wisner, Nebraska, with the defendant January 11 and 18, 1919, and that pregnancy resulted therefrom. The defendant denied these alleged acts of intercourse, and offered evidence tending to prove that on those dates he was not in Wisner, but at a distant place.

From the evidence it appears that, on the 27th day of June following, the complainant entered the Fairmount Maternity Hospital of Kansas City, Missouri, where she gave birth to a child October 3 following. She testified that a few days after its birth she consented to its adoption, and has never seen it since. The defendant offered in evidence, and the trial court excluded, an authenticated copy of the judgment of adoption of the child as entered by the circuit court for Jackson county, Missouri, at Kansas City on the 7th day of November.

No useful purpose will be served by a discussion of the many errors assigned. But few merit consideration. We

are presented at the outset with the question of the jurisdiction of the district court for Cuming county to try this case, the contention of the defendant being that the action abated because of the birth of the child and its adoption in Missouri, thereby relieving the mother and the county of all liability for its care and maintenance, and that neither the plaintiff nor the county could thereafter maintain an action for the maintenance of the child, neither being liable.

From the record in this case it appears without dispute that every jurisdictional fact necessary to give the county court jurisdiction existed, and jurisdiction was acquired, not only by the county court, but by the district court. The district court having rightfully obtained jurisdiction, did it lose it by the mother going outside of the jurisdiction of the court for the purpose of confinement and the subsequent adoption of the child? We think not. The district court, having once lawfully and properly acquired jurisdiction, retained it for the purpose of the entry of any judgment that might be proper under the pleadings and the evidence.

By the adoption of the child, the mother was relieved of its support and maintenance, and the liability of the father for the support and maintenance of the child to the mother ceased. The adopting parents being residents of Missouri, the child took the residence of the adopting parents and they became liable for its support and maintenance. The rule of law is: "An adoptive parent is ordinarily liable for the support of an adopted minor child to the same extent as a natural parent would be liable, and the natural parent is relieved of responsibility." 1 C. J. 1396, sec. 121. The relinquishment by the mother of the child and the adoption thereof relieved the mother of the maintenance thereof and placed the burden upon the adopting parents, and that part of plaintiff's cause of action against the defendant was abated. The action would not abate without a complete termination. If there was anything left to determine, the undetermined

matter was not abated. This court has held that the death of the child, also the mother, will not abate the proceedings. *Hanisky v. Kennedy,* 37 Neb. 618; *Dodge County v. Kemnitz,* 28 Neb. 224. In the *Hanisky* case, the child died during the pendency of the action, relieving the mother and possibly the county of its support; and this court held that complainant was entitled to recover the lying-in expense. The term "maintenance" used in section 6, ch. 37, Comp. St. 1889, was construed in that case to include the necessary expenses incident to the birth of the child, such as the employment of a nurse, midwife and physician, and a decent burial of the child. The right of recovery in this case is controlled by the *Hanisky* case, and as to the lying-in expense only, that part of the plaintiff's cause of action was not abated. It follows that the district court erred in not receiving in evidence the record of the adoption of the child, and erred in rendering judgment against the defendant for $1,800; the evidence before the court being that the lying-in expense was about $225.

A consideration of the other assigned errors is unnecessary, but in view of the fact that there may be a retrial of this case and that the trial court might again give the instruction complained of on an alibi, we deem it proper to express our disapproval thereof. This instruction is in conflict with the previous holdings of this court. The instruction complained of is as follows:

"The defendant has introduced testimony tending to prove an abili. An alibi is the claim of a defendant that he was not at the place of the commission of the alleged act at the time it is claimed to have taken place. Where this claim is made in good faith and supported by competent evidence it constitutes a defense; but as an alibi is capable of being manufactured and is sometimes manufactured, it is incumbent upon the jury to scan the evidence thereof with caution and care. If you believe from the testimony that the alibi has been established, then it would be your duty to find the defendant not guilty. If,

however, after considering all the evidence in the case and the logical deductions therefrom you are convinced that the defendant is guilty of the matters and things charged in the complaint, it is your duty to find him guilty."

The question of the parentage of the child was a question of fact for the jury. Evidence was properly received by the trial court as to the defendant's whereabouts on the dates of the alleged acts of intercourse, and it was the duty of the court to submit to the jury the defendant's defense of an alibi by proper instruction, and this defense should not be discredited by the trial court; the weight or sufficiency of the evidence for that purpose being a question for the consideration of the jury. *Henry v. State,* 51 Neb. 149; *Casey v. State,* 49 Neb. 403. By this instruction the jury are told that an alibi is capable of being manufactured and that it is sometimes manufactured, and that it is incumbent upon the jury to scan the evidence thereof with caution and care. A similar instruction to the one under consideration was given by the trial court in *Henry v. State, supra.* In that instruction the trial court said to the jury: "The fact, however, which experience has shown, that an alibi, as a defense, is capable of being and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance," etc. Chief Justice Post, in commenting on that instruction, said: "But that it is within the province of the judge, under our practice, by means of cautionary instructions, to discredit a particular defense or the evidence in support of a particular proposition we cannot admit, since witnesses are by no known rule of law or logic presumed to be less truthful simply because they testify concerning an alibi." In further criticism of this instruction Judge Post said: "We are, however, unable to conceive of any sound reasons for cautionary instructions with respect to an alibi which do not apply with equal force to any other defense."

In *Casey v. State, supra,* the trial court, instructing on the question of an alibi, said: "The evidence produced to establish an alibi should be cautiously received, though when proved, it is as strong as any other defense." Chief Justice Post said, in commenting upon this instruction: "The vice of the instruction here assailed is, when tested by the authorities cited, first, that it discredits a legitimate defense, by advising the jury that the evidence in behalf of the accused should be received with caution." The criticism of the instructions in *Henry v. State* and in *Casey v. State, supra,* apply with equal force to the instruction under consideration, and the giving was prejudicial error.

For the foregoing reasons, the judgment of conviction must be reversed and the cause remanded for trial *de novo.*

REVERSED.

SARAH ALICE KISER, APPELLANT, V. EOLA PEARL SULLIVAN ET AL., APPELLEES.

FILED JULY 7, 1921. No. 21591.

1. **Witnesses:** COMPETENCY. In an action by a nonresident married woman against a representative of a deceased person to recover title to lands in this state, her husband is a competent witness to testify to conversations with such deceased person, notwithstanding the provisions of section 7894, Rev. St. 1913. *Holladay v. Rich,* 93 Neb. 491, distinguished.
2. **Evidence:** SELF-SERVING DECLARATIONS. Self-serving declarations made by a decedent are incompetent to disprove a prior agreement to reconvey lands.
3. **Evidence** examined and found sufficient to sustain the judgment of the district court.
4. **Trusts:** CREATION: STATUTE OF FRAUDS. A constructive trust is not created by a daughter conveying lands by warranty deed, without consideration, to her father, upon an oral agreement with him that he will reconvey the lands to her upon his death or upon her request; but such transaction is an attempt to create an express trust, and, not being in writing, is inhibited by the statute of frauds.

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

Halligan, Beatty & Halligan, for appellant.

William E. Shuman and *John Grant, contra.*

Heard before LETTON, DAY and DEAN, JJ., GOOD and RAPER, District Judges.

GOOD, District Judge.

This action was brought in the district court for Lincoln county, to establish and enforce an alleged constructive trust in lands situate in said county. Defendants prevailed, and plaintiff appeals.

Sarah Alice Kiser is the plaintiff and Eola Pearl Sullivan and Charles Sullivan, husband and wife, are defendants. The plaintiff and defendant Eola Pearl Sullivan are sisters, and both are daughters of Jeremiah Snider, deceased.

Plaintiff alleges in her petition that she was the owner of the northwest quarter of section 26, township 13, range 28, in Lincoln county, by virtue of a patent issued to her by the United States government, on the 7th day of March, 1890, and that she had on the 15th of February, 1888, made final proof under homestead entry to entitle her to such patent; that plaintiff and her husband, in March, 1888, at the oral request of her father, executed a mortgage on said lands to the Lombard Investment Company for the sum of $650, and that she received no part of the proceeds of the mortgage loan, but permitted her father to receive the proceeds for his use and benefit; that plaintiff and her husband, on the 19th day of May, 1888, at the request and solicitation of and for the purpose of providing a home for her father deeded said lands to him, with the express oral understanding and agreement with him that at his death, or at such time as she should request a reconveyance, said lands should be reconveyed to her; that she received no consideration for the conveyance of said lands to her father, and that by reason of the re-

lationship and the confidence reposed in him she relied upon his oral promise to reconvey said lands to her, and by reason of the transaction a constructive trust was created and her father became a trustee, holding the legal title for her benefit; that her father, in violation of his trust, in his last will, which has been admitted to probate, devised said lands to the defendant Eola Pearl Sullivan, who claims by virtue of said devise to be the owner of said lands. Plaintiff asks the court to decree that Eola Pearl Sullivan holds the legal title to said lands in trust for the plaintiff, and that she be required to convey the same to her.

The defendants deny that there was any agreement on the part of Jeremiah Snider to reconvey the lands to plaintiff, and deny that the transfer of the land was without consideration, and allege that the statements in the petition are insufficient to constitute a cause of action, and other matters of defense, which need not be considered.

1. On the trial the plaintiff called as a witness her husband, and he testified to conversations with Jeremiah Snider occurring shortly before the execution of the mortgage to the Lombard Investment Company, and to other conversations occurring shortly prior to the execution of the deed to him by plaintiff and the witness. The conversations related to the conveyance of the lands, and tended to support plaintiff's contention that there was no consideration for the conveyance, and that an agreement existed that said Jeremiah Snider should reconvey the lands to plaintiff. This, however, was received over objection that the witness was incompetent to testify to the conversations, because of the prohibitions contained in section 7894, Rev. St. 1913, 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." The testimony was excluded from consideration in rendering judgment for the

defendants.

Plaintiff contends that this evidence was admissible and should have been considered. The precise question is as to whether the witness had a direct legal interest in the result of the suit. If so, the evidence should have been excluded; and, if not, then it was properly admitted and should have been considered. The record discloses that at the time of the trial, and for many years immediately previous thereto, the plaintiff and her husband had been residents of Oregon. Under the provisions of section 1269, Rev. St. 1913, if a married woman owning lands in the state of Nebraska is a nonresident thereof, she may convey the same by her deed, without her husband joining in such conveyance. Under this statute, while plaintiff and her husband were residents of another state, she could, without the consent of her husband, and without his joining in the deed, sell and convey any lands that she might own in Nebraska. Had she succeeded in this action, he would have had no interest in the lands that he could sell and convey. He would have no other than an indirect interest in the success of his wife, and the possibility of inheriting from her in the event she should predecease him while owning lands in this state. The possibility of inheriting is not a direct legal interest, and would not disqualify the witness. *Rine v. Rine,* 100 Neb. 225. It follows that, as he had no direct legal interest in the result of the suit, he was not disqualified by the statute from testifying, and his evidence should have been considered in deciding the case. His testimony is in the record, and, as this is a trial *de novo,* it will be considered. We are not unmindful that this court has held, in *Holladay v. Rich,* 93 Neb. 491: "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 (Rev. St. 1913, sec. 7894)." From a reading of the opinion, however, it is clear that the learned justice was then speaking of a situation where the parties were resi-

dents of this state; and under the decedent law in this state, where the husband and wife are residents of the state, neither could convey his or her lands without the consent of the other, and the husband would have a direct legal interest in any lands of which the wife was seised during coverture; and, of course, as applying to a situation where husband and wife were residents of Nebraska, and the adverse party was the representative of a deceased person, the husband would not be a competent witness for the wife as to any conversations had with the representative's decedent.

2. Plaintiff complains because of the admission of certain evidence on behalf of the defendants. A number of witnesses were called to testify to conversations with Jeremiah Snider, in which he stated his intention to devise the lands to Eola Pearl Sullivan, and tending to negative the idea that he had promised to reconvey the land to plaintiff. This, however, was in the nature of a self-serving declaration, and was not competent to disprove a prior promise to reconvey, and was clearly incompetent. It has been held, in *Harrison v. Harrison,* 80 Neb. 103, that "declarations against interest cannot be annulled or explained away by counter declarations;" and in *Dalby v. Maxfield,* 91 N. E. 420, (244 Ill. 214), the supreme court of Illinois, in passing upon the same question, held: "Self-serving statements made by decedent during his last illness in regard to the disposition of his estate, inconsistent with the existence of the contract to will it to defendant, were inadmissible to negative such agreement." See, also, *Oliphant v. Liversidge,* 142 Ill. 160, and *Oswald v. Nehls,* 233 Ill. 438.

3. Plaintiff contends that the judgment is contrary to the weight of the evidence. We have carefully read and considered all of the evidence, and, after excluding the evidence that was improperly admitted and considering that which was excluded from the consideration of the trial court, we have reached the same conclusion as did the trial court. The evidence in support of the alleged

oral contract consists almost exclusively of the testimony of plaintiff and her husband; the plaintiff testifying to conversations which she overheard between her father and her husband, and the latter testifying to conversations had between him and Jeremiah Snider and to conversations he had overheard between his wife and her father. It is conceded that these conversations tend very strongly to sustain the plaintiff's contention, but it must be remembered that they are vitally interested, and self-interest tends to color the testimony, even where the witness is void of corrupt intent. After the lapse of more than 30 years it is rather strange, to say the least, that the evidence of the plaintiff and her husband should dovetail so completely, and that she would remember the conversations which she overheard in almost the identical words and in the same sequence as her husband; and it is more than passing strange that more than 30 years should elapse without this alleged contract ever being directly referred to between the parties; and that, where there were several members in the family and at home at the time of the contract, none of the other parties had any actual knowledge of the contract. It is also remarkable that the deed, absolute upon its face, was made for the purpose of giving to plaintiff's father a home during his lifetime, when a life lease would have answered every purpose, especially when a competent attorney was consulted, who was doubtless familiar with the purpose of the conveyance and who drew the same. It is also significant that at the time of the conveyance plaintiff's father was in ill health and was not expected to long survive. The plaintiff moved away from the state, and she never made any inquiry, so far as the record discloses, as to whether the taxes upon the place were paid, nor did she ever request a reconveyance to her. The deed upon its face recites a consideration of $1,600. There is no competent evidence that plaintiff did not receive any of this consideration. It is true that plaintiff's husband testified that they received no part of the consideration,

but he was not present when the deed was delivered. The rule of law is well established that an oral contract of this character can only be established by evidence that is clear, convincing, and satisfactory, and that the very terms of the conveyance are evidence and must be overcome. *Doane v. Dunham,* 64 Neb. 135. After a careful consideration of all the evidence, we find that it is not "clear, convincing, and satisfactory."

4. There is still another reason why the plaintiff is not entitled to recover in this action. Plaintiff in her action seeks to establish a constructive trust in the defendant Eola Pearl Sullivan. It will be conceded that Mrs. Sullivan can have no greater right to this land than would her father, if living; and the converse is true, that the plaintiff can have no greater right against the defendant than she could have had if the action had been brought against her father in his lifetime. If the transaction between the plaintiff and her father creates a trust, then the defendant Eola Pearl Sullivan should be held to be a constructive trustee, as she took title to the lands as devisee under her father's will; but the conveyance of the land by Mrs. Kiser to her father, upon an oral agreement that he would upon his death or upon her request reconvey the lands to her, did not create a constructive trust, but was an attempt to create an express trust, and, not being in writing, is inhibited by the statute of frauds. That an express trust cannot be created by parol, and that an attempt to do so falls under the ban of the statute, has been so often decided that a citation of authorities to sustain the proposition would be a work of supererogation.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF EDITH LAUDERBACK.
REUBEN LAUDERBACK, APPELLANT, V. SMITH LOBDELL, APPELLEE.

FILED JULY 7, 1921. No. 21672.

1. Appeal: QUESTIONS OF FACT: REVIEW. In the absence of a bill of exceptions preserving the evidence, this court will presume that the district court correctly determined every issue of fact presented by the pleadings.
2. Husband and Wife: POSTNUPTIAL CONTRACT. Where husband and wife, because of the misconduct of one of them justifying a legal separation, find it impossible to dwell together in harmony and unity, and enter into a contract for the settlement of all their property rights, and each relinquishes all rights in the property of the other and to inherit from the other, and providing for immediate separation, such contract, if fair and equitable, will be enforced by the court with respect to property rights.
3. ———: ———: BAR OF RIGHT TO INHERIT. A valid postnuptial contract between husband and wife, which provides that each relinquishes all rights to the property of the other and releases and waives all right of each to inherit from the other, if observed by both until the death of one of them, will debar the survivor from receiving from the estate of the other the articles of personal property and allowance which the statute provides for the surviving spouse.

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

Cook & Cook, for appellant.

W. A. Stewart and *D. H. Moulds, contra.*

Heard before LETTON, ALDRICH, DAY and DEAN, JJ., GOOD and RAPER, District Judges.

GOOD, District Judge.

This action was begun by the appellant, Reuben Lauderback, widower of Edith Lauderback, to determine the validity of a postnuptial contract between him and his late wife, and to have set over to him the specific articles of personalty and allowances which the statute awards

from the estate of a deceased spouse to the surviving spouse. His application was resisted by the appellee, Smith Lobdell, father and heir at law of the deceased wife. Appellant was defeated both in the county and district courts, and has appealed to this court.

The parts of the contract that are material to the determination of this case are: "That the parties hereto are man and wife. That disagreements have arisen between them and they each have decided their future welfare and happiness will be better conserved if they live separate and apart and maintain each himself and herself. In order to make a fair, equitable and agreebale division of their property, both real and personal, the said Reuben Lauderback is to pay to said Edith Lauderback, his wife, the sum of $4,000. * * * Said Edith Lauderback to have all household goods, groceries, dishes, flour and other household utensils and supplies now in the home of the parties hereto. * * * Said Edith Lauderback being ill and under the doctor's care, and having removed from where the parties hereto have resided to the home of her sister, Mrs. James Beans, all of said property is to be removed from said premises herein described at her convenience and under her directions and at such times as she wishes to remove the same. * * * In consideration of the foregoing the parties hereto agree that from now henceforth and for evermore they will live separate and apart from the other, keep and maintain each themselves, make no claim or demand upon each other on account of the marriage relation and each hereby waives, *released* and quitclaims each to the other all right of inheritance and agree to claim nothing from the property each may now have or hereafter acquire, purchase or own in the future. And if either of the parties in the future apply for absolute divorce that this contract and this settlement shall be considered as full payment and settlement of all alimony, court costs or attorney fees that either might ask from the other in a divorce suit." The contract was signed and duly acknowledged.

1. Appellant asserts that the contract is invalid because there existed no sufficient grounds to entitle either to a divorce. This is a question of fact that was put in issue by the pleadings, and the evidence upon this question is not preserved in the bill of exceptions. This question cannot, therefore, be inquired into in this court, for it will be presumed, in the absence of a bill of exceptions, that there was sufficient evidence presented to sustain the findings of the trial court in that respect. *Cady Lumber Co. v. Reed,* 90 Neb. 293.

2. Appellant further contends that the contract is invalid because it was made before the parties had separated and in contemplation of a future separation of husband and wife. Whether the parties had actually separated before making the contract is a question that is not clear from the record. The contract recites: "Edith Lauderback being ill and under the doctor's care, and having removed from where the parties hereto have resided to the home of her sister, Mrs. James Beans, all of said property is to be removed," etc. If the recital in the contract is true, then the parties had separated prior to the entering into the contract. The answer of appellee contains the following averment: "That immediately upon the execution of said contract, said Reuben Lauderback and his said wife, Edith, separated and lived separate and apart during the remainder of the lifetime of the wife." This averment would indicate that the separation occurred immediately upon and coincidentally with the making of the contract. Whether the actual separation occurred prior to the making of the contract or immediately upon its execution is, in our view, unimportant. It is difficult to perceive any good reason for holding that such a contract may be valid if entered into after the separation, and that it would be invalid if made at the time of separation. If sufficient grounds for separation existed and the husband and wife found it impossible to live together in harmony and unity, there seems to be no substantial reason for holding that if they first separated they might

enter into a contract settling their property rights and providing for living apart, and that they could not make such contract to be followed by an immediate separation.

Elliott, in his work on Contracts, vol. 1, sec. 414, says: "It is obvious that, notwithstanding the husband and wife are given the power to contract with each other they cannot enter into an agreement which contravenes the public policy of the state where it is executed. Thus contracts between husband and wife looking to a future separation or to assist in the procurement of a divorce are invalid. However, when the parties at the time of or after the separation enter into a separation agreement fair as to all parties, it is, with a few exceptions, held valid and enforceable, so far as property rights therein contracted for are concerned."

Judge Field, in the case of *Wells v. Stout,* 9 Cal. 479, 494, says: "From these authorities, and others to the same effect might be cited, it is clear that, by the settled law in the United States, such agreements are not invalid, because against sound principles of policy, and are upheld and enforced, * * * if followed by immediate separation, or if separation has previously taken place."

In *Edleson v. Edleson,* 179 Ky. 300, it is said: "It has, however, long since been thoroughly established, as an equitable doctrine, that a contract between husband and wife made in contemplation of the continuance of a previous separation, or in contemplation of immediate separation, where disagreements have arisen between them, and the contract has for its purpose an adjustment of their respective property rights, and the making of a provision for the support of the wife, will be enforced, in equity, if fairly made and just."

In *Randall v. Randall,* 37 Mich. 563, Judge Cooley says: "When a separation has actually taken place, or when it has been fully decided upon, and the articles contemplate a suitable provision for the wife and children, or an equitable and suitable division of the property, the benefits of which both have enjoyed during the coverture, no

principle of public policy is disturbed by them; on the contrary, if they are fair and equal, and are not the result of fraud or coercion, reasons abundant may be found for supporting them, in their tendency to put an end to controversies, to prevent litigation, and to give to the wife an independence in respect to her support, which without some such arrangement she could not have under the circumstances."

Many other cases holding to the same effect might be cited from other jurisdictions, but the position that where husband and wife find it impossible to dwell together in harmony, because of the misconduct of one which would warrant a legal separation, decide to enter into a contract adjusting all the property rights, and each relinquish any rights in the property of the other, and providing for the immediate separation of the parties, is valid and will be enforced, is supported by the great weight of modern authorities, and is in consonance with reason and justice. There is nothing in the record in this case to indicate that the contract of settlement and for separation was unfair or inequitable, the parties having freely entered into the same and lived up to it until the death of one of the parties, there appears to be no good reason for not enforcing the same.

3. Appellant insists that, regardless of the contract, he was entitled to the specific articles of personal property and the allowance provided by statute for the surviving spouse. We think the contract of the parties was intended to absolutely and completely settle all the property rights of the parties, and that each should relinquish any right to an inheritance of the property of the other. We can see no good reason why appellant should be allowed the statutory allowance, any more than he would be entitled to inherit generally from his wife. By his contract he waived and terminated any right to any inheritance or to any part of the property of his wife. We hold that, the parties having made and carried out a contract for the complete settlement of all their property

rights, the husband was by such contract debarred from any part of the estate of his deceased wife, and that he was not entitled to the statutory allowance out of the estate of his deceased wife.

The judgment of the district court is

AFFIRMED.

SAMUEL M. HICKMAN, APPELLEE, V. CHARLES JONES, APPELLANT.

FILED JULY 7, 1921. No. 21195.

1. **Public Lands:** RIGHTS BASED ON SURVEY. Original surveys of public lands by the United States government, on the faith of which property rights have been acquired, control over surveys subsequently made by the government which affect such rights.
2. **Replevin:** VARIANCE. In the affidavit for replevin, the hay in dispute was described as being in stacks on the north tier of forties in section 21, and there was evidence tending to show that it was located on the south portion of section 16, which adjoins section 21 on the north. There was no dispute as to the identity of the hay, but only as to its ownership. *Held*, that the trial court did not err in overruling defendant's motion for a directed verdict in his favor on account of the variance between the allegations of the affidavit and the proof as to the location of the hay.

APPEAL from the district court for Morrill county: RALPH W. HOBERT, JUDGE. *Affirmed.*

McDonald & Irwin, for appellant.

C. G. Perry and *Mitchell & Gantz, contra.*

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS and MORNING, District Judges.

MORNING, District Judge.

This is a replevin action by plaintiff, Samuel M. Hickman, against defendant, Charles Jones, to recover a quantity of prairie hay. At the close of the evidence, at the trial in the district court, the defendant moved for a directed verdict, which motion was overruled. Thereupon

plaintiff moved the court to direct a verdict in his favor, which motion was sustained, and there was a verdict and judgment accordingly. Defendant appealed to this court.

In the replevin affidavit the hay is described as "sixty tons of prairie hay standing in stacks on the north half of the northeast quarter and the north half of the northeast quarter of the northwest quarter, section 21, township 21, range 47." There is some conflict in the evidence, and considerable doubt, as to whether the hay was cut from that portion of section 21 above described, or whether it came from ground immediately to the north, which would be on section 16 as originally surveyed. The conflict is not as to the identity of the hay, nor as to the spot from which it was cut, but as to whether that spot is to the north or to the south of the north line of section 21. Plaintiff has the fee title to that portion of section 21 from which he claims the hay was cut, which he derives by mesne conveyances from the holder of the patent from the United States government, and, at the time said hay was cut, he held a lease from the state of Nebraska upon section 16, which is a part of the public school lands granted to the state by the National government. The evidence shows that, according to the original government survey of the lands in that vicinity, section 16 lies immediately north of section 21.

It appears from the evidence that, owing to local disputes between landowners in that neighborhood as to boundaries, the United States government, in about the year 1900, employed one Alt, a civil engineer, to make a resurvey and fix boundaries there, and that, in so doing, he located section 16 in such manner as to leave a considerable strip of ground lying between the north boundary line of section 21 and section 16, as he located it, and it was from this intervening strip, which defendant refers to as "no-man's land," that defendant cut the hay in dispute. Defendant claims to have procured from the government land office what he calls a "settler's right," under which he took possession of said strip of ground,

and that, while he was so in possession, he cut said hay, and this constitutes the sole basis of his claim of title thereto. We cannot agree with him in his contention that there is anything in these facts that would in any manner tend to establish title in himself nor militate against plaintiff's title. We think it conclusively shown by the evidence that the hay in dispute belonged to plaintiff, wholly regardless of the effect of said Alt survey upon claims of parties whose rights had not become vested prior thereto, and who may have recognized and acted thereon since said survey was made. Long prior to said Alt survey plaintiff's grantors had acquired title to the land in section 21, and, at the time these rights were acquired, these two sections were adjoining each other and there was no strip of ground between them. The rights of neither the state nor of plaintiff's grantors were in the least affected by the Alt survey. Original surveys of public lands by the United States government, on the faith of which property rights have been acquired, control over surveys subsequently made by the government which affect such rights. 22 R. C. L. 282, sec. 42; *Burt v. Busch,* 82 Mich. 506; *Barringer v. Davis,* 141 Ia. 419; *Slack v. Orillion,* 13 La. 56, 33 Am. Dec. 551; *Washington Rock Co. v. Young,* 29 Utah 108, 110 Am. St. Rep. 666; *Miller v. White,* 23 Fla. 301; 5 Cyc. 946. Nor did the reference to said survey in the deed, whereby plaintiff acquired title to his land in section 21, operate to bind plaintiff by any of the results accomplished by said survey, especially as between plaintiff and defendant, there being no privity between them in said conveyance and defendant not being in a position to urge an estoppel. The description in said deed is by reference to the usual governmental subdivisions, and the reference to the Alt survey was added thereto as an alternative description, apparently under the belief, on the part of the grantor and the grantee, that there was no conflict in the two descriptions. And it can make no difference to plaintiff's title to said hay whether the spot from which it was cut was to the south or to the

north of the boundary line between sections 16 and 21. If it was to the south, it was upon plaintiff's deeded land in section 21; if to the north, it was upon section 16, which plaintiff held under lease from the state. As to the state and the plaintiff, there is no open space, or "no-man's land," between said two sections from which defendant could legally harvest hay to the prejudice of either. And we do not regard it as of practical importance, for the purposes of this case, just where these two sections were located, since, according to the original survey, the south boundary line of the one was the north boundary line of the other. If said Alt, in making his survey, was endeavoring to relocate and reestablish the south line of section 16 according to the original survey, his work, if it had any result at all, fixed the north boundary of plaintiff's deeded land in section 21 on the same line, because they were identical. If, as seems probable, he was merely trying to fix boundaries to conform to the contentions of resident owners, and to harmonize disputes as best he could, regardless of the original survey, then, as we have said, this could in no manner disturb the vested rights of the state nor of plaintiff's grantors in the two sections referred to. If it were a question as to whether or not this hay came from either of said sections as originally surveyed, then it would be of much, and perhaps decisive, importance to definitely determine the location of the original corners and lines, but there is no claim here by either party but that it came from a spot of ground on one or the other of said original sections, and the Alt survey did not, as against the plaintiff nor the state, create a strip of "no-man's land" between said sections.

We think there is no merit in defendant's point presented by his motion for a directed verdict, to the effect that the replevin affidavit locates the hay on section 21, whereas the evidence shows that it was located on section 16, and that, therefore, there is a fatal variance between the allegations and the proofs. There is no dispute here as to the identity of the hay, and this variance as to loca-

tion is immaterial. *Bilby v. Townsend*, 29 Neb. 220; *Nollkamper v. Wyatt*, 27 Neb. 565. The title to this hay is not made to depend upon identity, but the defendant asserts title in himself in the identical hay in question, and any variance between the allegations of the affidavit and the proofs as to location is waived. 23 R. C. L. 928, sec. 98.

The judgment of the lower court is

AFFIRMED.

SHANNER BROTHERS, APPELLANTS, V. VILLAGE OF PAGE, APPELLEE.

FILED JULY 7, 1921. No. 21607.

1. **Municipal Corporations: CONSTRUCTION OF SIDEWALK: SUIT TO ENJOIN: DISMISSAL.** In an action by resident property owners to enjoin a village from "further permitting or allowing" a certain sidewalk to be constructed contrary to an established grade and in violation of an ordinance of the village governing the construction of sidewalks, there being no evidence to show that the village had either authorized the construction of such sidewalk or that it had taken any part in such construction, *held*, that the action of the district court in dismissing the cause at the close of plaintiffs' evidence was proper.

2. ———: DUTIES: REMEDIES. The remedy, if any, to enforce the performance of a mandatory duty of a municipal corporation is mandamus, and not injunction.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

H. M. Uttley, for appellants.

J. A. Donohoe, contra.

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS (E. J.) and MORNING, District Judges.

MORNING, District Judge.

Action by plaintiffs as residents and property owners of the village of Page to enjoin said village from per-

mitting certain sidewalks to be constructed in violation of a certain ordinance of said village governing the laying of sidewalks. From a judgment for defendants, plaintiffs appeal.

The petition alleges in substance that plaintiffs are residents and property owners of said village, that the village is a municipal corporation organized under the laws of this state; that said village duly and regularly adopted and established a system of grades throughout said village for sidewalks; that said village is causing and permitting a certain designated sidewalk (specifically described) to be constructed without paying any regard to the established grade, over the protest and objection of plaintiffs duly made to the authorities governing said village, and that said sidewalk, so being constructed, by and with the consent of the village of Page, and the trustees thereof, does not conform to the grade established and adopted, "either with reference to its location distant from the property adjacent thereto or with the grade in elevation as adopted by said village." It is further alleged that to permit said sidewalk to be established without regard to the grade will materially and substantially affect the rights of plaintiffs and all other citizens of said village of Page; that no action at law to recover damages for such failure would be adequate, or could be maintained by the different citizens of said village, and that to permit the said village and the trustees thereof to allow sidewalks to be built without conforming to grade would be a serious injury and detriment to the village and all citizens thereof. There was a prayer for an injunction restraining defendant from further permitting or allowing sidewalks to be built in said village unless they conform to the established grade.

At the close of plaintiffs' evidence, on motion of defendant, the court dismissed the action at the costs of plaintiffs. The judgment of dismissal was on October 10, 1919. The transcript for appeal was filed in this court on June 21, 1920. On the day the judgment was entered,

however, plaintiffs filed in the court below a "motion for rehearing of this cause," which is in the nature of an argument intended to convince the court that the judgment was contrary to law and the evidence and not sustained by the evidence. This motion was not passed upon by the district court until the 29th day of March, 1920, when it was overruled. The appeal to this court was perfected within three months from the date of the ruling of the court on said motion. We have, with some misgiving, concluded to treat this motion as one for a new trial and thus avoid the necessity of dismissing the case for want of jurisdiction to hear it.

If it were not for the allegation of the fourth paragraph of the petition there would be nothing contained in it to indicate that the village is in any way an active party to the construction of the sidewalk complained of. It is there alleged that the village is "causing and permitting" it to be done. The prayer for an injunction is that defendant be restrained "from further permitting or allowing sidewalks to be built in said village of Page unless the same conform to and are in accordance with the established grade." There is a total lack of evidence either offered or received tending to show that the village either authorized or consented to the construction of the sidewalk complained of, or that it in any way actively participated in, or connived at, its construction. Indeed, the plaintiffs themselves proved by the testimony of the village clerk that no action had been taken by the village board authorizing the construction of this sidewalk. The question, then, is whether a party who can show himself aggrieved by the laying of a sidewalk in a village can maintain injunction against the village without alleging and proving that the village is in some way responsible for the work being done? We think the question must be answered in the negative. If the village owes any active duty to plaintiffs in the matter the remedy is not injunction, but mandamus to compel it to perform that duty. *Moores v. State,* 71 Neb. 522; *State v. City of Kearney,* 25 Neb. 262;

State v. City Council of City of Lincoln, 98 Neb. 634. But we think there is no duty resting upon the village to maintain an injunction suit against the parties responsible for the improvement, for the protection of aggrieved citizens or complaining parties. If sidewalks are being constructed by private parties in violation of the ordinances of said village, these plaintiffs, if they have a right of action at all, can maintain it themselves against the responsible parties, and are in no position to maintain an injunction suit against the village to restrain it from "further permitting" the work to be done. And we fail to find any convincing or satisfactory evidence in the record that the sidewalk complained of was being built contrary to the village ordinances and not according to the established grade. No surveyor was called as a witness, and the only evidence on the subject of improper grade or location of the sidewalk was of the most vague, indefinite, and conjectural character.

We think the action of the district court in dismissing the petition was right, and the judgment is

AFFIRMED.

URBAN R. ZEDIKER V. STATE OF NEBRASKA.

FILED JULY 7, 1921. No. 21868.

1. **Larceny:** INSTRUCTIONS. In the trial of a defendant upon a charge of larceny, it is reversible error for the court to instruct the jury that, if they were "satisfied from the evidence beyond a reasonable doubt that, shortly after the theft of the property described in the information, some part thereof was found in the possession of the defendant, and if his possession of the same has not been explained to your satisfaction, then you would be justified in inferring from said facts that the defendant stole the said property," unless the instruction is qualified to the effect that it is for the jury alone to say, in the light of all the facts and circumstances shown in the evidence, whether any such inference shall be drawn.

2. ———: ———. Upon a larceny charge, where the *corpus delicti*

is in dispute, or is not admitted by the defendant, it is error for the court in one of the instructions to assume that it is established, or to refer to it as an established fact, even though it is submitted to them for their determination by another instruction.

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

Eugene Burton and *Robert O. Reddish,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS (E. J.) and MORNING, District Judges.

MORNING, District Judge.

The defendant was convicted of larceny in the district court for Box Butte county and prosecutes error.

The only assignment of error necessary for us to consider is that relating to instruction No. 4, given by the court to the jury. Said instruction reads:

"In this case you are instructed that there is evidence tending to show that the property described in the information, or a part thereof, was found shortly after it was stolen, in the possession of the defendant, and on this proposition you are instructed 'that the unexplained possession of stolen property, shortly after the theft of it, is a fact which may justify the jury in inferring that the person so in possession is the thief.' And in this case, if you are satisfied from the evidence beyond a reasonable doubt that, shortly after the theft of the property described in the information, some part thereof was found in the possession of the defendant, and if his possession of the same has not been explained to your satisfaction, then you would be justified in inferring from said facts that the defendant stole the said property."

The quotation set out in said instruction was taken from the syllabus in *Palmer v. State,* 70 Neb. 136, and states a correct rule of law, but it should have contained

the qualification, or one in substance like it, which was embodied in the instruction dealt with in the above-cited case, viz., "Whether such inference should be drawn is a fact exclusively for the jury." *Pospisil v. State, ante,* p. 40. And we think, also, that the court should have instructed the jury, in that connection, that, if they believed the explanation of the defendant as to how he came into possession of the property, or if it created in their minds a reasonable doubt as to his guilt, they should acquit the defendant.

This instruction also assumed that the *corpus delicti* was an established fact; that is, it assumed that the property found in the possession of defendant had been stolen, whereas this was a fact which the jury must find from the evidence, beyond a reasonable doubt, before there could be any inferences drawn from, or any legal significance attached to, the fact that the property was found in the possession of the defendant. "Unless the jury are satisfied beyond a reasonable doubt that the offense has been committed, the unexplained recent possession of goods will not justify the conclusion that the person in whose possession they are found is the thief." 17 R. C. L. 72, sec. 76.

In criminal cases, the court may in the instructions to the jury assume the existence of collateral facts established by uncontroverted evidence which tend to prove one of the constituent elements of the crime. *Welsh v. State,* 60 Neb. 101. They may also assume the existence of any fact forming a material element of the crime, where such fact is admitted by the accused, or where his defense is of such a nature that it is by him treated as established. *Hill v. State,* 42 Neb. 503; *Morgan v. State,* 51 Neb. 672; *Pisar v. State,* 56 Neb. 455. But it is reversible error for the court to assume in the instructions that the *corpus delicti,* or any fact necessary to establish the guilt of the accused, has been proved, and so relieve the jury from its consideration, unless the same is expressly or tacitly admitted by defendant. The presiding judge is without

lawful authority to determine the issue, or any of the facts involved therein. That is the function of the jury, regardless of the state of the evidence. They are the sole judges of the credibility of the witnesses and of the weight to be given to the evidence, and the court cannot assume that they are convinced of any constituent element of guilt because they ought to be. They may entirely discredit any witness though uncontradicted, or refuse to believe all the evidence tending to establish guilt even though it is unopposed and free from conflict. *Heldt v. State,* 20 Neb. 492; *Metz v. State,* 46 Neb. 547; *Goldsberry v. State,* 66 Neb. 312. And if the court in one instruction assumes the existence of a material fact, which should have been submitted to the jury, the error is not cured by the submission of it in another instruction. This was expressly held by this court in *Metz v. State, supra,* where we were called upon to consider an instruction given by the trial court in the following language:

"If you believe from the evidence, beyond a reasonable doubt, that soon after the burglary of the storehouse or warehouse of the said Jasper N. Binford and the larceny of the corn therefrom, portion of the said corn so stolen was in the exclusive possession of the defendant George Metz, you are instructed that this circumstance, if so proved, is presumptive, but not conclusive, evidence of the defendant's guilt, and you should consider this circumstance, if so proved to your satisfaction, along with the other evidence in the case in arriving at your verdict, giving it such weight and effect as you think it entitled to, and giving the defendant the benefit of any reasonable doubt of guilt."

Chief Justice Norval, in discussing that instruction, on page 554 of the opinion, said: "The foregoing was erroneous for more than one reason. By it the court assumed that a burglary and larceny had been committed. The accused, during the entire trial, strenuously insisted that such were not the facts, and it was prejudicial error for the court to assume as established the *corpus delicti.*

True, the question was submitted to the jury for their determination by another instruction, but that did not cure the error indicated in the instruction quoted, since the jury would be left in doubt as to which instruction should guide them in their deliberations."

For the reasons indicated in the foregoing discussion, we hold that the fourth instruction given by the court below was prejudicially erroneous, and that the judgment of conviction should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM DETER FISCHER, APPELLANT, V. GOTTHARDT S. FISCHER ET AL., APPELLEES.

FILED JULY 7, 1921. No. 21564.

1. **Statute of Frauds:** HEIRSHIP: ORAL CONTRACT. A verbal contract whereby a widower with five minor children promises an unmarried woman, pregnant by a third person, that if she will marry him and be a mother to his children, he will make her child, when born, an equal heir with the others in his estate, is void under the third subdivision of section 2630, Rev. St. 1913.
2. ———: MARRIAGE CONTRACT. Her agreement to marry and to care for his children constitutes one entire contract made "upon consideration of marriage," and therefore within the statute.
3. ———: ———: HEIRSHIP: PART PERFORMANCE. Neither the marriage nor, in addition, her compliance with the other terms of the contract constitute such part performance as will require the enforcement thereof upon the ground that a refusal would work a fraud upon her.
4. **Parent and Child:** DUTY OF STEPMOTHER. Without attempting to define the duty a stepmother owes to the children of her husband by a former wife, the proposition that she owes them *no* duty finds no support in nature, logic, or law.

APPEAL from the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

Halligan, Beatty & Halligan, for appellant.

Bruckman & Paulson, contra.

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., ALLEN and REDICK, District Judges.

REDICK, District Judge.

This is an action in equity to compel the specific performance of an oral antenuptial agreement which plaintiff claims was made by his mother, Margaret Fischer, with the father of the defendants, Gotthardt Fischer. The circumstances out of which the agreement is alleged to have arisen, in brief, are as follows: Gotthardt Fischer had been a widower for about 2 years, having 5 minor children ranging from 6 to 14 years. Plaintiff's mother was an unmarried woman of 19, but pregnant of the plaintiff, whose father was other than Gotthardt. Through the efforts of friends Gotthardt and plaintiff's mother were introduced, and after three days' acquaintance, and upon urgent solicitation of Gotthardt, were married on or about January 7, 1882, and plaintiff was born May 10, thereafter.

The plaintiff states that the contract was that, in consideration of his mother marrying Gotthardt and being a mother to his children, taking care of them as her own until they reached manhood, the said Gotthardt would make the plaintiff an equal heir with the minor children of Gotthardt; plaintiff, therefore, claiming a one-sixth interest in the property of his stepfather, who by will gave it to his five children, expressly excluding plaintiff and two children of the Gotthardt marriage from all participation therein.

The only evidence of the contract comes from the mother, who, having refused the offer "because I was afraid I couldn't have a good home for my child, because the children would look down upon him," states the contract as contained in the answer to the question, "And what did he say about that? A. He says that they wouldn't; that he would promise me that if I would marry him he would give my child his name, and a home, and no one should know that it was not his child, and that it should have the same right in everything as his children."

It also appears in the evidence that on May 19, 1911, the plaintiff's mother obtained a divorce from Gotthardt on the grounds of cruelty, and an allowance of $4,000 permanent alimony.

The defendants rely upon the statute of frauds as contained in section 2630, Rev. St. 1913, as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith. * * * Third. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry"—also that the decree for divorce and alimony operated as a rescission or cancelation of the contract.

Upon the mere reading of the statute and statement of the contract there would seem to be no question that the latter was clearly within the former. Where the supposed contract has nothing to rest upon as a consideration beyond the marriage, and even where there may be other considerations, but the real inducement was the marriage, there seems to be no conflict of opinion upon the proposition that the agreement is unenforceable. *Hunt v. Hunt,* 171 N. Y. 396; *Henry v. Henry,* 27 Ohio St. 121; *Mallory's Admrs. v. Mallory's Admr.,* 92 Ky. 316; *Bradley v. Saddler,* 54 Ga. 681; *Dienst v. Dienst,* 175 Mich. 724; *Rowell v. Barber,* 142 Wis. 304. The question has not been decided in this state.

Counsel for appellant, however, states the proposition in his brief as follows: "An oral antenuptial agreement, fairly entered into between two parties, the consideration of which is the marriage of the parties, is not affected by the statute of frauds, when one of the parties in reliance thereon has married the other party, who has thereupon received, enjoyed and retained the benefits thereof, and where not to enforce such contract would be to perpetrate a fraud upon the innocent party." The following cases are cited in support thereof, which will be considered in their order:

Moore v. Allen, 26 Colo. 197, which holds that equity will not permit the statute to be made an instrument for the perpetration of a fraud, and that where the marriage has been induced by *deception* and *artifice,* a wife having entered into a relation from which she cannot recede, the statute does not apply. The promise of the intended husband in that case was to convey to the wife certain real estate, and the fraud was claimed to arise from the fact that she had been given possession of the premises and had made lasting and valuable improvements thereon. It will therefore be noticed that there was some semblance of fraud entering into the contract, and the case belongs to that class in which the conscience of the chancellor is said to be touched by the peculiar hardships attendant upon a different decision. Moreover, the cases cited to support the decision fail to strengthen the application of the principle announced to the facts of that case. The first one, *Green v. Green,* 34 Kan. 740, was another "hardship" case in which the plaintiff, a cripple, was induced to marry the mother of the defendants upon the representation that she owned a farm, and that its proceeds should go to their support after they were married so long as they lived. On the eve of the marriage she executed deeds of the farm, constituting all of her property, to her children by the former marriage for the consideration of love and affection, and without the knowledge of plaintiff, and it was held that such deed was a fraud upon the rights of the husband and that he might have them set aside. The case presented a situation of active artifice and deception.

Peek v. Peck, 77 Cal. 106. In this case the court held marriage is not of itself part performance, and say: "But if the marriage was brought about by a fraudulent contrivance, as by a promise to have the conveyance executed, and the evasion of such promise by false representations, a court of equity will decree a conveyance." The artifice used in that case was that the day before the marriage the intended husband called the plaintiff to the

hotel for the purpose of executing the settlement agreed upon, and after leaving her for a few minutes returned, saying that a Mr. McKenny was out of town and it could not be attended to that evening; the next day "he said he would have the deeds drawn, and he went up and said that they were all busy at the courthouse, and he couldn't have it done at that time, and he called on me again with the same story—that the gentlemen at the courthouse were busy, and that he could not have the deeds fixed, and that I could rest contented." On the very day that he was making these excuses he executed a deed conveying the property to his son—another case of positive fraud.

Petty v. Petty, 4 B. Mon. (Ky.) 215. In this case the court refused to enforce the antenuptial contract as being within the terms of the statute, but the deeds which the husband had made to his children a few days before the marriage were set aside as a fraud upon the marital rights of the wife to the extent of her dower interest in her husband's property.

Glass v. Hulbert, 102 Mass. 24, 39. This case is not in point, but is cited for the following quotation from the opinion: "The marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation that, *if procured by artifice,* upon the faith that the settlement had been, or the assurance that it would be, executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute." It will be noted that, "if procured by artifice," the marriage settlement may be enforced.

The plaintiff also cites *Weld v. Weld,* 71 Kan. 622: The intended wife being indebted to the intended husband on a note secured by mortgage, the parol agreement was that the marriage should operate as a satisfaction of the note, and the court held that there was no question of part performance, and that the marriage constituted payment, and there was no question of the statute of frauds, the entire contract having been executed.

Also, *Knights of Pythias v. Ferrell,* 83 Kan. 491: Here the parol antenuptial contract was that he would cause the wife's name to be inserted as a beneficiary with his children by a former marriage, and the change was actually made, and the court held that the contract was fully executed and the statute did not apply, and that a subsequent change of the certificate omitting the name of plaintiff as beneficiary, without her knowledge or consent, would not defeat her interest therein.

And the last case cited on this point, *Freitas v. Freitas,* 31 Cal. App. 16, 19, is to the same effect as *Knights of Pythias v. Ferrell.*

In none of the above cases was it held that the parol contract was taken out of the statute of frauds, except where it was shown that the complaining party was induced to enter into the marriage contract by some artifice and deception; and no case has been brought to our attention holding that the mere failure to keep the promise made in the agreement amounts to artifice or fraud. The case before us presents no fact or circumstance of the character just mentioned which would justify a court of equity in disregarding the statute.

The plaintiff, however, contends that the marriage was not the sole consideration for the contract, and says: "There was no duty upon Mrs. Fischer to rear and care for the children of Gotthardt Fischer and her agreement to do so, when fully performed and carried out, was a sufficient consideration to support the agreement of Gotthardt Fischer to make her child an equal heir with his own children." And in support of this proposition he cites *Larsen v. Johnson,* 78 Wis. 300. But in that case the court held that the contract was fully executed, and therefore not within the statute, the conveyance called for by the contract having been duly executed. If in the instant case the agreement had been that Gotthardt should make a conveyance to plaintiff upon his being born, and such conveyance had been executed and delivered, the case cited would be in point, and the children

of Gotthardt would be unable to plead the statute because the contract was fully executed. The court, however, held that, although marriage furnished the inducement for the contract, the consideration for the conveyance of the land by the intended wife was the provision for the support and comfort of the wife, and not the marriage of the parties; but, in view of the undoubted complete execution of the contract by both parties, this holding must be considered obiter. And, moreover, the contrary has been held in the case of *Henry v. Henry,* 27 Ohio St. 121, where the question was squarely presented. See, also, *Dienst v. Dienst, supra,* and *Rowell v. Barber, supra.*

Plaintiff also cites in this connection, 21 Cyc. 1152, to the effect that a husband is under no legal obligation to support the children of his wife by a former marriage, which is undoubtedly correct, barring a great many exceptions, particularly in cases where the children live with their stepfather as a part of his family. Neither is the wife legally liable for the support of the husband's children. But we would be loath to conclude from such premises that a woman marrying a widower with minor children owed no duty of nurture and maternal advice to them. Plaintiff has cited us to no authority supporting such proposition, and we are pleased to say that our researches have revealed none. So long as the widowed with children are permitted to remarry, we think the doctrine contended for would be contrary to natural instincts and public policy. We are clearly of the opinion that the agreement of plaintiff's mother to care for and be a mother to the minor children of Gotthardt Fischer furnishes no good or valuable consideration for the contract; but, if it did, it was so connected with the contract of marriage as to make the contract an entirety, and so may be not considered an outside or independent consideration.

We have assumed that the contract in question is definite enough, and that the plaintiff has a right to sue

upon it as having been made for his benefit, and, in view of our conclusion upon the question of the statute of frauds, it will not be necessary to discuss other matters presented by the briefs.

We conclude that the contract sought to be enforced is void under the statute of frauds, and that the decree of the lower court is right, and it is

AFFIRMED.

CENTRAL BRIDGE & CONSTRUCTION COMPANY, APPELLEE, V. SAUNDERS COUNTY, APPELLEE: JOHN O. SCHMIDT, APPELLANT.

FILED JULY 7, 1921. No. 21779.

1. **Counties:** BRIDGES: CONSTRUCTION IN ANTICIPATION OF LEVY. Where the county commissioners included in their yearly estimate of expenses for the ensuing year the sum of $80,000 for bridge fund, they were authorized to order, under a yearly contract previously let for that purpose, the construction of bridges in anticipation of the levy which might lawfully be made for such fund, the cost of which was within the estimate and not in excess of such levy. *Austin Mfg. Co. v. Brown County*, 65 Neb. 60, approved.

2. ———: ———: ———. Such orders are not rendered invalid by the fact that the bridge fund for previous years was exhausted, and that unpaid warrants were outstanding to an amount in excess of the authorized levy for the year in which such orders were issued; nor by the fact that such warrants were paid out of and exhausted the fund produced by the levy just mentioned.

3. ———: WARRANTS: PAYMENT. Warrants issued in payment for work contracted for in a certain year may not be lawfully paid with funds provided for expenses of a subsequent year, unless included in the estimates for such subsequent year, or unless there be a surplus in the proper fund after all claims against it arising during such year have been paid.

4. ———: CULVERTS: PAYMENT. The cost of building culverts under section 2956, Rev. St. 1913, is chargeable to the "county bridge fund" authorized by section 6456.

5. ———: INTEREST. Counties are mere political subdivisions of the state, and are not chargeable with interest on claims against

them, except where lawfully contracted for, or imposed by statute. Counties and municipal corporations proper distinguished.

APPEAL from the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Affirmed as modified.*

Good & Good, for appellant.

Slama & Donato, B. E. Hendricks and *J. H. Barry, contra.*

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ., ALLEN and REDICK, District Judges.

REDICK, District Judge.

This is a taxpayer's appeal from the allowance by the county commissioners of Saunders county, August 22, 1919, of certain claims of the plaintiff for the construction and repair of bridges and culverts for the said county during the year 1918, in the sum of $51,791.03, composed of the following items: $23,331.82 for culvert work, $25,499.06 for bridge construction and repair, and $2,960.75 interest thereon; John O. Schmidt, taxpayer, appealed from said allowance to the district court, where the same was confirmed, and now brings the matter here for review.

The facts are not disputed and are briefly as follows: In response to demands by the county, the plaintiff made bids for the construction and repair of bridges and culverts during the year beginning December 21, 1917, which were accepted, and on December 28, 1917, separate contracts were entered into covering said work which was to be accomplished upon written orders by the commissioners; such orders were issued and the work performed in accordance with the contract, and the principal amount allowed therefor is correct, and the fair and reasonable value of the work and labor performed and materials furnished.

It further appears that the bridge levy for the year 1917 in Saunders county was $48,498.22 and the emergency

bridge levy $11,624.56, and the bridge levy for the year 1918 was $51,500.51 and the emergency bridge levy $12,875.13, and for 1919 a total levy for both funds of $64,171.25; the total valuation upon which the levy was made was $12,290,289. In January, 1918, and again in January, 1919, annual estimates were duly made and published of the necessary expenses of the county during the years, respectively, for the bridge fund $80,000 and for the emergency fund $20,000.

The following extracts are taken from a stipulation in the record:

"That on the 22d day of August, 1919, and prior to the allowance of the claims involved in this action, there were outstanding and unpaid warrants against the general bridge fund of Saunders county, and claims allowed against said general bridge fund upon which warrants had not yet been issued, in an amount in the aggregate exceeding the amount of money on hand in said bridge fund plus 85 per cent. of the levy on that day made for said fund.

"That on the said 22d day of August, and prior to the allowance of the claims involved in this action, the county board of Saunders county, Nebraska, allowed claims on the county bridge fund in the aggregate amount of $29,360.18, and ordered the county clerk to issue warrants on the said fund for the payment of the same.

"That on August 22d, 1919, there were outstanding unpaid warrants drawn upon the general bridge fund of Saunders county, Nebraska, $30,253.04, and that there was a balance of $322.39 in cash in said fund.

"That the amount of levy for the year 1919 for the county bridge fund was four mills on the dollar valuation, and for the emergency bridge fund one mill on the dollar valuation.

"That on the 22d day of August, 1919, the total amount of cash in the general bridge fund was $322.39, and that the amount of cash in the emergency bridge fund on said day was the sum of $11,626.36, making a total in said

fund in the sum of $11,948.75."

At the time of the levy, August 22d, 1919, a special levy of five mills was made under the supposed authority of chapter 26, Laws 1919, and warrants to cover the claims in suit drawn upon the funds so attempted to be created; but this court held in the case of *Beadle v. Sanders,* 104 Neb. 427, that such levy was invalid.

The first question presented for decision involves the construction of section 2971, Rev. St. 1913, reading as follows:

"Bridges shall not be built, the aggregate cost of which shall exceed a sum greater than the amount of money on hand in the bridge fund derived from the levy of previous years, plus 85 per cent. of the levy of the current year, together with the amount of money in the district road fund in the district where such work is to be performed."

By section 6456 the levy for the county bridge fund is fixed at four mills on the dollar valuation, and the county is elsewhere (section 3001) authorized to levy not to exceed one mill as an emergency bridge fund, and the amounts realized from such levies have been stated above.

Appellant contends that the county has no power to contract for bridges unless there is at the date of the contract sufficient money actually in the funds to pay for the same. It is not contended that the contracts of December 28 are invalid, but the claim is that, before any orders for the construction of bridges or culverts could be issued by the board under said contracts, there must be money in the funds to cover them, and that, inasmuch as the bridge fund for 1917 had been exhausted and the levy for 1918 not made, the orders given to appellee for the construction of bridges and culverts were illegal; the result of such construction of the statute being that from the date of the contract to the date of the levy for 1918 the commissioners had no power to order the construction of any such improvements.

We do not think the construction contended for is reasonable; it disregards entirely the words "plus 85 per cent. of the levy of the current year," which would be mere surplusage if the power to contract were measured only by the amount of money actually in the funds, and might just as well have been omitted. But effect must be given to every provision of the statute, and it seems to us that the language quoted was inserted for the purpose of stating a rule by which the extent of the power to contract was to be measured; the word "plus" indicates something added to that which has gone before, and in this connection undoubtedly grants a power to contract to an extent in addition to the actual money in the different funds referred to, measured by the current levy. Supposing the section read, "Bridges shall not be built, the aggregate cost of which shall exceed a sum greater than 85 per cent. of the levy of the current year," I think it would hardly be contended that the language would suggest that the money must be actually in the fund; in other words, we think the words "plus 85 per cent. of the levy of the current year" merely furnishes a measure; and if it had read "plus a sum equal to 85 per cent. of the levy" the meaning would be perfectly clear.

What, then, was the power of the county commissioners with reference to the construction and repair of bridges and culverts under the contracts in question? In January, 1918, an annual estimate was made, as required by law, of the expenses of the county for the *ensuing year,* including $80,000 for bridge fund and $20,000 for emergency bridge fund, which estimate formed the basis for the levy of taxes for that year. It would seem, therefore, that the commissioners were authorized to order bridge and culvert construction up to an amount within the estimate and not in excess of the amount authorized by the statute to be levied; in other words, the levy for that year, when made, having produced for bridge fund only $51,500.51, any orders in excess of that amount would be invalid.

It was held in *Austin Mfg. Co. v. Brown County,* 65 Neb. 60, opinion by Kirkpatrick, C., that it was not "unlawful for a county board, after estimate made and prior to its meeting as a board of equalization, to anticipate the levy for the current year, and contract an indebtedness upon a particular fund within the estimate, although there is at the time no money in the treasury to the credit of such fund for the payment of the indebtedness, if in contracting such indebtedness the board remain within the limits prescribed by the Constitution and statutes." This case was cited with approval by Epperson, C., in *Roberts v. Thompson,* 82 Neb. 458. The decision in *Austin Mfg. Co. v. Brown County,* however, was criticised by Hastings, C. (who had concurred in it), in the case of *Clark v. Lancaster County,* 69 Neb. 717, in a discussion as to what was meant by the words "current year," in which he concluded that they meant the year from levy to levy, rather than the calendar year, and held that the section in question "gives no authority to the board to take into account the levy of the current calendar year prior to the making of such levy" in the making of contracts for bridge building. But this holding is subject to the same criticism which the learned commissioner makes of the *Brown County* case, to wit, that the opinion went further than was necessary for the determination of that case. In the *Clark* case the court held that, where the county commissioners had entered into a yearly contract for the construction of bridges, they were without power to cancel that contract with the consent of the contractor and let a new one covering a portion of the improvements included in the first contract; but, the contractor having rendered services and materials in good faith, was permitted to recover the reasonable value thereof. We think, however, the current year refers to the period of time during which the contracts are to be performed and the indebtedness incurred, and that the uncertainty as to the precise limits of the power of the county commissioners growing out

of the fact that the levy for that year is not made until August is not greater than generally exists in human affairs; the total valuation for the county for the year previous and the number of mills which may be levied for the purpose furnish a reasonably certain basis from which to calculate the limit to which contracts may extend.

Section 6420 requires the assessment for taxation on April 1; section 6437 provides for the county board of equalization to sit in June; and section 6456 requires that the sitting be continued until the state board of equalization has acted, whose sessions begin the third Monday of July (section 6447), after which "the county board shall levy the necessary taxes for the *current year*" (section 6456). It was said in *State v. Cornell,* 54 Neb. 647: "A consideration of the various provisions of the revenue law relating to the levy, collection, and disbursement of the public moneys of the county, the statute requiring the usual levy of taxes for county purposes to be made annually upon estimates prepared by the county board in January of each year, and forbidding such board from contracting any indebtedness for any object not enumerated in such yearly estimate of expenditures, * * * make it reasonably certain that the lawmakers intended that the fiscal period of a county should correspond to the calendar year." It follows that "current year" as used in the revenue statute means the fiscal year, and that the same words in section 2971, and "ensuing year" in section 954, all refer to the fiscal or calendar year; and the second syllabus in *Clark v. Lancaster County, supra,* is disapproved.

A county may make a valid contract to be paid out of available funds in the treasury, or with the proceeds of taxes that have been or may lawfully be levied during the year the contract is made. *Manly Building Co. v. Newton,* 114 Ga. 245; *Board of Commissioners v. Sauer,* 8 Okla. 409.

If the contracts were valid when made and orders for construction given thereunder not in excess of the levy

for 1918, then the fact that the bridge fund for 1918 was exhausted through the payment of warrants issued for work done in 1917 or previous years would be immaterial. It is unquestionably the theory of our revenue laws that each calendar year, which is the county fiscal year (*State v. Cornell,* 54 Neb. 647), shall take care of itself, and the expenses provided for by the yearly estimate shall be paid out of the funds raised by the levy for that year; in fact, it has been the law of this state since the decision of the *State v. Harvey,* 12 Neb. 31, that the fund arising from the levy of one year cannot be legally used to pay the warrants of preceding years, at least until all of the expenditures contemplated by the yearly estimate have been met. See, also, *State v. Clark,* 79 Neb. 263, holding: "A county warrant issued against the general fund of a certain year is not payable out of the general fund of a subsequent year, unless included in the estimate of the latter year, or unless, after deducting the items included in such estimate, sufficient remains to pay such warrant." The contractor in this case had a right to expect payment from the levy for the year 1918, and, it not appearing that the claims for bridge construction in 1917 and previous years were included in the estimate for 1918, the payment of warrants covering such claims out of 1918 bridge fund was illegal and the rights of plaintiff cannot be affected thereby. *Pope County v. Sloan,* 92 Ill. 177.

There is no warrant for the proposition that the allowance of these claims by the county commissioners was irregular and erroneous; the case of *State v. Farrington,* 80 Neb. 628, does not so hold, but merely, if erroneous, that would not prevent the issuance of a writ to compel levy of a tax to pay the claims. The better reasoning would require the holding that under section 952, subd. 5, Rev. St. 1913, the board may audit and settle claims as soon as the work is completed, though no warrant may issue until after levy; however, an erroneous judgment does not require a reversal unless prejudice is shown.

In 1919 section 2971, *supra,* was amended by adding the following: "Provided, however, if any county has before January first, 1919, entered into any contract for bridge construction or repair in excess of the amount herein permitted to be expended, and the county has received the benefits accruing by virtue of said contracts and the work has been done in accordance with such contract, prior to January 1, 1919, said contracts are hereby validated and made the obligations of the county, and the county board may levy a special tax not to exceed five mills in any one year until sufficient moneys are raised to pay said indebtedness. No estimate shall be required preceding this levy, and the taxes so arising from said levy shall be placed in a special fund to be used for the sole purpose of paying said indebtedness and shall be applied thereto as collected." Laws 1919, ch. 26.

It would seem, therefore, that, regardless of the question of the validity of the orders for bridge and culvert construction, the legislature has declared the bridge orders, at least, valid claims against the county. But appellant contends that the validating act does not cover claims for culvert construction; the language being, "contract for bridge construction or repair." This brings us to the second question presented, the determination of which involves the construction of the validating act in connection, of course, with the other provisions of the statute of which, as an amendment, it forms a part. In view of our holding that the commissioners were authorized to anticipate the levy for the year 1918 in issuing the orders in question, and that such orders were valid, it will not be necessary to decide this question. In the opinion of the writer, however, the validating act is broad enough to cover both bridge and culvert construction for the reasons: (1) A culvert is easily within Webster's definition of a bridge: "A structure erected over a depression or an obstacle, as over a river, chasm, roadway, railroad, etc., carrying a roadway for passengers, vehicles," etc. Of course, a culvert, strictly speak-

ing, is a conduit for passage of water, or a way, but with respect to its use in a highway may be, and generally is, a structure carrying a roadway—it bridges a chasm in the road. If the structure over a ditch consists of longitudinal stringers with planks across, it is a bridge. Is it any less a bridge, in a general sense, if it consisted of a box of four sides laid transversely to the road? The primary object in each case is to carry the road over the ditch. (2) The other sections of the statute of which it forms a part deal with both kinds of improvements, both of which are to be paid for from the same fund, and the statute does not pretend to determine how much of such fund shall be devoted to the construction of bridges and how much to culverts, and the amount limited for bridges alone is therefore not determinable; (3) and while the validating act uses the term "bridges" only, it is dealing with the total fund, and the evident intent of the legislature was to validate all contracts which might lawfully be paid out of such fund but for the fact that they were excessive. Appellant cites a number of cases involving construction of statutes, to the effect that a culvert is not a bridge, but they were all cases involving the liability of municipal corporations for damages by reason of defective bridges, calling for a strict construction of the statutes declaring liability; the statute in question is remedial and should receive a liberal construction.

The last contention of appellant is that the county is not liable for interest, and in this we think he is right. There is no question but that as a general rule counties are not liable for interest on claims against them. 15 C. J. 662, sec. 375; 1 Dillon, Municipal Corporations (5th ed.) sec. 35 (23); *Seton v. Hoyt*, 34 Or. 266. And this on the ground that a county is essentially an arm or agency of the state, and only liable for interest when so provided by statute, or by a contract therefor lawfully entered into. Section 5638, Rev. St. 1913 is as follows: "All warrants issued by the county board shall, upon being presented for payment, if there is not sufficient

funds in the treasury to pay the same, be indorsed by the treasurer, 'not paid for want of funds,' and the treasurer shall also indorse thereon the date of such presentation and sign his name thereto. Warrants so indorsed shall draw interest from the date of such indorsement, at the rate of seven per cent. *per annum* until paid. No account or claim whatsoever against a county, which has been allowed by the board, shall draw interest until a warrant shall have been drawn in payment thereof and indorsed as herein provided." Whether or not this is an inhibition against interest before the allowance of the claim might be a nice question, but it certainly grants no affirmative or inferential authority to make such allowance. Appellee refers to *State v. Farrington*, 86 Neb. 653; but the question was disposed of on the doctrine of the law of the case as announced on the former appeal (*State v. Farrington*, 80 Neb. 628), and there interest was allowed *sub silentio*. The question was not argued nor presented in the briefs, and no mention of it is contained in the syllabus; furthermore, it was an application for mandamus to compel the county commissioners to levy a tax to pay a claim which had been allowed, including interest, and from which no appeal had been taken. *Heald v. Polk County*, 46 Neb. 28. Under these conditions neither case can be considered as authority upon the question. *Grand Island Gas Co. v. West*, 28 Neb. 852, and *Murphy v. Omaha*, 33 Neb. 402, are cited, but these cases are distinguishable from the fact that cities are municipal corporations, while a county is not. The distinction is well pointed out in *Woods v. Colfax County*, 10 Neb. 552, where it was sought to hold the county liable for the negligence of its agents. See, also, *Davie v. Douglas County*, 98 Neb. 479. An interesting discussion of the question at issue will be found in *Reichert v. Milwaukee County*, 159 Wis. 25. It is an undoubted hardship upon appellee to deny a recovery of interest, but we are unable to find any authority for its allowance in the statute or the law.

While we hold the orders upon which these claims arose were valid, the latter, together with similar claims for previous years, make up an excess of the amount permitted to be expended and come within the purview of the validating act; and therefore the county commissioners would be authorized to provide for their payment either under said act, in which case no estimate is necessary, or under their general powers to levy a tax for debts of previous years, in which case they should be included in the yearly estimate; the levy, of course, must not exceed the constitutional limit, nor unduly restrict other funds for carrying on governmental functions.

Judgment modified so as to allow plaintiff $48,830.88 and interest thereon from July 15, 1920.

AFFIRMED AS MODIFIED.

JENNIE FELLERS, APPELLEE, V. LOUIS HENRY HOWE, APPELLANT.

FILED JULY 7, 1921. No. 21649.

1. **Trial:** INSTRUCTIONS: EXCEPTIONS. Where exceptions are taken to two certain instructions given by the trial court, and it appears that said instructions bear such relation to each other that if one is upheld the other, at most, becomes harmless error, said instructions will be construed together, and upon sustaining the former the exceptions to the latter will likewise be overruled.

2. **Pleading:** CONSTRUCTION. In the construction of certain allegations in a pleading, to the sufficiency of which, in so far as they purport to state the fact intended by the pleader, no complaint is made by either party, the rule that it will be taken most strongly against the pleader will be applied, and the general rule that the allegation of a pleading shall be liberally construed with a view to substantial justice between the parties does not apply.

3. **Evidence:** EXPERT EVIDENCE: HARMLESS ERROR. Where, in a breach of promise suit, certain practicing physicians were permitted to testify generally as to what would be the natural effect upon the physical and nervous health of a woman who had experienced the disappointment caused by a broken marriage engagement by her affianced under conditions stated in the hypo-

thetical question set forth in the opinion, *held*, for reasons stated in the opinion, no error.

4. **Marriage Contract:** ACTION FOR BREACH: ADMISSIBILITY OF EVIDENCE. Where, in an action for breach of promise to marry, evidence is introduced of the defendant's reputation for wealth in the community in which he lives, when, as in this case, it is followed by an instruction to the jury to the effect that such evidence was admitted, not for the purpose of proving the defendant's ability to pay damages, but only as tending to show the condition of life which the plaintiff would have secured by a consummation of the marriage contract, *held* no error. *Stratton v. Dole*, 45 Neb. 472.

5. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. Although certain instructions of the trial court may be technically erroneous, yet the same will not work a reversal of the case, where the verdict is clearly right on the merits and the only one which could have been reached upon the particular issues involved.

6. **Trial:** INSTRUCTIONS: RECITAL OF UNSUPPORTED ALLEGATIONS. Recital to the jury of allegations in a pleading to support which no evidence had been offered, although, as in the present case, not always sufficient to require a reversal of the case, is nevertheless bad practice and should be carefully avoided as far as possible.

7. **Appeal:** EXCESSIVE VERDICT. Where the only reversible error appearing in the record is that the amount of the recovery is excessive, but not as the result of passion or prejudice of the jury, this court will affirm the judgment upon the excess being remitted.

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

Kelligar, Ferneau & Gagnon, T. J. Doyle and *P. R. Halligan*, for appellant.

Stout, Rose, Wells & Martin and *Dort & Cain, contra.*

Heard before MORRISSEY, C.J., ALDRICH and FLANSBURG, JJ., DICKSON and TROUP, District Judges.

TROUP, District Judge.

This is an action brought by Jennie Fellers, appellee, against Louis Henry Howe, appellant herein, to recover damages for an alleged breach of contract to marry. The issues, as contained in the pleadings, may be briefly summarized as follows:

The petition states that the acquaintance and friendship between plaintiff and defendant began when plaintiff was about 14 years of age, defendant being 10 years her senior; that the continuance of this friendship ripened into attachment and courtship and culminated in an engagement to marry in December, 1896; that from time to time from that date to September 7, 1918, defendant reiterated promise and agreement of marriage; that there was reliance thereon by plaintiff until September 7, 1918, and readiness upon part of plaintiff to marry at any time; that plaintiff gave her entire time and affections to the defendant as to courting, and no attention to any other man, and defendant did likewise; that in contemplation of the marriage defendant gave plaintiff many gifts; that no exact time for the marriage was fixed because defendant stated that his mother was old and she and plaintiff would be unable to get along together, but that he would arrange it and they would soon be married, all of which statements plaintiff believed and relied upon and kept herself ready for the marriage at any time; that upon September 7, 1918, plaintiff requested the fulfilment of said agreement to marry, and defendant then and there, for the first time, refused to fulfil his promise and breached said agreement; that plaintiff had great affection for defendant, was at the time of filing the petition 41 years old, had lost her expectations of advantageous marriage and settlement in life and of maternity; she was injured in her feelings and affections, humiliated and rendered ill and nervous; that defendant during the courtship and engagement consulted with plaintiff, and she assisted, so far as possible, in helping to accumulate his property; that he is possessed of real estate and other property worth $88,000, and plaintiff prays damages in the sum of $50,000.

After a denial of all allegations in the petition not admitted, the answer of defendant admits that the marriage contract or engagement existed between plaintiff and defendant for several years prior to the commence-

ment of this action, but alleges that by mutual agreement no time was ever fixed for the marriage; that during the time defendant was conducting the farm plaintiff declined to marry defendant because she did not care to live on a farm with his father and mother; that after the death of his father, in 1901, defendant continued to live on the farm and care for his mother, aged 87 years; that plaintiff from time to time declined to marry defendant while he lived with his mother, giving as a reason therefor that she could not get along with his mother, and defendant refused to forego his duty to his mother; that in 1916 plaintiff became afflicted with goitre and other ailments which permanently affected her health and rendered her an invalid, weak and emaciated in body, and of unsound mind, and unfit for the marriage relation; that she changed from a courteous and affectionate to a discourteous, cold and hostile disposition; and, in fact, plaintiff made it so disagreeable that defendant had no desire to visit or be with plaintiff; that in 1911 defendant was anxious to marry plaintiff and attempted to rent a house, but plaintiff again stated that she would not marry him while his mother was living, and reiterated this statement on various occasions up to and including their last conversation on the subject in September, 1918.

The reply of plaintiff, denying all allegations in the answer not admitted, admits plaintiff became affected with goitre, but that same did not appear until the engagement had subsisted for 20 years, and that said ailment did not incapacitate her for marriage; that defendant at no time disavowed his promise to marry plaintiff, but, on the contrary, adhered to and repeated his promise during the entire period of her ailment; that the affliction was temporary and curable, and had been entirely and permanently cured, as defendant knew, prior to his breach of the engagement September 7, 1918.

A trial of the action to a court and jury resulted in a verdict for the plaintiff for $22,000. Judgment was rendered thereon, and defendant appeals.

The chief objection by the defendant, and that most urged, both in the oral argument and printed brief, is to the giving of instruction No. 18 by the trial court, whereby it is claimed the court withdrew from the consideration of the jury the averment of the answer: That during the early part of the year 1911 the defendant was anxious to marry the plaintiff, and entered into negotiations to rent a home. The plaintiff told the defendant not to rent a home, that she would not marry him while his mother lived, and continually thereafter stated she would not marry him while his mother lived, and so stated in the last conversation in September, 1918.

Instruction No. 18 is as follows: "Touching the allegation of defendant's answer that in the year of 1911 defendant was anxious to marry plaintiff, and that plaintiff then stated to defendant that she would not marry him while his mother was living, you are instructed that this averment when read in connection with an allegation contained elsewhere in the answer that, by mutual agreement between the plaintiff and defendant, no time was ever fixed when said marriage should take place, does not tender the issue that the plaintiff by her own conduct or statements terminated the contract or engagement to marry in said year."

We are of the opinion that much more importance is attached to this alleged error than the situation warrants. Instruction No. 18 should be considered in connection with instruction No. 16. Instruction No. 16 is as follows: "You are instructed that it is the law of this state that facts alleged in the petition and admitted in the answer are to be taken as true and need not be supported by evidence. In this connection you are instructed that the plaintiff alleged the existence of a contract between plaintiff and defendant to marry and that defendant's answer 'admits that a marriage contract or engagement to marry existed between the plaintiff and defendant for several years prior to the commencement of this action.' You will therefore accept as true without proof

the fact of a continuing 'marriage contract or engagement to marry' between the plaintiff and defendant for a period of several years prior to the commencement of this action."

That part of defendant's answer to which instruction No. 16 refers is as follows: "The defendant admits that a marriage contract or engagement to marry existed between the plaintiff and defendant for several years prior to the commencement of this action, but the defendant alleges, by mutual agreement between the plaintiff and defendant, no time was ever fixed when said marriage should take place."

If instruction No. 16 was properly given, then there was little use or harm in giving instruction No. 18, for the giving of instruction No. 16 virtually superseded the necessity for instruction No. 18. After giving instruction No. 16, then instruction No. 18 was much of the nature of harmless surplusage, and, if error at all, was error without prejudice.

Was there error in giving instruction No. 16? We think not. We believe the well-established rule in construing a pleading, under circumstances similar to those existing under which the point in the case at bar was raised, requires that it be taken most strongly against the pleader. *Gibson v. Parlin & Orindorff*, 13 Neb. 292, and cases cited; *Duval v. Advance Thresher Co.*, 85 Neb. 181.

The defendant insists that the allegations referred to should be liberally construed, and cites in support thereof: *McArthur v. Clarke Drug Co.*, 48 Neb. 899; *Hartzell v. McClurg*, 54 Neb. 313; *Butts v. Kingman & Co.*, 60 Neb. 224; *Tacoma Mill Co. v. Gilcrest Lumber Co.*, 90 Neb. 104; *Keenan v. Sic*, 91 Neb. 582. It is true these decisions hold as contended for by defendant, but decided, however, apparently in pursuance of section 121 of the Code then in existence, requiring the allegations of a pleading to be liberally construed with a view to substantial justice between the parties. This section, however, has been omitted from the Revised Statutes of 1913 ap-

parently, and no longer appears therein, so far as we have been able to discover. Whether this omission occurs by inadvertence or otherwise we do not know; perhaps, however, by inadvertence only. What this court would hold to be the rule if the question was presented under circumstances similar to the cases above cited, in the absence of the statute, we do not now say, nor is it necessary at this time to determine, for the point is made now that the rule applied under the circumstances of the cases above cited, whether with or without the aid of the statute, has no application to the situation in the case at bar, and does not abrogate the rule sought to be applied here. In every one of the above cases cited by the defendant we believe the point was raised on demurrer, in one form or another, usually after the case had been tried, to the sufficiency of the petition in not stating a cause of action, and no doubt the court very properly held, under these circumstances, that a pleading should be liberally construed with a view to substantial justice between the parties.

But that is not the situation here. Plaintiff, in the case at bar, is finding no fault with the part of the defendant's answer in question. There is no claim that it is deficient or that it is other than what it purports to be, and, taking it for what is claimed it plainly purports to be, plaintiff insists that the allegation that the defendant "admits that a marriage contract or engagement to marry existed between the plaintiff and defendant for several years prior to the commencement of this action" is an admission by defendant that the marriage contract continued throughout the period mentioned, and therefore was in existence up to and until the alleged breach of the same by defendant, shortly prior to the commencement of this action, and asked the court to so interpret to the jury this part of defendant's answer, which the court did. If the rule contended for by plaintiff properly applies in this instance, and we think it does, then certainly the defendant cannot complain of the construction placed upon said pleading by the court.

Besides, it must be remembered that before this instruction was given the whole of the evidence in the case had been adduced in the presence and hearing of the court and jury, and we feel perfectly justified in saying that it would be impossible for any one to read the record in this case without being convinced, by the overwhelming testimony, that this marriage contract was never renounced nor abrogated by either of the parties, either in 1911 or at any other time prior to September 7, 1918. Except the paragraph heretofore quoted, all of the defendant's answer seems to proceed upon this theory, and all the evidence, defendant's as well as plaintiff's, except for the bare statement of defendant himself, that plaintiff said she would not marry him as long as his mother lived, which is denied by the plaintiff, tends to demonstrate that such was the fact. The defendant continued thereafter to visit the plaintiff almost daily up to the very day before she started for Rochester to have her operation performed, precisely the same as he had done all the years before, bestowing upon her presents, affection and caresses as only one engaged to be married would be expected to do. It is unbelievable, under the evidence, that either party understood that the marriage engagement had been broken at any time and that it did not exist at all times prior to September 7, 1918. Even under the defendant's own theory and statement he considered the consummation of the marriage contract suspended only, for in his cross-examination, after being asked if he did not continue to visit the plaintiff almost daily and bestow presents and affection and caresses upon plaintiff and treat her in all respects, after the incident of 1911, as he had done all the years before, and defendant admitting that he had, he was then asked this question: "Q. And while you were doing that, when you were doing all of that, did you consider the incident closed? A. I did not, I considered it closed as long as mother lived." So that, under the defendant's own theory or interpretation, the moment his mother died the mar-

riage contract would be revived in all its original force and effect. It was only by the defendant's own conduct on and after September 7, 1918, by his abandonment of plaintiff and the marriage contract and his refusal to have anything more to do with her, that the marriage contract was broken.

If this be the true situation, as we think it is, then the trial court made no mistake in its construction of that part of defendant's answer contained in instruction No. 16. If there was no error in giving instruction No. 16, as we think there was not, then instruction No. 18 became of little or no consequence, for, at most, it would leave the allegations of defendant's answer referred to in instruction No. 18 as amounting to no more than a specific denial of the existence of the marriage contract after 1911; an allegation directly inconsistent with his admission, as we have seen, in that part of his answer as construed in instruction No. 16, that there did exist "a continuing marriage contract or engagement to marry between the plaintiff and defendant for a period of several years prior to the commencement of this action." And as such inconsistent allegation, of course, it could not stand. "A pleading should be construed with reference to the general theory upon which it proceeds; and a pleading should not be uncertain as to which of two or more theories is relied on." Phillips, Code Pleading, sec. 354. Also, *Keenan v. Sic,* 91 Neb. 582.

But, again, we think the whole matter involved in instruction No. 18 was effectually disposed of, and any issue that may have been tendered by the allegation of defendant's answer in this respect sufficiently submitted to the jury by the court's first instruction to the jury on the merits of the case and after a statement of the issues. This instruction is designated as No. 12, and is as follows: "It is admitted by the pleadings and the testimony of both parties that there was an engagement or promise of marriage between them. Now, under the pleadings of this case, the burden is upon the plaintiff to prove by

a preponderance or greater weight of evidence that the plaintiff was ready and willing to marry defendant at all times after said engagement and that upon or about the 7th day of September, 1918, the plaintiff offered to marry him as she had promised and requested him to fulfil his promise to marry her."

By this instruction the trial court virtually told the jury that plaintiff could not recover at all unless she had established by a preponderance of the evidence all of the facts embraced in said instruction, including the fact that "plaintiff was ready and willing to marry defendant *at all times after said engagement.*" The jury, by its verdict for plaintiff, must have found that this last-stated fact was true. If it did, then it perforce must have found that there was no broken engagement in 1911, nor at any other time prior to September 7, 1918.

We are of the opinion that the exceptions to instructions No. 16 and No. 18 are not well taken, and the same are therefore overruled.

Certain medical gentlemen, Doctors Mitchell and Hayes, were called to testify in behalf of plaintiff, and to each was put a question, hypothetical in form, in substance, as follows: In a case where there has been more or less persistent courtship of a girl, beginning at the age of about 16, with an engagement to marry at 19, to a man ten years her senior, and this courtship continued from that period until she reaches the age of 40, she remaining a virgin and unmarried, what would be the natural effect of that experience on such virgin woman, as to her physical and nervous health, of the breaking of the engagement to marry by her affianced, and upon being told by him that he would not marry her?

To this question the defendant objected as invading the province of the jury, not a proper matter for expert testimony, and as immaterial and irrelevant. The objection was overruled, and Doctor Mitchell answered as follows: "I am not an authority on love and courtship, but I do know this: That there isn't anything that would

so upset the nervous system as love affairs and a broken engagement, whether in a woman or in a man; I think more in a woman than in a man." Doctor Hayes, to whom was propounded a similar question, answered, over a similar objection, as follows: "The effect might be decidedly exhaustive to her nervous system." The plaintiff then asked the witness: "Now, what would you say would be the natural tendencies of that experience?" To which the witness answered, over a like objection by defendant: "The natural tendency would be that the girl was suffering a depression, nervous depression, and a more or less nervous exhaustion."

The chief objection to these questions, as we view it, is the meagre foundation laid for expert testimony on the subject. We think plaintiff should have been required, first, to show what the actual physical and nervous health of the plaintiff was at the time she received the knowledge of the broken engagement, and then to have asked these witnesses, upon conditions shown, what would be the natural and probable effect on her physical and nervous health of a sudden knowledge of a broken engagement. For it is evident that all persons are not affected alike, under like circumstances. It depends much upon the nature and temperament of the individual as to how such an incident as the one in question would affect such individual. One might be prostrated with grief followed by serious physical and mental illness, more or less enduring, while another might accept it with comparative indifference. Nor does the same cause always produce the same effect upon the same person; it depends many times upon the particular condition of the physical and nervous health of the individual at the time, as also the circumstances under which the incident occurs.

But, with all this admitted, are the answers, as given by the witnesses, prejudicial to the defendant, so prejudicial as to require a reversal of the case? We think not. Conceding, as we may, the meagre basis supplied in this instance for the introduction of expert testimony, never-

theless we think that it cannot be said the situation was one entirely destitute of ground upon which evidence of this character might be admitted. It is but fair to assume that, by and through his observations and experiences in more or less constantly treating persons who have undergone an experience, or like experience, indicated by the facts involved in the hypothetical question, a practicing physician must gain some knowledge of the natural and probable effects such an experience would have upon the physical and mental health of such persons, which the average layman would not possess. This is all that is required, under the authorities, to entitle such evidence to be received. It is in evidence also that both these physicians had a long personal acquaintance with the plaintiff; Doctor Mitchell knowing and treating her occasionally ever since she was two years old, and Doctor Hayes having a personal acquaintance with her for at least 30 years. With this fact in the minds of the witnesses when they testified, as it doubtless was, the danger of any mistake in their answer, as applicable to the instant case, would be reduced to the minimum. We do not believe such error obtained in the introduction of this testimony as requires a reversal of the case, and the exceptions thereto are therefore overruled.

Complaint is also made that the court erred in admitting evidence of defendant's reputed wealth. Evidence was received from at least three witnesses as to defendant's reputation for credit and pecuniary wealth in the community in which he lived in September, 1918. But this was followed by instruction No. 25 to the jury: "That said evidence was not admitted for the purpose of proving defendant's ability to pay damages, but as tending to show the condition in life which the plaintiff would have secured by consummation of the marriage contract." There was no error in receiving this evidence, when limited, as it was, in its effect and purpose, by the above instruction. *Stratton v. Dole*, 45 Neb. 472, and cases therein cited. Besides, this evidence was followed by

further evidence of the same witnesses and others as to defendant's actual wealth, and in no instance, we believe, did the amount of his reputed wealth exceed that given as the amount of his actual wealth, and neither is anywhere materially disputed by the defendant. This assignment must also be overruled.

Upon the the assumption that the defendant has properly interposed the alleged existence of plaintiff's physical and mental illness as a defense to this action, he objects to certain instructions given and others refused on that phase of the case. There may be some question as to the theory upon which defendant was entitled to have this phase of his defense considered at all. It is true he recounts at considerable length in his answer the irritability of plaintiff, her physical, nervous and mental illness, unfitting her for the marital relation, and he and others testified to these facts as existing subsequent to and including the year 1916, but he nowhere, at any time, assigned this as a reason for refusing to marrying the plaintiff; but the sole and only reason assigned for his refusal, either in his answer or his evidence, up to and including September 7, 1918, the date of the last conversation between them on the subject, is that plaintiff refused to marry defendant so long as his mother lived. So it would seem that the only theory, if any, upon which defendant is entitled to avail himself of the defense of plaintiff's impaired health is a recognition of the present existence of the marriage contract, but that he ought not to be held liable for its breach because of plaintiff's unfit physical condition, and it is upon this theory only we feel warranted in considering this phase of the case.

The chief objections interposed by defendant on this branch of his case are to instructions No. 13 and No. 22, given by the court on its own motion, which may be considered together. Instruction No. 13 is as follows: "The defendant alleges that the plaintiff, in September, 1918, was afflicted by a disease that rendered her unfit for the marital relation. The burden of proof is upon the de-

fendant to prove by a preponderance of the evidence that the plaintiff was at that time afflicted by some disease that unfitted her permanently for the marital relation, and unless the defendant has so satisfied you by a preponderance of the evidence you should find against the defendant on such issue."

Instruction No. 22 is as follows: "In order that an illness of one of the parties to a contract to marry constitute a justification or excuse for the renunciation of the contract or refusal of the other party to consummate the marriage, it is necessary that such illness be permanent and incurable."

At first, we were strongly impressed with the belief that the giving of these instructions, particularly instruction No. 22, was error for which the case must be reversed. Upon mature consideration of the whole case, as reflected by the evidence, however, we conclude that the objections should be overruled. It is contended by the defendant that when the court instructed the jury, in instruction No. 13, that, before the defendant could avail himself of the defense pleaded, it was incumbent upon him to prove that at the time in question the plaintiff was afflicted with some disease which unfitted her *permanently* for the marital relation, and when, in instruction No. 22, the court told the jury that, in order that an illness of one of the parties constitute a justification for the refusal of the other party to consummate the marriage, it is necessary that such illness be *permanent* and *incurable,* is going too far beyond the rule established by the great weight of authority on this question. We think we will agree with the defendant that the court probably erred in requiring it to be shown that the alleged illness of plaintiff was *permanent* and *incurable.* We think the better rule in such case is something like this: Where disease or physical disability rendering it unsafe or improper to marry has developed in either party to the contract, without intervening fault on the part of the other, subsequent to the making of the con-

tract and before its consummation by marriage, such other party will be required to wait a reasonable time for a cure to be effected, and if such disease or disability proves to be of a permanent character, may refuse to carry out the contract. See 9 C. J. 339, sec. 31, and cases cited. But, as before stated, we think this case should not be reversed because of the error complained of. If with or without these instructions a verdict for plaintiff is the only verdict that could be rendered by the jury under the evidence, the case will not be reversed because of an erroneous instruction. *Stratton v. Dole*, 45 Neb. 472. The evidence imperatively demands a verdict for plaintiff in some amount, and the instructions referred to could not affect the amount.

In this connection it is perhaps proper to give a brief statement of what the evidence shows in regard to plaintiff's illness and the facts and circumstances surrounding the same. The undisputed evidence shows that in the spring of 1916, and after the contract of marriage between plaintiff and defendant had existed for nearly 20 years, during which time the plaintiff enjoyed almost perfect health, she became seized with pains in her neck, which gradually grew more severe and which caused her, at times, to be exceedingly irritable and nervous, with more or less loss of appetite, and so continued up to about July, 1918, although at no time, however, was she not able to be "up and about." In attempts to discover the nature of her illness she visited and consulted physicians in Lincoln, Chicago, and the Mayo Brothers at Rochester, Minnesota, but without, at that time, gaining further knowledge of the true cause of her ailment. She then visited California, where she spent some time with the hope that a change of climate would benefit her health, returning, however, but little improved. Some time thereafter it was discovered she was afflicted with goitre, and after advising with defendant what to do, stating that she would do whatever he said, in the month of June, 1918, she returned to the Mayo Brothers at

Rochester, where an operation for the removal of the goitre was performed, and where she remained under the doctor's treatment for a period of ten weeks, returning to her home at the end of that time, so runs the evidence, feeling "good and very happy." Doctor Mitchell, having examined the plaintiff after her return, testified that the goitre had been removed so that there was no longer any enlargement of the neck, and that the illness had in no way incapacitated her for the consummation of marriage or the performance of the marriage functions, including maternity.

It is undisputed that during the whole period of her illness, except for the short time plaintiff was absent from home for the purposes above stated, the defendant visited plaintiff almost daily, accompanied her and her sister on their trip to California, corresponding with her in her absence, and treated her with love and endearment in all respects as he had done throughout this especially long engagement, even up to the very evening before her departure for Rochester for the operation, when, as always, he bestowed upon her the embraces and caresses of a lover; yet never once, then or at any other time, intimated that he desired any modification of the marriage contract; but, on the contrary, upon an occasion shortly before her departure for Rochester, the plaintiff, in speaking to defendant of her illness, and stating to him that, if he ever got tired of her or came not to care for her, she hoped he would tell her so and they would fix matters up in some way, the defendant made answer, as testified to by plaintiff, "He said he never would give me up as long as there was a breath in my body." It was not until plaintiff returned from Rochester "good and very happy," as plaintiff and others testified, that defendant manifested a disposition to have no further relations with her and to abandon the engagement. Under these undisputed facts and circumstances, we submit that the only verdict that could be rendered is one for plaintiff, and, that being

true, the objections to the instructions last referred to will be overruled.

Objections are made to a number of other instructions directed to the merits of the case, but to comment on each separately would extend this opinion to an unnecessary length. Suffice it to say they have all been examined and considered, and we find no error in any or all of them to justify criticism.

Again, objections are made to numerous so-called "instructions," but which, although paragraphed and numbered, consist simply of a recital of facts alleged in the pleadings. Some of these, however, contain averments of the pleadings to support which no evidence was offered. This is not good practice and ought to be avoided, as far as possible, and the court should submit to the jury only such issues in support of which at least some evidence has been admitted.

The final objection of defendant is that the verdict is excessive, and to such an extent as unmistakably shows passion and prejudice on the part of the jury that rendered it. While the amount awarded may be somewhat more than should be permitted to stand, we are not of the opinion that it is excessive to such an extent as indicates passion or prejudice on the part of the jury, demanding a retrial of the case, or that, under the rule, forbids this court from properly adjusting the amount to be awarded.

There is no doubt but the plaintiff is entitled to a substantial sum for the breach of this contract. She gave up more than 20 years of her young life to the defendant's courtship of her, materially aiding him in his business and social life throughout this long period, excluding herself in the meantime from the attentions of all others and the opportunities which might have been hers to contract marriage with another, until now she has reached an age quite beyond the ordinary marriageable age of a maiden. On the other hand, it must be said to the credit of the defendant that throughout all the years of his engagement to plaintiff his relations with her have never been

other than honorable, kind and indulgent in every respect until the final breach occurred.

The evidence shows both the reputed and actual wealth of the defendant, at the time of the breach, to be all the way from $50,000 to $75,000. The actual wealth of defendant is by no means the sole basis on which damages in a case of this nature are to be measured, but it is a circumstance which will be considered in fixing a proper amount. We are of the opinion that justice will be fully subserved by a reduction of $5,000 from the judgment as awarded, leaving a judgment of $17,000 as the amount to be recovered.

The order will therefore be that, if within 20 days from the filing of this opinion the plaintiff file in this court a remittitur of $5,000, the judgment so reduced will be affirmed; otherwise, the case will stand reversed and a new trial ordered.

AFFIRMED ON CONDITION.

ALDRICH, J., dissents.

BARNEY MCSHANE, APPELLEE, V. CORNELIUS MURRAY ET AL., APPELLANTS.

FILED JULY 7, 1921. No. 21682.

1. **States: ACTION: WAIVER.** Where by its Constitution the state is immune from suits against it except as the legislature otherwise provides, the immunity thus provided cannot be waived by a voluntary general appearance in the case and a participation in the trial thereof upon its merits by the attorney general in an unauthorized action brought against the state.
2. ———: **UNAUTHORIZED ACTIONS.** A decree rendered against the state under the circumstances above stated is void as against the state, and upon appeal to this court will be vacated and set aside in so far as the same seeks to bind the state.
3. **Dismissal and Nonsuit.** Such dismissal of the state from the litigation, however, does not affect the action against other defendants against whom the plaintiff had a right to maintain a suit.

4. **Boundaries: ESTABLISHMENT: SUFFICIENCY OF EVIDENCE.** In a dispute arising between plaintiff and defendants as to the true boundary line between their adjoining lands, the sole question depended upon the genuineness of a certain alleged original government quarter corner. The trial court found for the plaintiff and established the corner as contended for by the plaintiff. Evidence examined, and *held* to support the decree of the lower court.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed in part, and reversed in part.*

Clarence A. Davis, Attorney General, and *Mason Wheeler,* for appellants.

J. E. Gilmore and *J. H. Edmunds, contra.*

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., DICKSON and TROUP, District Judges.

TROUP, District Judge.

This is a suit for an injunction. Plaintiff is the owner and in possession of the southeast quarter of section 25, township 32, range 46, and defendant, Cornelius Murray, is the lessee and in possession of the north half of section 36, same township and range, and all in Sheridan county, Nebraska; the latter description being a part of the school land owned and leased by the state of Nebraska and coming to the defendants Murray in 1911 through mesne assignments of the lease, and lying immediately south of said section 25.

A dispute having arisen between the plaintiff and defendant Murray as to the location of the true boundary line between the two sections, and plaintiff claiming that the defendants were undertaking to enter upon and cultivate a portion of the land lying within the disputed tract, but which plaintiff alleges belongs to him, he instituted this action in April, 1917, to enjoin the defendants from so doing. Upon presenting plaintiff's petition to the judge of the district court for Sheridan county, a restraining order was issued against the defendants ac-

cordingly, and the same remained in force and effect until the final decree in June, 1920.

At the commencement of the action, Cornelius Murray and John Murray, only, were made defendants. A year thereafter, however, but without leave of court to make additional parties defendant or to issue summons therefor, a summons was issued against and served upon the state of Nebraska, commanding it to answer it in the usual time thereafter.

None of the defendants having answered, on February 5, 1920, the court entered an order requiring all defendants to answer the petition of the plaintiff on or before March 8, 1920. Without interposing any objection to the action thus taken by the plaintiff in seeking to bring the state into the litigation, on February 20, 1920, the state filed its answer, setting out the fact that the state was the owner of the land referred to in section 36; that it had leased the same to its codefendants herein and put them in possession thereof; that it had theretofore caused said land to be surveyed, and that the disputed tract falls within the boundaries of section 36, and asked that plaintiff's action be dismissed. At about the same time the defendants Murray filed their joint answer, in which they set forth substantially the same facts as contained in the answer of the state. The plaintiff replying denied all new matters set forth in the respective answers.

A trial was had to the court, and on June 17, 1920, a final decree was rendered by the court, finding generally for the plaintiff and against all the defendants; found the boundary line between the two sections to be as claimed by the plaintiff; found the corner designated in the evidence as the "McShane" corner to be the location of the original government quarter corner, and established the same as such by the decree, and made the restraining order theretofore granted a perpetual injunction. The defendants appeal.

The appellants first contend that the plaintiff has no lawful right or authority to sue the state in an action like

the present one and was without authority or legal right to make it a party to the litigation, and cites authorities in support thereof. We are constrained to hold that the position of the state on this point is well taken and must be sustained. Section 22, art. VI, of the Constitution of Nebraska, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." Under this provision, of course, no action can be brought against the state unless and until the legislature has so provided. The legislature of the state has acted in pursuance of this provision of the Constitution and has specified certain classes of actions which may be brought against the state. Rev. St. 1913, sec. 1177. In the case of *State v. Stout*, 7 Neb. 89, this court held that the section of the statute above referred to "covers all the various claims and demands on which the state may be sued." See, also, *State v. Mortensen*, 69 Neb. 376. It is quite evident that the action at bar is not one within any of the classes mentioned in said section of the statute, and we are not cited to, nor are we aware of, any other provision enacted by the legislature since, which would authorize the maintenance of an action in the nature of the one at bar against the state. Indeed, judging from the entire silence of plaintiff's brief on the subject, we assume that plaintiff is not resisting this claim made on the part of the state. Of course, if the plaintiff had no authority or legal right to make the state a party to this action or maintain this suit against it, the voluntary appearance by the attorney general in behalf of the state and his failure to object to the jurisdiction of the court over the state did not, and could not, in any wise bind the state so as to make the decree rendered against it of any validity. The exception of defendants in the particular stated is therefore sustained, and so much of the decree of the lower court as purports to adjudicate the matters in suit against the state is vacated and set aside and the action as against the state dismissed.

However, a dismissal of the state from the litigation does not affect the action as to the other defendants. The plaintiff would still have the right of action against them personally to restrain them from taking possession of premises already in the possession of plaintiff. And this brings us to a consideration of the case upon its merits.

In 1882 a government survey was made of the two sections involved in this controversy and adjacent sections, at which time the section corners and some, perhaps all, of the quarter section corners were located and marked. This dispute as to the location of the true boundary line having arisen, the defendants Murray, in the year 1914, applied to the state commissioner of public lands and buildings to have the correctness of the former survey of section 36 tested, in pursuance of the provisions of sections 5563, 5564, and 5566, Rev. St. 1913. In pursuance of the authority conferred by these provisions of the statute, the commissioner of public lands and buildings delegated one E. C. Simmons, then deputy state surveyer, to make a retracement survey of these lands with a view of definitely establishing the boundary line between the two sections. In March, 1914, Simmons made a retracement survey and filed his report thereof accompanied by a blue-print or diagram of the premises, a copy of which, with the various notations thereon, being attached to the record herein. The chief and about the only point of contention now is which one of the two points shown upon this plat is the original government quarter corner, that marked by the red letter "A" and designated in the evidence as the "McShane" corner, or the one marked by the red letter "B" and designated in the evidence as the "Simmons" corner. As before stated, the court found the "McShane" corner to be the true one and so decreed. Deputy state surveyor Simmons in his retracement survey in 1914 rejected the McShane corner as not being an original government quarter corner, and established what he claimed should be the original government quarter corner

at "B" or Simmons corner. The statute above referred to (section 5564) provides that, when such survey shall have been made and properly approved, filed and recorded, it "shall be *prima facie* evidence of the correctness thereof." Is the *prima facie* case thus made, together with such other testimony introduced tending to support it, overcome by direct and positive evidence against its correctness? We think it is.

The plaintiff testified that in the year 1885 (three years after the original survey was made) he, with other members of the McShane family, first went into possession of the southeast quarter of section 25 as homesteaders and has occupied it ever since; that sometime in July, 1885, he first discovered the now so-called "McShane" corner, has been familiar with it ever since, and described it as consisting of two pits and a mound, just the same as all the other government corners and corresponding in line with other government corners to the west; that they built their house about 20 or 30 rods north of this quarter corner; that a number of years later one Ball, the then county surveyor of Sheridan county, was engaged by them to do some surveying in that vicinity, and at that time they had him build up this corner a little more and dug out the pits to do it with, and that Ball at that time put a brick in the mound, but, with this exception, left it just the same as it was before and as it has been since. John McShane, brother of the plaintiff, corroborated the plaintiff in his evidence in all material respects.

Witness Sage testified that in the year 1887 he leased the school section in question for a horse pasture, and, in endeavoring to locate its boundaries in company with the plaintiff, the plaintiff at that time showed him the quarter corner now called the "McShane" corner, that he examined it and took it to be a government corner, but because it was a short section he abandoned the lease.

Witness Linden testified that his homestead was just east of the school section, where he had lived since 1884; that he was acquainted with the boundary lines and sec-

tion corners in that vicinity; that he first saw what is called the "McShane" quarter corner in 1885, and that it looked to him like all the rest of the quarter corners around there, and was in line with the rest of the corners to the west, but not with those to the east.

Surveyor Simmons, called in behalf of the defendants, testified that he had been surveyor and civil engineer since 1875 and had done a great deal of retracement of old lines; that he had made the retracement of the boundary line of section 36 in this case; that, after locating the four original government section corners, he went to and examined the corner now called the "McShane" quarter corner, which he said seemed to have been recently built, and had two large pits and a mound with a brick in it, which he said compared with other corners established by former county surveyors, and that the government did not use bricks in establishing its corners. Upon being asked: "Did the physical marking of the McShane corner differ in any other way from the markings of government corners?" he answered: "I don't know as it does, I don't recall any special features." Being of the opinion that the quarter corner called the "McShane" corner, marked "A" on the plat, was not the original government corner, Simmons rejected it and located the quarter corner at the point marked "B" on the plat and called the "Simmons" corner.

Witness McCarthy testified that he had been a surveyor since 1868, and is the present county surveyor of Sheridan county; is familiar with the corners of section 36; first saw the McShane corner about ten years ago; consisted of two pits and a mound with a brick in it; pits were large and were in northeast and southwest direction, and, after making some measurements respecting it, thought something peculiar about it and could not give it credit for being the original corner.

Cornelius Murray, one of the defendants, testified that he had lived in Sheridan county for 35 years, and on section 36 since 1911; is familiar with the government

corners of 36; first saw the McShane corner about 1900; in June, 1885, he and the plaintiff herein, having located the northeast government corner of 36, secured a surveyor's chain and chained pretty straight west for half a mile to locate the quarter corner, but could not find it, although they hunted all around, and is positive it was not there in June of that year.

Three other witnesses testified on behalf of the defendants. One who had lived in the vicinity since 1884 said he first saw the McShane corner in 1890, but could not say it was not there before. Another who lived in the neighborhood since 1905 said he first saw it about ten years ago. Another who had lived in the vicinity since 1887 first saw the McShane corner sometime in the nineties. This closes the testimony on the subject except a few field notes which will be referred to presently.

Of course, the testimony of these witnesses who say they did not see the McShane corner until a greater or less number of years after 1885, but who had never endeavored to see it and had no interest in its discovery or location, avails little or nothing as against the positive evidence of persons who actually did see it in 1885 and have been familiar with its existence ever since that time. So it seems to us that we are compelled either to find that the four witnesses—the plaintiff, his brother, Sage, and Linden—swore falsely, or accept as a fact conclusively established that the McShane corner, such as it was, was in existence at the point claimed by the plaintiff as early as 1885 at least. If so, what proved fact or even suspicion under the evidence justifies a finding that said corner is not a genuine government corner? The defendants have introduced certain field notes of the 1882 survey which they claim are in corroboration of their theory. It is doubtful whether in this case recourse may be had to the field notes to contradict the genuineness of the McShane corner as established by the evidence. The case of the *State v. Ball*, 90 Neb. 307, seems to announce the correct rule in this respect:

"Monuments erected by the government surveyor to mark the section corners according to his survey will control, although in conflict with his field notes. If the monuments have been obliterated, but their location can be ascertained from a consideration of the testimony of witnesses who know and testify to the fact, the site thus established will control. If the monuments have been destroyed and their original location cannot be established by other proof, recourse may be had to the field notes of the original survey."

The McShane corner was discovered in the summer of 1885, but three years after the original survey, and at the time when and by the first settlers who went upon that land and all described it as looking like all the other government corners. It has never been obliterated or destroyed, but has been a known corner ever since. Under the rule above stated it would seem that the field notes cannot be permitted to displace a fixed corner thus established. Besides, the field notes are not corroborated by the discovery of a monument of any character, pits, mounds, sandstone or anything else in the vicinity of the so-called "Simmons" corner, although no doubt diligent search has been made for the same. It is true that the line connecting the McShane corner with the northwest and northeast corners of the section is not a straight line, and that, to our minds, is the strongest evidence against the genuineness of the McShane corner, but neither will courses and distances be allowed to prevail over original government corners convincingly established by evidence. We have much respect for the opinions of the witnesses Simmons and McCarthy as practical and experienced surveyors and believe they honestly entertain a doubt that the so-called McShane corner is the true original government corner, but we think the evidence does not support such doubt. We think the decree of the lower court, as to the defendants other than the state, was right and should be affirmed.

As before stated, so much of the decree of the lower

court as purports to adjudicate the matters in suit against the state of Nebraska is vacated and set aside and the action as against the state dismissed. As to the other defendants, the decree is affirmed.

JUDGMENT ACCORDINGLY.

DANIEL H. BURTON, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JULY 7, 1921. No. 21701.

1. **Negligence:** QUESTION FOR JURY. "Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established." *City of Omaha v. Houlihan*, 72 Neb. 326.
2. ———: ———. Evidence in the case at bar examined, and *held*, the same required the application of the rule above quoted.

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

Hall, Baird & Williams, for appellant.

H. N. Mattley, contra.

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., DICKSON and TROUP, District Judges.

TROUP, District Judge.

The plaintiff, Daniel H. Burton, brings this action against the defendant, Lincoln Traction Company, to recover damages for personal injuries to himself alleged to have been sustained through the negligence of the defendant company by a collision of one of the defendant's street cars with plaintiff's team and wagon at the intersection of Twenty-seventh and W streets in the city of Lincoln.

The negligence charged against the defendant is that, just before and at the time the accident happened, it was running its car at an unreasonable and reckless rate of speed, and that it was negligent in the operation of said car in that it failed to keep the same under proper control as it approached the intersection where the accident occurred, and although the plaintiff, before and at the time he entered upon said intersection, was in plain view of the defendant's motorman operating said car, he negligently failed to reduce its speed or give plaintiff timely warning of the approach of said car, thus colliding with plaintiff's wagon and injuring the plaintiff.

The defendant, answering, denies the averments of negligence attributed to the defendant, and alleges that the injuries received by the plaintiff were due to the negligence of the plaintiff in attempting to cross the defendant's track in front of the defendant's moving car under such circumstances that it was impossible for the operator of said car to avoid the accident.

The reply of plaintiff denies the allegations of the answer attributing negligence to the plaintiff. A trial of the case before court and jury resulted in a verdict and judgment for plaintiff, from which defendant appeals.

The defendant having made a motion for a directed verdict at the close of plaintiff's evidence, and renewing the same at the close of all of the evidence, and making a like complaint on its motion for a new trial, which motions were all overruled, now submits three assignments of error, but all of the same import, which may be summed up in the single statement: "That the testimony in the case established the gross negligence of the plaintiff and failed to establish any negligence on the part of the defendant." It seems to be agreed by both the plaintiff and the defendant, in which agreement this court concurs, that the above proposition, in turn, resolves itself into the question whether upon the whole case the evidence was such as required its submission to the jury, or should a verdict have been directed for the defendant.

It is in evidence that when plaintiff drove his team and wagon across the defendant's track about 100 yards south of the intersection where the accident happened, for the purpose of driving north on the right-hand side of the street, he looked both north and south and saw no car at all to the south and was certain there was none nearer than Vine street, 100 yards away. He then drove north on Twenty-seventh street parallel with defendant's track at the rate of about 4 or 5 miles an hour for the distance of about 150 feet, which took him to the intersection of Twenty-seventh and W streets, where the accident occurred. It is admitted by the plaintiff that he did not again look south for an approaching street car before venturing to cross defendant's track at the W street intersection. This fact alone, however, is not necessarily conclusive evidence of negligence. It depends much upon what consideration should be given to the fact that the plaintiff had looked for street cars to the south a moment or two before and saw none. In the case of *Fairbanks v. Bangor, O. & O. R. Co.*, 95 Me. 78, it is said: "There is no absolute rule of law that a person riding along a street must look and listen for an approaching car before entering upon the track of an electric railway. Whether his failure to look and listen amounts to negligence must be determined from all the facts and circumstances proved." See, also, *Robbins v. Springfield Street R. Co.*, 165 Mass. 30; *Watson v. Boone Electric Co.*, 163 Ia. 316; *Callett v. Central California Traction Co.*, 36 Cal. App. 240; *Wallenburg v. Missouri P. R. Co.*, 86 Neb. 642.

But, even assuming that the act of the plaintiff in attempting to cross the intersection under the circumstances he did was negligence on his part, neither would this fact alone necessarily bar plaintiff's right to recover. The plaintiff's right to recover would still depend upon the conduct of the defendant and the manner in which it operated its car in approaching the intersection while plaintiff was in the act of making the crossing, and whether the defendant was negligent or not in the opera-

tion of its car at this point, under all the facts and circumstances disclosed by the evidence. "Negligence of plaintiff in driving across a street railway track without stopping to look and listen will not excuse the company from its duty to use reasonable diligence to stop its car after discovering the perilous situation, and if its failure to do so, after seeing the danger, directly and immediately causes an injury to him, the company may be held liable for such injury." *Omaha Street R. Co. v. Larson*, 70 Neb. 591. See, also, *McKennan v. Omaha & C. B. Street R. Co.*, 97 Neb. 281. This was the rule of law even when any act of contributory negligence of the plaintiff would bar recovery. *Harris v. Lincoln Traction Co.*, 78 Neb. 681. A double reason exists for the recognition of the rule at this time, in view of the comparative negligence statute. Rev. St. 1913, sec. 7892.

The motorman in charge of the operation of defendant's car testified that he first saw the plaintiff when he came out of the lumber yard with his team and wagon and crossed the street to the right-hand side thereof and proceeded northward at the time the defendant's car was crossing Vine street, 450 feet to the south, and that he had the plaintiff in plain view from that time until the collision at or near the intersection of W street; that he was running from 8 to 10 miles an hour and could stop his car, when running at that rate of speed, within 25 or 30 feet; that when within about 35 feet of the plaintiff he sounded the gong, and that when it became apparent that plaintiff was attempting to cross the track the car was between 20 and 25 feet away from plaintiff's wagon, "then I applied the air, that is all there is to it;" that the defendant's car then hit the wagon, but not hard enough to jolt it much, and the car stopped exactly where the wagon was hit.

The plaintiff testified that he was upon the crossing when he first saw defendant's car; that his attention was first attracted to it by the ringing of the bell, and which seemed to him at that time was about 50 or 60 feet away,

but that it was upon him in an instant; that the car hit his wagon two times, and that it was the second time that caused him to be thrown from the wagon and injured.

Other witnesses also testified to different versions as to how the accident happened, but we think enough has been stated to show that there was such a conflict in the evidence upon material issues as to require a submission of the case to the jury. "Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established." *City of Omaha v. Houlihan*, 72 Neb. 326. See, also, *Kafka v. Union Stock Yards Co.*, 87 Neb. 331.

We think the conflict in the evidence in the case at bar required the application of the rule above quoted. The trial court submitted all the issues concerning which there was a conflict of testimony to the jury by appropriate instructions, to which no complaint is made. We think the court did not err in so doing, and the judgment below is, therefore,

AFFIRMED.

STOCKMEN'S STATE BANK, APPELLEE, V. H. G. FISHER, APPELLANT.

FILED JULY 7, 1921. No. 21733.

1. **Bills and Notes: BONA FIDE PURCHASER: INSURANCE PREMIUM NOTE.** Where the statute provides that "it shall be unlawful for any company or agent thereof to hypothecate, sell or dispose of a promissory note, received in payment for any part of a premium on a policy of insurance applied for under the provisions of this chapter, prior to the delivery of the policy to the applicant" (Rev. St. 1913, sec. 3291), and it appears from the testimony that the applicant for insurance executed and delivered his note to the agent for the insurance company for the premium therefor, which agent almost immediately, and before the policy of insurance had

been delivered to the applicant, sold and transferred said note to the plaintiff bank, with full knowledge on the part of said bank of the purpose for which said note had been given, and that the policy, for the premium on which said note had been given, had not been delivered to the maker of said note, *held*, that plaintiff was not a *bona fide* holder of said note and could not recover thereon.

2 **Cases Distinguished.** The cases of *Citizens State Bank v. Nore*, 67 Neb. 69, and *Bank of College View v. Nelson*, *ante*, p. 129, referred to in the opinion, commented upon, and distinguished.

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

W. A. Stewart and *John H. Linderman*, for appellant.

George C. Gillan, contra.

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., DICKSON and TROUP, District Judges.

TROUP, District Judge.

This is an action upon a promissory note for $165.75, which plaintiff alleges was executed and delivered to one T. A. McCrystal on April 30, 1919, due September 1, 1919, and by McCrystal sold and transferred to the plaintiff, in due course, for a valuable consideration, and without notice of any defense to the same. The note not having been paid by the defendant when due, plaintiff prays judgment for the amount of said note and interest.

The defendant, answering, denies that plaintiff is the owner of the note in suit, and denies that he is indebted to the plaintiff in any sum whatever, but alleges that the note in question was given by the defendant to one T. A. McCrystal, as the agent of a certain hail insurance company, and in payment of a premium on a policy of insurance to be issued by said company to the defendant against damage by hail; that on the same day on which said note was given said McCrystal sold and delivered the same to the plaintiff; that at the time of the sale and delivery of said note by McCrystal to the plaintiff the said policy of insurance had not been delivered to the

defendant, all of which the plaintiff well knew at the time it purchased said note; that at the time defendant made application for said insurance he informed McCrystal that he already had a certain amount of insurance on his crops, whereupon McCrystal expressed some doubt as to whether further insurance could be contracted for, but that he would receive defendant's application subject to the acceptance of the same by the company; that the defendant was never informed by any one that said application had ever been accepted until after the crops professed to be protected by said insurance had been harvested and said note became due; that said defendant never received a policy for said insurance at any time; that the attempted transfer of said note was unlawful and in violation of the statute of this state, and the defendant invokes said statute as a complete defense to this suit. The reply of plaintiff denies all new matter pleaded in the answer. On a trial of the case to the court, without a jury, the court found for the plaintiff and awarded judgment for the full amount of said note, with interest and costs. A motion for a new trial having been made and overruled, the defendant appeals.

The statute referred to in defendant's answer is as follows: "It shall be unlawful for any company or agent thereof to hypothecate, sell or dispose of a promissory note, received in payment for any part of a premium on a policy of insurance applied for under the provisions of this chapter, prior to the delivery of the policy to the applicant." Rev. St. 1913, sec. 3291.

The undisputed evidence shows that on April 30, 1919, on solicitation therefor by one McCrystal, an agent for a certain hail insurance company, the defendant gave to McCrystal an application for a certain amount of hail insurance upon defendant's growing crops, upon which some insurance already existed; that, because of some doubt expressed as to whether the insurance company would accept the application for the increased insurance, McCrystal stated to the defendant that he would

receive the application subject to the company's acceptance of the same; that at the same time the defendant executed and delivered to McCrystal the note in suit; that on the same day, or the day following the giving of the note and application to McCrystal, and before the application had been accepted by the insurance company, or a policy of insurance delivered to the defendant, McCrystal sold and disposed of defendant's note to the plaintiff herein.

Under these undisputed facts, the act of McCrystal in selling and disposing of this note to the plaintiff was a direct and positive violation of the statute above quoted, and constituted the transaction an utterly illegal and void one, so far, at least, as McCrystal is concerned. We assume that this much must be and probably is conceded by the plaintiff. So that the only question left in dispute, and the only one for us to determine, is, did the plaintiff purchase and receive the transfer of said note from McCrystal under such conditions and circumstances as will entitle it to recover thereon?

There are some other facts practically undisputed which apply to the plaintiff's participation in the selling and purchasing of this note. These are that the plaintiff knew, before and at the time it purchased this note from McCrystal, that the policy of insurance, the premium for which this note was given, had not been delivered to the defendant, for plaintiff bought it either on the very day or the day following its execution and delivery by the defendant to McCrystal. In the very nature of things Ralston, the president of the plaintiff bank, and who represented the bank in this transaction, knew that it was a practical impossibility for the policy to have been executed and delivered to the defendant before that time. Besides, there is conclusive evidence that Ralston had actual knowledge of and understood the fact that the policy had neither been issued nor delivered to anybody at the time he purchased this note, for he testified that he was familiar with the business of writing hail insurance,

and had, himself, much experience as a solicitor, and knew that a hail insurance company would not send a policy to the insured until the cash for the premium had been received by it, and that one of the reasons why he purchased the note was to furnish to McCrystal the cash to send this company in payment for this and other policies.

Under these facts and circumstances, therefore, can plaintiff claim it took the note free of its infirmity and recover thereon regardless of the situation? If it did and can, then it was folly to have written this provision into the statutes, for to sanction such a transaction would defeat the sole and only purpose and object of the statute, namely, to prevent irresponsible insurance companies and their agents from realizing on the obligations of applicants for insurance before delivery of the policies, and without giving them the protection contracted for.

It is said the statute does not inveigh against the purchaser of a note thus hypothecated, but against the seller only. It is true the statute does not, in express terms, make the act of purchasing a note, under the circumstances stated, unlawful. Nevertheless, plaintiff, in taking the part it did in the transaction, certainly violated the spirit of the law. As said in the defendant's brief, there could be no seller without a purchaser, so that when plaintiff purchased said note he knew McCrystal, the holder thereof, had no lawful right to sell it, and that it was a direct violation of the written statute for him to do so. With full knowledge of this fact, plaintiff actively aided and abetted McCrystal in the commission of the unlawful act, and without whose aid the unlawful act could not have been committed. In our opinion such an act on the part of the plaintiff is an assault upon the law, as well as upon good morals, whether a particular statute made it so or not, which this court will not sanction nor encourage by aiding the

one so offending to recover on an alleged cause of action based solely upon the unlawful transaction.

"The maxims '*Ex turpi causa non oritur actio*' and '*Ex dolo malo non oritur actio*,' founded as they are on sound morals, have for a long time been applied by courts in the practical administration of justice. Under the doctrine expressed in these maxims it has been said that no court will allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. * * * The general rule that no action can be based on an illegal contract is therefore not open to question." 6 R. C. L. 816, sec. 215. In *Rudolph v. Winters*, 7 Neb. 125, it is said: "Whenever a claim is bottomed on an immoral or illegal transaction, no right whatever can be founded upon such contract which the law will sanction or the courts maintain."

The plaintiff cites the case of *Citizens State Bank v. Nore*, 67 Neb. 69, as authority for the contention that plaintiff has the right to recover on the note in suit. We think the case is not in point. The bank, in the case cited, had no knowledge of any infirmity in the note purchased. In the opinion it is said: "Brett (the seller of the note) was a stranger in the town and the cashier had seen him only once before, but there is no evidence that the cashier or any of plaintiff in error's officers or agents had any knowledge or notice of the purpose for which the note was given." And, therefore, the court held the purchaser to be a *bona fide* holder. In the case at bar, however, the plaintiff bank had full and complete knowledge of the infirmity of the note purchased, and therefore was not a *bona fide* holder, neither was it an innocent purchaser under the negotiable instruments act. Rev. St. 1913, sec. 5374.

It may, perhaps, be proper here to call attention to the case of the *Bank of College View v. Nelson*, *ante*, p. 129

In that case this court held, through ROSE, J., delivering the opinion: "As a general rule, courts will not refuse to enforce a bank's contract for the loan of money, or disallow damages for a breach thereof, merely because the amount lent exceeds 20 per cent. of the capital and surplus, notwithstanding a statute penalizing the banker for exceeding that limit." In the body of the opinion it is said: "In limiting the amount of an individual loan to 20 per cent. of the capital and surplus and in directing punishment for exceeding that limit, the statute established a rule for the government of the bank."

The statute in the case referred to was not enacted for the particular purpose of protecting the borrower, but as "a rule for the government of the bank." Here, in our opinion, lies an important distinction between the case referred to and the one at bar. The statute in the case at bar was evidently enacted for the express purpose of protecting the maker of a note, executed under the circumstances indicated, who had no part in its unlawful transfer, yet who may be grossly defrauded by such transfer except as he is protected by the statute.

We think the court erred in rendering a judgment for the plaintiff, and the same is

REVERSED.

CARTER TRANSFER & STORAGE COMPANY ET AL., APPELLANTS, V. ALLEN S. CARTER ET AL., APPELLEES.

FILED JULY 15, 1921. No. 21452.

1. **Trade-Name:** UNFAIR COMPETITION. Where an established business with a trade-name representing good-will is drawn into competition by a recent rival wtih a name so similar and so displayed as to be likely to mislead the former's customers and the public, the denial of a purpose to do so has little weight in the defense of a suit to prevent such a wrong.

2. ———: ———: INJUNCTION. Equity may enjoin the use of a truck painted white with the name "Carter Brothers Transfer"

displayed thereon in red letters, where it has recently come into competition with a formerly established business built up under the trade-name of the "Carter Transfer & Storage Company," a trade-name representing good-will, and displayed in red letters on trucks painted white, the similarity being such as to be likely to mislead the public and the customers of the latter company.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Reversed, with directions.*

F. C. Foster, O. K. Perrin and *S. M. Kier,* for appellants.

Stewart, Perry & Stewart, contra.

Heard before MORRISSEY, C.J., DAY, DEAN, LETTON and ROSE, JJ.

PER CURIAM.

This is a suit in equity to enjoin Allen S. Carter and David O. Carter, defendants, from using in Lincoln for the transportation of freight for hire any truck, van, or other vehicle, while painted white, with the name "Carter Brothers Transfer" thereon in red. The trial court dismissed the suit, and plaintiffs have appealed.

The controlling facts are not in dispute. There are two plaintiffs and both are corporations. For more than 12 years one of the plaintiffs, the Carter Transfer & Storage Company, was engaged in the business of transporting freight for hire in Lincoln and vicinity. Its name appeared on its letter-heads and other stationery. It had over 500 contracts in its corporate name. It had many trucks and vans which it used on the public streets and at the railway stations. These were painted white and there was displayed thereon in red letters the trade-name of "Carter Transfer & Storage Company." In that name the corporation acquired a good reputation and established an extensive, profitable business. Prior to 1919, no one by the name of Carter, except those connected with the Carter Transfer & Storage Company, had been engaged in the business of transporting freight for hire in

Lincoln. The other plaintiff, the Globe Delivery Company, was and is also engaged in the business of transporting freight for hire in Lincoln. In April, 1919, the business of the two corporations was consolidated and it has since been carried on partly in the name of one and partly in the name of the other. The principal owners of the stock of the Globe Delivery Company bought the capital stock, business and property of the Carter Transfer & Storage Company, including its good-will and the right to use its name, letter-heads, other stationery, trucks and vans. The original contracts for the transportation of freight were carried out in the name of the Carter Transfer & Storage Company and its letter-heads and other stationery have been used for that purpose. Some of the vans and trucks as originally painted white with the trade name displayed thereon in red have been continuously used without change since the consolidation. Other vans and trucks now in use bear the names of both corporations, the Globe Delivery Company as successor to the Carter Transfer & Storage Company. In this manner the new management has sought to retain as property owned by plaintiffs the good-will of both corporations. Prior to the consolidation each of the two defendants, Allen S. Carter and David O. Carter, had been connected with the Carter Transfer & Storage Company in one capacity or another as stockholder, officer or employee. They are sons of the founder of the business enterprise conducted in that corporate name.

While the business of plaintiffs was being conducted in the names and in the manner outlined, defendants engaged in the same business in the same place and used on the public streets of Lincoln and at the railway stations a truck painted white with the name "Carter Brothers Transfer" displayed thereon in red letters.

Defendants plead and testify that they are not using the name "Carter Brothers Transfer" and their truck for the purpose of deceiving the public and the customers of plaintiffs or for any purpose of diverting the business of

plaintiffs to themselves. They further plead and testify that they are engaged in the business of transporting freight for hire under their own name, as they claim a right to do, operating their truck honestly in good faith for the purpose of doing a legitimate business.

The uncontradicted proof, nevertheless, shows that at least two regular customers of the "Carter Transfer & Storage Company" gave their business to "Carter Brothers Transfer" after the latter in that name became a competitor, that the mail of the two rivals is often confused, and that freight is sometimes mixed at the railway stations. Defendants have not been contented to use their own names without employing words in the name of their competitor or without imitating the latter's method of display. They have utilized their patronymic with "Brothers" and "Transfer" in red letters on a white background on their truck. As thus displayed before the public there is a marked similarity between the name "Carter Transfer & Storage Company" and "Carter Brothers Transfer." Without regard to the intentions of defendants the similarity is well calculated to mislead the public and customers of plaintiffs into believing that "Carter Brothers Transfer," thus displayed on the truck, is the name of the identical business established by the "Carter Transfer & Storage Company" during years of rectitude and efficient service.

Good-will in connection with a business is property. The owner of a business and of the property used in conducting it is the owner of the good-will. The name is the trade designation of the business to which the good-will attaches. The unfair use of a new artificial name by competitors, where the effect is to transfer to them good-will of a business previously established by others under a similar trade name, is a misappropriation of property. The good-will of the Carter Transfer & Storage Company belongs to plaintiffs, and not to defendants. It is intangible property which a court of equity may protect. The modern rule, founded on business integrity and fair com-

petition and supported by the better reasoning, is: Where an established business with a trade-name representing good-will is drawn into competition by a recent rival with a name so similar and so displayed as to be likely to mislead the former's customers and the public, the denial of a purpose to do so has little weight in the defense of a suit to prevent such a wrong. 26 R. C. L. 873, sec. 51, 885, sec. 60; *Payn's Sons Tobacco Co. v. Payette*, 149 N. Y. Supp. 183; *Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 100 Me. 461, 4 L. R. A. n. s. 960, and note; *W. B. Mfg. Co. v. Rubenstein*, 236 Mass. 215, 11 A. L. R. 1283; *Kyle v. Perfection Mattress Co.*, 127 Ala. 39, 50 L. R. A. 628; *Hudson v. Osborne*, 39 L. J. (Eng.) 79.

The undisputed evidence shows that the name adopted by defendants and their manner of displaying it on their truck will quite likely mislead the public and customers of plaintiffs to the injury of the latter. Without questioning the motives or the honesty of defendants, who no doubt had an honorable part in building up the business of the Carter Transfer & Storage Company, a court of equity should hold that they have made no defense to this suit.

The judgment is reversed and the cause remanded, with an instruction to the district court to grant an injunction according to the prayer of the petition of plaintiffs.

REVERSED.

EDWARD L. SIMON, APPELLANT, V. H. J. CATHROE COMPANY ET AL., APPELLEES.

FILED JULY 15, 1921. No. 21936.

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

Robert J. Greene and *Hugh C. Wilson*, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN,

FLANSBURG and ROSE, JJ.

PER CURIAM.

This is a claim under the workmen's compensation act. Laws 1913, ch. 198. Plaintiff was injured while in the employ of defendant, H. J. Cathroe Company, and under judgments heretofore pronounced has recovered compensation. The present proceeding is in the nature of an application to have the court declare that there has been a change in plaintiff's condition since the former judgment wherein plaintiff was found to be suffering from permanent partial disability, and the court is now asked to hold that he is suffering from permanent total disability. There was no new question of law presented, and the question before the trial court was one of fact. Plaintiff offered the testimony of men eminent in the profession of medicine and surgery, one of whom had performed the original operation on plaintiff and had testified on a former hearing of the case. Without undertaking to quote this testimony, but giving it the full force that plaintiff claims it is entitled to, we may say that it tends to support plaintiff's claim of permanent total disability. But defendant offered testimony of others, also eminent in the profession of medicine and surgery, and, without setting out their testimony, it may be said that it shows plaintiff is suffering permanent partial disability. On this conflicting evidence the trial court found generally for the defendants.

It is the settled law of this state that a finding of the district court on an issue of fact in a compensation case will not be set aside on appeal, where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong. *Manning v. Pomerene*, 101 Neb. 127; *Miller v. Morris & Co.*, 101 Neb. 169; *Kanscheit v. Garrett Laundry Co.*, 101 Neb. 702; *Anderson v. Kiene*, 103 Neb. 773; *American Smelting & Refining Co. v. Cassil*, 104 Neb. 706; *Lincoln Gas & Electric Light Co. v. Crowley*, 104 Neb. 701; *Christensen*

v. Protector Sales Co., 105 Neb. 389. And this is the general rule. Note to L. R. A. 1916A, 266.

The evidence being ample to sustain the judgment, the issue of fact determined by the trial court will not be disturbed.

The judgment is

AFFIRMED.

STANLEY FOX V. STATE OF NEBRASKA.

FILED JULY 15, 1921. No. 21407.

1. **Evidence** examined, and *held* to sustain the verdict.
2. **Rape: CHASTITY: EVIDENCE.** Where, on the trial of one charged with rape upon a girl over the age of 15 years and under the age of 18 years, the evidence shows that defendant was one of a party making the assault, and that before the commission of the act charged against defendant prosecutrix had been ravished by another member of the party, it is proper for the court to instruct the jury that the intercourse had by prosecutrix with the first assailant did not render her unchaste within the meaning of the statute.

ERROR to the district court for Douglas county: WILLIAM A. REDDICK, JUDGE. *Affirmed; sentence reduced.*

Jamieson & O'Sullivan and *C. J. Southard*, for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

Heard before MORRISSEY, C.J., DAY, DEAN, FLANSBURG and ROSE, JJ.

MORRISSEY, C.J.

Defendant prosecutes error from a conviction of the crime of rape in the district court for Douglas county.

On the evening of September 13, 1919, defendant, a boy 19 or 20 years of age, and three other boys and two girls went "joy-riding" in the city of Omaha. After driving about the city for a short time they drove to the edge of

the city onto a street little used, and there the boys assaulted the girls.

After presenting 14 assignments of error, the brief recapitulates and reduces the number to six, which it says is a sufficient "statement of the record necessary to present these errors." These six assignments may be summed up in the statement that the evidence is insufficient in law to sustain the verdict, and that it is especially lacking in corroborating evidence of the principal fact charged, and testified to by the prosecutrix.

The boys were well acquainted, one with the other, but prior to that evening none of them had met either of the girls. While two of the boys were riding in the automobile they accosted the girls, who had shortly before left a school entertainment, and invited them to ride. The invitation was accepted. Subsequently defendant and another boy joined the party. The girls were indiscreet in accepting an invitation from young men whom they did not know, but they were only 17 years of age, had lived in a city but a short time, and lacked the knowledge of the world that years will bring them. The record shows that they were virtuous girls, and there was nothing in their appearance or conduct to invite the assaults that were later made upon them.

Shortly before the assault defendant and another boy got out of the car, which proceeded for a short distance, when it was stopped. One of the party explained that the supply of gasoline was exhausted. The girls, evidently feeling that their companions had criminal designs, alighted from the car. One girl attempted to walk home, but she was immediately followed and assaulted by one of the party. Prosecutrix undertook to crank the car, when she was assaulted and ravished by the boy who had been driving. Presently defendant, who, as heretofore stated, had left the car some time before, came up and, according to the testimony of prosecutrix, had forcible intercourse with her. Defendant claims to have only caressed her, and denies having had sexual intercourse.

At the preliminary hearing, on cross-examination, prosecutrix testified that defendant did not have intercourse with her, but on the main trial she testified that he had, but said the act was not completed because some one in the party called out that a man was coming on horseback, and defendant desisted.

The entire party later got into the car to return to the city, but at the first opportunity prosecutrix left the car, fled from her assailants, and the assault was reported to the police authorities forthwith. The story of prosecutrix is fully corroborated by her girl companion, except only as to what occurred during the few moments they were separated. The physical condition of prosecutrix, as described by a physician who examined her shortly after the assault occurred, also corroborates her. The evidence is sufficient to sustain the verdict.

In addition to the assignments heretofore mentioned, it is urged that, because the proof shows prosecutrix was first ravished by one of defendant's companions, she was not, therefore, previously chaste within the meaning of the statute, and that it was error to give instruction No. 6, which told the jury that, "in order to sustain a conviction in this case, the evidence must show beyond a reasonable doubt, among other things, that the female with whom sexual intercourse is alleged to have been had was, prior to that intercourse, sexually pure," but also told the jury that it was sufficient if the state had established the chastity of the prosecuting witness previous to the night of the transaction described in the evidence, and that the fact that prosecutrix shortly before the assault alleged to have been made by defendant had been assaulted and ravished by his companion would not render her unchaste within the meaning of the statute.

In *Bailey v. State*, 57 Neb. 706, the rule is announced that a woman not "previously unchaste" within the meaning of the statute is one who has never had unlawful sexual intercourse prior to the intercourse with which defendant stands charged. There, however, the court was

considering a record which showed that the prosecuting witness had permitted defendant to have unlawful intercourse with her in another state prior to the time charged in the information. In the discussion the court correctly stated the purpose of the statute to be the protection of the virtuous maidens of the state. A statute which would permit a party of men to assault a maiden and have intercourse with her forcibly and against her will, and then permit the acquittal of defendant because he was not the first of the party to have such intercourse, would fall short of the object so well stated by the author of the opinion in *Bailey v. State, supra*. Where a prior act of intercourse was had with prosecutrix, forcibly and against her will, she was thereby debauched in a physical, but not in a moral, sense and was still chaste within the meaning of the statute. The instruction of the court was proper under the evidence.

Defendant is young and appears to have been industrious and well-behaved prior to the commission of the crime of which he has been convicted. He was not one of the moving spirits in the organization of the party nor one of the leaders in the assault. While the crime is a heinous one, it is easy to believe that he yielded to the evil influence of his companions, rather than to inherent criminal tendencies. The case seems to fall within the provisions of section 9179, Rev. St. 1913. The term of penal servitude is reduced to four years; and, as thus modified, the judgment of the district court is affirmed.

AFFIRMED.

GEORGE T. LOWMAN, APPELLANT, V. JOSEPH SHOTKOSKI, APPELLEE.

FILED JULY 15, 1921. No. 21629.

1. **Contracts:** CONSTRUCTION. Where the language of a written contract is susceptible of two interpretations as to the time when it became effective, and parol evidence has been introduced without objection as to the surrounding circumstances at the time of its

execution, the court will consider all the facts in evidence in order to arrive at the meaning and intention of the parties at that time.

2. **Brokers:** ACTION FOR LOSS OF PROFITS. An action for loss of profits cannot be maintained where the evidence establishes that the sale, damages for the loss of profits on which the plaintiff seeks to recover, was not an actual *bona fide* sale.

APPEAL from the district court for Platte county: A. M. POST and GEORGE H. THOMAS, JUDGES. *Affirmed.*

Garlow & Long, for appellant.

Reeder & Lightner, contra.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

LETTON, J.

Defendant entered into a written contract with plaintiff whereby he appointed plaintiff "sole and exclusive agent to sell" his 365-acre farm in Nance county for $70,000. He agreed to pay $1,000 commission, and a further commission of all over $69,000 for which the agent might sell the land. The terms of sale were: "Cash to bind the sale, $4,000; balance as follows: First mortgage $20,000 for 9 years at 5½ per cent., second mortgage $8,800, 5 years, March 1st, 1920, at 6 per cent., and $27,200 March 1st, 1920." The contract gave the agent the right to purchase on the terms named therein, and deduct commission. It also provided: "Terms of this contract to be valid and binding for the term of 10 days from the date hereof."

The petition pleads that on the same day plaintiff tendered defendant the sum of $4,000 as first payment on the real estate, as provided in the contract; that he informed defendant that he was ready, able and willing to purchase the land, but that defendant refused and failed to execute the proffered contract of sale, or any other contract, but permitted the land to be sold by another agent, making performance of his agreement with plaintiff im-

possible; that plaintiff had the land resold at that time to one Bisson, and that he lost his profit on such sale amounting to $2,905, for which he prays judgment.

The answer admits the contract, but alleges that at the time of its execution the land was listed with other agents, including one Schild; that Schild had shown one Eggli his farm and was about to close a contract of sale with Eggli; that defendant had signed the contract on July 15, and had given Schild the entire day of July 16, 1919, to complete the sale; that before the contract with plaintiff went into effect, Schild sold the land to Eggli; that plaintiff knew Eggli was Schild's customer and had practically closed the deal; that plaintiff, through Bisson, who was his partner or accomplice, induced Eggli to sign a contract of purchase of the land from Bisson by falsely representing to Eggli that he could not purchase the land through any one but plaintiff; that as soon as Eggli ascertained the truth he canceled the contract with Bisson, and purchased the land through Schild; that neither plaintiff nor Bisson wished to purchase the land for himself, but the offer to purchase was made only upon the strength of a sale by Bisson to Eggli, and was really made in behalf of Eggli.

At the conclusion of the evidence the defendant moved for a directed verdict. The motion was sustained and judgment of dismissal rendered, from which plaintiff appeals.

The evidence on behalf of plaintiff establishes that one Bisson, the owner of a restaurant in Columbus at which plaintiff boarded, told him on July 15, 1919, that he had a contract as agent with Eggli for the sale of his land in Polk county; that Eggli wanted to purchase the Kelm land owned by defendant in Nance county; that it would have to be sold within a certain time, and that other parties had a contract for the sale which had expired. The morning of the next day, July 16, he and Bisson drove to defendant's house. Plaintiff asked defendant if he would give him a contract for a short time, and 10

days' time was agreed upon. Plaintiff drew up the contract, which defendant signed. Bisson was present at this conversation. Plaintiff testifies that on the way home he tried to sell the land to Bisson, and finally sold it to him that afternoon for $197 an acre; that Bisson gave him a check for $3,990 and $10 in money; that later in the day he and Bisson drove out to see defendant, and he told defendant he was ready to make the deal; that defendant wanted to consult his banker at Genoa; that on the way there defendant said: "What if Vaught has sold the land?" I said, "Go call him and ask him, and if he has sold it, it is all right with me; but if he has not sold it, it is my deal;" that defendant tried to call Vaught by telephone, but could not reach him. While the banker was looking at the contract in the bank, Vaught called defendant out, and when defendant returned he informed plaintiff that Vaught had sold the place, and he could not go further with him.

The evidence in behalf of plaintiff further establishes that, after their return from defendant's home in the morning, Bisson showed Eggli the contract with Lowman, and called his particular attention to the clause in which it states that Lowman had the exclusive agency, and told Eggli he would have to buy the farm from Lowman or him; that Eggli then entered into a contract to buy from Bisson, but, when he ascertained later that he could still purchase the land from Vaught, he refused to complete the contract, and his check was returned to him and he bought through Schild and Vaught.

Plaintiff's position is that he had the right to sell the land, or to purchase it himself for 10 days, including the 16th day of July. Defendant insists that the pretended offer of purchase by Lowman and sale by him to Bisson were not made in good faith, but only as part of a scheme to procure a commission on the sale to Eggli made by Schild and Vaught. He also contends that the language for terms of "10 days from date hereof" means that the day of the date is excluded, and further that

plaintiff knew he had no authority to sell on the 16th. The courts are by no means uniform in their construction of language of this nature in a contract. Generally speaking, the word "from" is a term of exclusion, but since the decision in *Pugh v. Leeds*, 2 Cowp. (Eng.) 714, in which the subject was examined at length by Lord Mansfield, it is generally held that, though a term of exclusion, it is to be construed inclusively or exclusively according to the context, the subject-matter, or the expressed intention of the parties. 38 Cyc. 317. The context yields no light on the question presented, but no objection was made to parol testimony tending to disclose the intention of the parties.

Among other things the contract provides: "We further agree not to price said land to any person whomsoever, or to do or perform any act that might interfere with the operation of this agency or the sale of said property by said agent." The testimony of plaintiff discloses that he knew that Vaught had the right to sell the land that day. If the contract was in force on the 16th, neither defendant nor Schild and Vaught had the right to sell to any one else than plaintiff, and this and other undisputed facts show the understanding of the parties was that Vaught or Schild might sell on that day. Furthermore, on the evening of the 15th, defendant and wife had signed a written contract for the sale of the land presented by Vaught, and were anticipating its execution on the 16th. But even if the contract included the 16th, we are of the opinion that the evidence does not establish that plaintiff ever suffered any actual loss of profits. He and Bisson both knew before they went to see defendant early in the morning of the 16th that Eggli was negotiating with Schild and Vaught for the purchase of the land. They deny defendant's testimony that he told them that morning the facts as to the transaction with Vaught the night before, but their own testimony convicts them of knowledge of the negotiations. After they returned to Columbus, Bisson showed Eggli the contract with plain-

tiff and called his particular attention to the clause giving plaintiff the exclusive agency to sell, and procured a contract from Eggli to purchase the land. Bisson says he then bought the land from plaintiff, and later in the evening they drove to defendant's house, where plaintiff attempted to buy. Before this time Schild and Vaught had shown the land to Eggli, and he had determined to buy it when he sold his land. The fact that Bisson negotiated the sale of Eggli's land is not material except to show the intimate connection of Bisson with Eggli's land transactions.

The conduct of Lowman and Bisson in their dealings with Eggli and with defendant, as narrated in their testimony, the haste and expedition with which they worked, the fact that Bisson showed Eggli the Lowman contract, as we have stated, after he knew that Eggli had already made up his mind to buy from Vaught and was anxious to obtain the land, and that this occurred before the sale that plaintiff asserts he made to Bisson took place, convinces us that their actions were not in good faith; that the sale to Bisson was merely colorable or pretended; that plaintiff never suffered any actual loss of profits and has no right to recover in this case. This decision is based upon the undisputed testimony, and the natural, reasonable and proper inferences to be drawn from the conduct of the parties as narrated by the witnesses on behalf of the plaintiff. We conclude that the district court made no error in directing a verdict for the defendant, and that a verdict in favor of plaintiff could not be sustained.

AFFIRMED.

A. C. THOMPSON, PLAINTIFF, V. JOHN H. TODD ET AL., APPELLANTS: M. E. MICHELSON, APPELLEE.

FILED JULY 15, 1921. No. 21663.

Homestead: FORECLOSURE SALE: ESTOPPEL. One T. was the owner of six lots covered by a mortgage, two of which lots were occupied

as the family homestead. The property was sold separately under foreclosure proceedings in which a judgment creditor was found to have a second lien. T. took a nine month's stay of the order of sale under the statute. *Held*, this did not estop him from claiming, after confirmation, the surplus proceeds arising from the sale of the homestead property.

APPEAL from the district court for Wheeler county: BAYARD H. PAINE, JUDGE. *Reversed, with directions.*

Albert & Wagner and *J. M. Shreve*, for appellants.

A. L. Bishop, contra.

Heard before LETTON, DAY and DEAN, JJ., GOOD and RAPER, District Judges.

LETTON, J.

This was a suit to foreclose a mortgage on six lots belonging to John H. and Mary E. Todd, two of which constituted their family homestead. M. E. Michelson was the owner of a judgment against the Todds. The two lots constituting the homestead were sold separately from the other four, the homestead bringing $700 and the other lots $600. After the satisfaction of the mortgage debt there remained about $568 surplus. Defendants filed a petition to have this surplus paid to them by virtue of their homestead right in the two lots. Cross-petitioner Michelson objected, claiming the same by virtue of the lien of her judgment, and also pleading that defendants Todd are estopped from asserting the homestead right at this time, having filed a request for a stay of the order of sale, which was granted.

The court found that, on account of a stay having been requested, the Todds were estopped to claim the surplus. A case very similar in its facts is *Hooper v. Castetter*, 45 Neb. 67. In that case the court held that the question of the homestead right of the mortgagor was not involved nor litigated in the foreclosure suit; that the decree rendered therein was not a bar to the mortgagor's application to have the surplus paid to him in lieu of his

homestead; that, though the judgments were liens upon the real estate, they were subject to the mortgagor's homestead rights in the property; that the decree in the foreclosure suit finding the judgments were liens and ordering them paid out of the surplus should be construed to mean that they were liens and should be paid out of the surplus, subject to the mortgagor's homestead rights; that the judgment creditors did not acquire by the decree any greater liens upon or right to the money than they had against the property, and that the surplus might be claimed as exempt at any time before it was finally distributed by the order of the court.

We are satisfied with the reasoning in that case. It is decisive of the question presented. The judgment of the district court is reversed and the cause remanded, with instructions to award to defendants Todd the surplus arising from the sale of their homestead.

REVERSED.

STATE, EX REL. CITY OF O'NEILL, RELATOR, V. GEORGE W. MARSH, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF NEBRASKA, RESPONDENT.

FILED JULY 15, 1921. No. 22121.

Mandamus: REGISTRATION OF MUNICIPAL BONDS: VALIDITY OF ELECTION. In a mandamus proceeding brought to compel the auditor of public accounts to register certain water-works bonds issued under the provisions of section 5119, Rev. St. 1913, as amended in 1917 (Laws 1917, ch. 103), *held*, (1) that such an election may be ordered by the city council by resolution; (2) that a notice of such an election which called for the election to be held "at the regular polling places in said city," in the absence of a showing that it was not so held, will be considered sufficient; (3) that, in the absence of affirmative evidence to the contrary, the court will presume that the judges and clerks of election were either legally appointed or were *de facto* officers.

ORIGINAL proceeding in mandamus to compel the state auditor to register water-works bonds of the city of O'Neill. *Writ allowed.*

W. J. Hammond, for relator.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS and MORNING, District Judges.

LETTON, J.

This is a mandamus proceeding brought to compel the auditor of public accounts to register certain bonds of the city of O'Neill in the sum of $19,000 issued for the purpose of maintaining and extending the water-works of the city. The respondent refused to register the bonds for the following reasons: First, that the bond election was called by the council by the adoption of a resolution, and not by the passage of an ordinance. While there have been some slight changes in the statute since the decision in *State v. Babcock*, 20 Neb. 522, we are convinced that the changes do not materially affect the question presented, that the reasoning of that case still applies, and that the council had power to call the election by resolution. Second, that the notice, which called for the election to be held at "the regular polling places in said city," was defective, and was not sufficient notice to the electors of the locality of the polling place. This identical question was presented in *Hurd v. City of Fairbury*, 87 Neb. 745, and was decided against the respondent's contention. The decision governs in this case.

Further complaint is made that the history presented does not show the appointment of judges and clerks of election. In the absence of affirmative evidence to the contrary, the court will presume that the judges and clerks were either legally appointed or were *de facto* officers. A peremptory writ of mandamus is allowed as prayed.

WRIT ALLOWED.

AMANDA K. GILBERT, APPELLEE, V. GEORGE ROTHE ET AL., APPELLANTS.

FILED JULY 15, 1921. No. 21606.

1. **Action:** CONSTRUCTION OF PLEADING. A petition alleging facts which show that plaintiff was the owner of the merchandise in a store conducted by him, and that he was wrongfully dispossessed by defendants who illegally seized the merchandise and detained the stock five days, thus causing damages in a specific amount pleaded, *held* to state a cause of action for trespass cognizable in a court of law, notwithstanding an unnecessary plea that defendants acted pursuant to a conspiracy to violate an injunction granted by a court of equity.

2. **Sheriffs:** WRONGFUL LEVY: LIABILITY. A sheriff who levies on property of a wife under an execution against her husband is liable for resulting damages.

3. **Process, Abuse of:** LIABILITY. A judgment creditor who knowingly advises or ratifies an abuse of process resulting in a wrongful seizure of personal property to satisfy the judgment is liable as a trespasser.

4. **Trespass:** DAMAGES. In the absence of fraud, malice or other aggravating circumstances, mental suffering is not an element of damages for a trespass resulting in a sheriff's temporary seizure of personal property.

5. ———: MEASURE OF DAMAGES. In the absence of malice, fraud or other aggravating circumstances, the measure of recovery for a trespass resulting in the seizure and temporary detention of personal property under an execution is the actual pecuniary damage caused by such unauthorized acts.

6. ———: DAMAGES. Where a store is closed by the wrongful act of a sheriff in seizing and in temporarily detaining the merchandise therein under an execution, loss of profits and loss of goodwill are provable as elements of damage in an action of tresspass.

7. ———: ———: PROOF. To justify a substantial recovery for the loss of good-will and for the loss of profits in an action of trespass against a sheriff for the seizure and temporary detention of a stock of merchandise in a store, the evidence must contain sufficient data to enable the jury, with a reasonable degree of certainty and exactness, to estimate the actual damages.

8. **Evidence:** VALUE OF MERCHANDISE. The owner of a stock of mer-

chandise may, as such owner, if he knows its value, testify thereto.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Reversed.*

A. G. Wolfenbarger and *Ross P. Anderson,* for appellants.

R. J. Greene, contra.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, LETTON and ROSE, JJ.

ROSE, J.

This is an action by Amanda K. Gilbert, plaintiff, to recover damages resulting from the illegal acts of defendants in seizing the stock of goods in a bookstore owned and conducted by her in Lincoln, in dispossessing her, and in detaining her property five days before returning it to her. The items of damages pleaded are: Injuring and destroying stock, $1,000; destroying plaintiff's business from October 1, 1918, to October 6, 1918, and injuring it for a year thereafter, $1,000; "mortification, humiliation, and disgrace," $1,000; total $3,000. Defendant Lorenzo A. Simmons was the sheriff and defendant George Rothe was deputy sheriff. They seized and detained plaintiff's property under an execution issued by direction of defendant Gertrude J. Cooper. The bookstore was formerly owned by David B. Gilbert, husband of plaintiff, but she bought it for $1,910 in March, 1918, at the foreclosure sale of a chattel mortgage which he had executed. The husband, as principal debtor, and plaintiff had previously executed in favor of defendant Cooper a note for $2,500 and had secured the debt by a mortgage on a lot in Lincoln. The amount due on the real estate mortgage March 22, 1918, when a decree of foreclosure was rendered, was $2,731.47. After the mortgaged lot had been sold at sheriff's sale to satisfy the decree, a balance of $485.45 due on the secured note remained unpaid. Though plaintiff, the wife of the prin-

cipal debtor, had not bound her separate estate for the payment of her husband's debt, and was not personally liable therefor, a deficiency judgment was rendered against both her and her husband for $485.45, August 3, 1918. On this deficiency judgment defendant Cooper caused an execution to be issued to the sheriff August 13, 1918. To prevent proceedings under the writ a restraining order granted by the district court was served on defendant Cooper August 29, 1918. It was while the restraining order was in force that the sheriff dispossessed plaintiff and seized and detained her stock of goods. The judge presiding in the equity court ordered the release of the levy and the return of the goods October 6, 1918. Later the deficiency judgment was set aside in the equity court as to plaintiff herein and a perpetual injunction was granted to prevent defendants herein from proceeding under the execution. In the present case defendants demurred to the petition on the ground, among others, that the action is one to recover damages for the violation of an injunction and cognizable only in the equity court where the injunction was granted. The demurrer was overruled, but was renewed in an answer, admitting that plaintiff was the owner of the stock of goods when seized, and denying that defendants committed any unlawful act resulting in damage to plaintiff. The trial court directed a nonsuit as to the plea for "mortification, humiliation, and disgrace," and instructed the jury that plaintiff, on the admissions and the undisputed evidence, was entitled to recover nominal damages, at least, and such actual pecuniary damages, if any, as she had sustained as a result of the seizure and detention of her property. From a judgment in favor of plaintiff for $1,000, defendants have appealed.

The litigants do not agree on the nature of the action. Defendants argue that their demurrer should have been sustained, because, under their interpretation of the petition, they are sued for violating an injunction and consequently are answerable only in equity for the wrongs

pleaded. Plaintiff calls her case an action at law to recover damages for trespass resulting in the seizure and detention of her personal property. Viewed in that light, she unnecessarily pleaded a conspiracy by defendants to violate the restraining order and to deprive her of her property. The petition nevertheless alleges, in substance, that she was the owner of the stock of goods, that defendants wrongfully dispossessed her and seized her merchandise, and that they illegally detained it for five days, thus causing the damages pleaded. Under the liberal construction of pleadings authorized by the code, the trial court properly held that plaintiff stated a cause of action for trespass. With that understanding, the case was tried as an action at law, and defendants have no substantial reason to complain of the overruling of their demurrer or of the action of the trial court in assuming jurisdiction as a court of law.

A more serious question is raised by the contention that there is no competent evidence sufficient to sustain a verdict in favor of plaintiff for $1,000. The store was wrongfully closed for five days during a busy season, and to the extent of nominal damages, at least, there was no defense to plaintiff's claim. The amount of the actual damages, however, depends on competent evidence. The principles of law applicable to a case of this kind are generally well settled.

A sheriff who levies on property of a wife under an execution against her husband is liable for resulting damages.

A judgment creditor who knowingly advises or ratifies an abuse of process resulting in a wrongful seizure of personal property to satisfy the judgment is liable as a trespasser. *Murray v. Mace,* 41 Neb. 60.

In the absence of fraud, malice or other aggravating circumstances, mental suffering is not an element of damages for a trespass resulting in a sheriff's temporary seizure of personal property. *Murray v. Mace,* 41 Neb. 60.

In the absence of malice, fraud or other aggravating cir-

cumstances, the measure of recovery for a trespass resulting in the seizure and temporary detention of personal property under an execution is the actual pecuniary damage caused by such unauthorized acts. *Murray v. Mace,* 41 Neb. 60.

Where a store is closed by the wrongful act of a sheriff in seizing and in temporarily detaining the merchandise therein under an execution, loss of profits and loss of good-will are provable as elements of damage in an action of trespass. 12 R. C. L. 996, sec. 18; *Kyd v. Cook,* 56 Neb. 71.

To justify a substantial recovery for the loss of good-will and for the loss of profits in an action of trespass against a sheriff for the seizure and temporary detention of a stock of merchandise in a store, the evidence must contain sufficient data to enable the jury, with a reasonable degree of certainty and exactness, to estimate the actual damages. 12 R. C. L. 996, sec. 18; *Kyd v. Cook,* 56 Neb. 71; *Sessinghaus Milling Co. v. Hanebrink,* 247 Mo. 212, Ann. Cas. 1914B, 875; *Burckhardt v. Burckhardt,* 42 Ohio St. 474; *Nightingale v. Scannell,* 18 Cal. 315; *Shaw v. Jones, Newton & Co.,* 133 Ga. 446.

The owner of a stock of merchandise may, as such owner, if he knows its value, testify thereto. *Jensen v. Palatine Ins. Co.,* 81 Neb. 523; *Hespen v. Union P. R. Co.,* 82 Neb. 495; *Neal v. Missouri P. R. Co.,* 98 Neb. 460.

In the present case there was no foundation for the recovery of damages for "mortification, humiliation, and disgrace," and the trial court properly withdrew that issue from the jury. The other claims for damages were: Injuring and destroying stock, $1,000, and destroying plaintiff's business for five days and injuring it for a year, $1,000. There was no proof of the extent to which any particular article of property was injured, or of the value of any missing or destroyed property. There was no evidence to support a finding that any article was either taken from the stock or physically destroyed as a result of seizure and detention. The extent of actual damages

depends on the testimony of plaintiff and her husband. Plaintiff was a teacher and had no personal knowledge of the value of her merchandise, but, as owner, she was permitted to testify that the value of the stock, when seized, was $5,000, and, when returned, $3,000. Her husband, who had qualified himself as a witness, testified to the same effect. The testimony of both, however, shows that the principal elements of actual pecuniary damages were loss of profits and loss of good-will. The proofs contained no direct evidence showing the extent of the loss of profits, or of the loss of good-will, or of items comprising either. Both of these elements are susceptible of competent proof directed specifically thereto. For the failure to adduce such evidence no reason is given. The jury were left without sufficient data to enable them, with a reasonable degree of certainty and exactness, to estimate the actual damages based on the loss of profits and the loss of good-will. Under the circumstances of this case general opinions of value before and after seizure do not take the place of proper data. The judgment for $1,000 is not supported by sufficient competent evidence. It is therefore reversed and the cause remanded for further proceedings.

REVERSED.

MILDRED WENDT, APPELLEE, V. ROSE B. WENDT, APPELLANT.

FILED JULY 15, 1921. No. 21658.

1. **Husband and Wife:** ALIENATION OF AFFECTIONS: PROOF. Where, in an action for the alienation of the affections of a husband, the proof clearly and satisfactorily shows that defendant's acts and conduct in the premises were not only intended to effect an alienation, but actually did accomplish that result, a verdict in favor of plaintiff will not be disturbed.

2. ———: ———: INSTRUCTION. In an action for the alienation of the affections of a husband, it is not error for the court to instruct the jury that, if the evidence shows that the defendant was "the willing recipient of the complaints" made by the husband to

defendant against his wife, "with the ultimate intention and ulterior purpose of alienating his affections," and that she, the defendant herein, "thereby caused him to abandon her, and deprived her of his affections, aid, comfort and society, she would be liable in this case."

APPEAL from the district court for Cuming county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

F. D. Hunker and *A. R. Oleson,* for appellant.

Zacek & Nicholson, contra.

Heard before LETTON, DAY and DEAN, JJ., GOOD and RAPER, District Judges.

DEAN, J.

Mildred Wendt sued to recover damages from defendant for the alienation of the affections of her former husband. She recovered a verdict and judgment thereon of $3,000, and defendant appealed.

Plaintiff and Arthur W. Wendt were married January 4, 1917, and lived together about a year and a half. Some time in May, 1918, marital differences arose between them that grew out of the misconduct of defendant, as alleged, whom plaintiff charges with having alienated the affections of her husband. She avers that defendant constantly and persistently forced her attentions and blandishments upon him, and that as a direct result of such attentions her former husband, in July, 1918, deserted her and went to live with defendant and subsequently obtained a divorce from plaintiff. Within four months thereafter defendant and her husband were married at Council Bluffs, Iowa, and within about six months defendant gave birth to a child. Plaintiff alleges that she tried by various means to induce her husband to return to her, and that upon his refusal she became greatly provoked. For this deprivation of the society and comfort of her former husband she prayed for $10,000 damages.

Mr. Wendt applied for the divorce in question and his then wife, plaintiff herein, filed a cross-petition. The

court found against her on her cross-petition and granted the decree to her husband on the grounds of extreme cruelty. The court, however, awarded the custody of their infant child, Arthur W. Wendt, Jr., to the plaintiff herein. In her petition in the present case plaintiff admits that, "in her constant endeavor to retain the affections of her then husband against the design of the defendant on his affections, * * * the plaintiff did at certain times, while in the heat of passion, assault her then husband and use strong language toward him in her efforts to counteract" defendant's designs. She alleges that the unseemly conduct of defendant, in the premises, so aggravated her that it threw her into a fit of passion, from time to time, and that it was while in this abnormal condition that she attacked her husband.

The defendant's answer herein avers that Wendt abandoned plaintiff because of her extreme cruelty, and denies that defendant alienated the affections of plaintiff's husband, and charges that she lost her husband's affection by her cruel treatment of him. With respect to the wedded life of plaintiff and Wendt it may be said that, except as to a few digressions, it ran smoothly so long as they lived together. Their child, Arthur W. Wendt, Jr., was born February 21, 1918. About March 22, 1918, they bought a home in West Point; both husband and wife contributing to the payment of the purchase price. Wendt, with some assistance from plaintiff's father, bought a garage and there engaged in the automobile business.

The testimony tends to show that the defendant and plaintiff's then husband met some time in May, 1918, and that in that month defendant remarked to plaintiff, in a significant manner, that Mr. Wendt was a very attractive person. This was the first intimation that she had of the defendant's designs upon her husband. She charges that defendant thereafter constantly sought the society of her husband. In July, 1918, she discovered a coolness in her husband's treatment of her, and avers that he then began

to stay out late at night; that his automobile was frequently seen parked in front of defendant's home in the evenings, and that subsequently defendant and Wendt met frequently at the post office and had clandestine meetings elsewhere. She testified that they were frequently seen riding together; that plaintiff became concerned about her husband's late hours and his conduct generally, and when she found out the real situation she was naturally embittered toward defendant and her husband and became angry and upbraided him for his insincerity; that when her husband finally left her she constantly endeavored by various means to win him back to his home; that, notwithstanding she was always repulsed by him, she went frequently to his place of business and entreated him to return. She conceded that when he refused to do so she made violent attacks upon him and spoke to him in an abusive manner; that the cruelty upon which the divorce decree was based consisted in the attacks that she made upon him while she was so distraught with grief over his conduct and the conduct of defendant that she could not control herself. The material evidence of plaintiff, with respect to defendant's conduct, was corroborated by six or more witnesses who lived in the immediate vicinity.

Defendant cites authorities going to show that in this class of cases there is no ground for action unless it clearly appears that the defendant has done something to win the affections of the enamored spouse. Even so; the law cited is not applicable to the facts before us. Without going into tiresome details it sufficiently appears that defendant's conduct was such that it would naturally attract the attention and the admiration of a vain, vacillating and insincere person. On this point the evidence amply supports the verdict.

That plaintiff was indiscreet in the strong arm methods she employed in her attempt to win again the affection of her erring husband, and that seem to savor of the stone age, appears, not only in the proofs, but is admitted in the

allegations of her petition as well. The evidence, however, was submitted to a jury of the neighborhood, and, under fair instructions, they found for her and against defendant. There is proof tending to show that defendant exercised subtle contrivances, wiles, and blandishments to win plaintiff's husband away from her. That she thereby succeeded in doing so is well established.

Complaint is made respecting some of the court's rulings on the admission and the rejection of evidence, and also with respect to certain observations that were made by the trial judge on the evidence while the case was being tried. Reversible error does not appear in the assignments. Certain of the instructions are also complained of. The instruction of which the most complaint is made correctly informs the jury that, if the evidence shows that defendant was "the willing recipient of the complaints" made by the husband to defendant against his wife, "with the ultimate intention and ulterior purpose of alienating his affections," and that she, the defendant herein, "thereby caused him to abandon her, and deprived her of his affections, aid, comfort and society, she would be liable in this case."

Other assignments of alleged error are pointed out that we do not find it necessary to discuss. The record presents an aggravated situation in which a measure of justice has been meted out. Reversible error does not appear. The judgment is therefore in all things

AFFIRMED.

STANDARD OIL COMPANY, APPELLANT, V. CITY OF KEARNEY ET AL., APPELLEES.

FILED JULY 15, 1921. No. 21326.

1. **Municipal Corporations: POLICE REGULATIONS: REVIEW BY COURTS.** In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances are required for the health, comfort and safety of the people, but their action is not final and is subject to the

scrutiny of the courts.

2. ———: INVALIDITY OF ORDINANCE: EVIDENCE. To overturn a city ordinance as being arbitrary, unreasonable or discriminatory, the evidence of such facts should be clear and satisfactory.

3. ———: ———. In the light of the evidence, the ordinance set out in the opinion is *held* void as being an arbitrary, unreasonable and discriminatory exercise of the police power.

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

Pratt & Hamer and *W. H. Herdman,* for appellant.

E. P. McDermott, contra.

Heard before MORRISSEY, C.J., DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

DAY, J.

The only question involved in this case is the validity of a certain ordinance of the city of Kearney, Nebraska.

Plaintiff, who was the owner of certain lots abutting upon Central avenue at Twenty-fourth street in the city of Kearney, had commenced to erect thereon a filling station for the purpose of selling on the premises gasoline and lubricating oil to the users of motor vehicles. When the city council of defendant city learned of the character of the improvement the plaintiff intended to make and the nature of the business it proposed to conduct on the premises, the council very promptly passed the ordinance in question. Section 1 provides: "That it shall be unlawful for any person or persons, firm, or corporation to erect or construct upon any lot, piece of lot, or parcel of land, a filling station wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oils, between Eighteenth and Thirty-first streets on Central avenue, in the city of Kearney, Nebraska." Section 2 provides a penalty for a violation of the ordinance.

Acting under authority of this ordinance, the municipal authorities were proceeding to stop the further progress of the work on the filling station when this action was

commenced. By this action the plaintiff sought an injunction restraining the municipal authorities from interfering with it in the construction of the improvement upon the ground that the ordinance is unreasonable, discriminatory, and an illegal invasion of its property rights. The trial court found the issues in favor of the defendants, and dismissed the plaintiff's cause of action. From this judgment plaintiff appeals.

It is conceded that the legislature has, by section 4862, Rev. St. 1913, delegated to the municipal authorities of cities of the class of defendant city the power to enact all needful ordinances, rules, and regulations for maintaining the peace, good government, and general welfare of such cities. It is manifest that the council in passing the ordinance in question was acting under the "general welfare" clause of the power delegated to it by the legislature. Generally speaking, it is within the right of municipal legislative authority, acting under the "general welfare" clause, to determine what ordinances are required to protect and secure the public health, comfort, and safety, but it may not, under the guise of such power, enact ordinances which are unreasonable, or discriminatory, or an invasion of constitutional rights.

In *Peterson v. State*, 79 Neb. 132, it was held: "The determination of the question whether an ordinance is reasonably necessary for the protection of life and property within the city is committed in the first instance to the municipal authorities, and, when they have acted and passed an ordinance, it is presumptively valid, and the courts will not interfere with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence." The same principle is announced in *State v. Withnell*, 91 Neb. 101. Whether an ordinance of this character is a proper exercise of power becomes, therefore, in its last analysis, a question for the courts to decide, and when it appears from all of the facts and circumstances to the satisfaction of the court that an ordinance is unreasonable or dis-

criminatory, or an invasion of constitutional rights, it is the duty of the courts to declare such ordinance void.

With this general principle in mind, we proceed to examine the facts and circumstances existing at the time the ordinance was passed, and the mischief proposed to be remedied thereby. The record shows that the plaintiff was proceeding to erect upon its lots abutting on Central avenue and Twenty-fourth street a filling station for the purpose of vending oils and gasoline to the users of motor vehicles, when stopped by the defendants. The general plan of the improvement contemplated the construction of a small one-story cement and concrete office building, standing well back from the two streets, and having a wide semicircular driveway extending from Central avenue to Twenty-fourth street across the plaintiff's premises. The plan was that a customer by driving across the sidewalk could enter upon the premises from either of the two streets; it being the intention that a customer who entered the premises from Central avenue, after having his wants supplied, could make his exit on Twenty-fourth street, and *vice versa*. Pumps were to be stationed along the driveway in the open air, well back from the streets, by means of which customers were to be supplied with gasoline. It was the plan to store the gasoline upon the premises in large steel tanks specially designed for the purpose, and buried in the ground, while the oil was to be stored in metal cans such as are generally used for that purpose. The building itself fully complied with the fire protection and building ordinances of the city, and the proposed manner of storing the gasoline and oils on the premises was not in violation of any ordinance of the city, or any law of the state.

It further appears that Central avenue is the principal business street in the city, and that the plaintiff's property is one of the important corners along that street. For about four blocks south of the proposed improvement, the business consists mostly of retail stores in buildings of one and two stories. Along the street are a few very

valuable improvements, such as the federal post-office building, a church, a hotel, and residences.

It will be noted that the ordinance forbids the construction of a "filling station" wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oil. Just what the council may have intended by the term "filling station" is not entirely free from doubt. It would seem, however, that there could be an equipment which would come within the general meaning of that term, where no building was employed, and that, therefore, the building which the plaintiff proposed to construct was not the objectionable feature of the improvement. The ordinance, as we view it, does not prevent the storing of oils and gasoline on the premises within the restricted district, and selling them to users of motor vehicles at the curb of the street. In fact, it is shown that within a few doors from the plaintiff's premises, and within the district, gasoline is being sold to users from a pump at the curb; the gasoline being stored in a large tank beneath the sidewalk. If the ordinance was really intended as a good-faith fire protection measure, it would seem that it would have been more general in its application, both as respects the territory in which it operated and the persons to whom it applied. It is difficult to see how there would be more danger to the public from selling gasoline and oil from a pump on the premises, than from selling the same commodities from a pump at the curb of the street; both being in the open air. Besides this, the ordinance by its terms operates on Central avenue only, and from the conditions as shown by the photographs in evidence there would be as much danger from such a business conducted just off Central avenue as along that street.

In further support of the ordinance, it is argued that the crossing of the sidewalk by motor vehicles would unwarrantably interfere with the use thereof by pedestrians. The record does not show the approximate number of pedestrians using the sidewalk, nor the extent of the in-

terference which the motor vehicles would entail. The court will, however, take judicial notice of the fact that the population of defendant city is less than 8,000, and from the circumstances in evidence, as shown by the photographs, we are convinced that the slight inconvenience to pedestrians by motor vehicles crossing the sidewalk is not of sufficient magnitude to justify the ordinance on that ground. The automobile as a business and pleasure vehicle has come to stay, and the rights of users, who constitute a considerable part of the public, must also be considered in determining the validity of ordinances of this nature. Besides this, within one block from the plaintiff's premises, and within the district, is a public garage, access to which is had across the sidewalk. It is conceded that the ordinance does not prohibit crossing the sidewalk to enter the garage. It is also claimed that the noise of the honking of horns and the running of the engines would be a nuisance to the other users of the street. The noise, however, is only incidental to and not a necessary part of the proposed business. If the protection of the public from noise was the purpose sought to be attained, it would seem that it could be easily controlled by proper ordinances going directly to that subject.

Without extending the argument further, we are satisfied from a consideration of the entire record that the ordinance cannot be sustained. While there are some phases of it which upon first impression appear to be within the domain of the proper exercise of the police power of the municipality, yet when considered in connection with the facts and circumstances as shown by the record it becomes apparent that it is an unreasonable, arbitrary, and discriminatory exercise of power. We think the real reason for the ordinance is set forth in the defendant's answer wherein it is charged that the construction of an oil-filling station on the principal street of the city would be an "everlasting eyesore and disgrace." While great latitude must be given to municipalities in the matter of

the exercise of police power, it must not be carried to the extent that it is unreasonable, arbitrary, or discriminatory.

From what has been said, it follows that the trial court should have granted the relief prayed. The judgment of the district court is reversed and the cause remanded, with directions to enter a decree granting the injunction prayed.

REVERSED.

DEAN, J., dissenting.

Under the facts and the law it seems that the judgment should be affirmed. The ordinance prohibits the erection, on a certain designated part of a certain street, of all oil-filling stations of a certain class, namely, those "wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oils."

There is a stipulation in the record wherein, among other things, substantially these material facts appear: Immediately east, and across Central avenue, from the proposed site of the oil-filling station is located the United States post-office, a two-story marble building erected at a cost of about $150,000, and also an apartment house. One block away from plaintiff's lots is located the three-story 100-room Midway hotel, and just across the street therefrom, and one block from plaintiff's lots, is the Christian church, and east and north of that church is a residence district. About a half block west of plaintiff's lots is a Catholic church, and connected therewith is a parochial school which is open and in continuous session nine months in the year. A block south of the Catholic church and school is the Presbyterian church, and across the street east of the Presbyterian church is the Christian Science church. Both sides of the four blocks that are directly south of plaintiff's lots are practically all built up with business houses. Central avenue, whereon the proposed oil-filling station is to be permanently located, is one of Kearney's principal business streets and is one of

the main traveled routes from the business center on a paved street that leads to the State Teachers college. On the east and south sides of the block in which are situated plaintiff's lots the sidewalks are about 20 feet wide.

It is into the midst of such an environment that there has been permanently located, almost under the eaves of a $150,000 federal building, by a judgment of this court, a noise-producing oil-filling station that is to be used, as we are informed by plaintiff's brief, "in said business of vending oils, grease, and gasoline." The environment of the new structure will, as the stipulation shows, consist of a group of four leading churches, a church school, an apartment house, a large hotel, and the federal building; a residence section of the city being on one side and the business center on the other. The oil station is permanently established over the protest of the city council, and in violation of an ordinance, adopted under the police power, and contrary to a judgment of the district court pronounced by a judge who has resided in Kearney more than 30 years, and who has been a district judge for almost 20 years.

One of Kearney's leading citizens, who lives directly across the street from a "two-pump" oil-filling station, testified, in substance, that on Saturday evenings, from 5 o'clock until midnight, and on Sunday afternoons and evenings and on holidays, the station does a very large business, and at such times from four to six cars stand and honk and wait, all clamoring to be served at one time, and that to add to the confusion about half of the cars while waiting permit their engines to run, so that the noise interferes with ordinary conversation on his porch and injuriously affects the health of his family. He further testified that the traffic on the street was congested by large motor trucks and mule trucks backing up to the curb to fill the tank of the station with gasoline almost every evening, and that it was further obstructed by from three to six cars standing at the curb in the evenings waiting to have air pumped into the tires.

He said his knowledge was confined to the hours he named as he was not at home very much during the day throughout the week. No evidence was offered by plaintiff on the question of noise, other than that of an employee of plaintiff who testified that their men were instructed to ask car drivers to stop their engines while the tank was being filled. It is, however, suggested in plaintiff's brief that it was the customers, and not the plaintiff, that created the noise and the confusion of which complaint is made. But that suggestion does not meet the objection. In view of the evidence it is perhaps well that the federal court has not yet begun to hold its sessions on the second floor of the federal building.

In its argument plaintiff contends that the ordinance is discriminatory because two "gasoline curb pumps" have been installed on the street in question. The contention is not sound. There is a vast difference between a "gasoline curb pump," a temporary and transitory contrivance, installed before the passage of the ordinance in question, and a permanent "oil-filling station," to be used for selling "oils, grease, and gasoline." They are not in the same class, nor can a comparison properly be drawn between a "gasoline curb pump" that was first brought into use by the pioneer oil sellers, and now almost obsolete, and a pretentious, modern and permanent "gas-filling station," the last word in architectural expression and design of the modern oil vender.

The majority opinion points out that the automobile, that indispensable adjunct of modern and social life, has come to stay; likewise the pedestrian. And some inalienable rights remain to him. Among these is the right freely to walk in peace and in safety on either side of a public street that he may choose. It is obvious that an oil-filling station, located on a street corner in the business center, no matter how attractive, when newly built, in architectural design and appearance, with cars darting in and darting out, across a greasy sidewalk, adds to the peril of the passing pedestrian, of whatever age or sex.

But in its brief plaintiff makes this argument in extenuation of its persistent and unwelcome intrusion. It says: "The slight inconvenience to pedestrians using the sidewalk on the same side of the street, although they could use the one on the opposite side, must as a public necessity be submitted to." Doubtless the same argument, upon which comment may well be spared, was advanced in the district court and was noted by the trial judge.

It has often been said that the police power is to the state what self-protection is to the citizen. It is for the city council then, under that beneficent power, reasonably to determine in the first instance in what district certain occupations, and the erection of certain structures, shall be prohibited. Under the police power the city council may determine too whether the perils of automobile traffic to pedestrians upon the main street intersections, shall be diminished and the safety of the citizens enhanced, by preventing the establishment on its prominent street corners of such oil-filling stations and at such locations as the present case contemplates. And if complaint is made, as here made, and notwithstanding we must try the case here *de novo,* we have held, in the past, that the judgment of the district court, in an equity case, should be given great weight by this court when sitting as a court of review. And this case is not an exception. The question is: Has the council been unreasonable in its exercise of the police power? I submit that it does not clearly so appear. I fear that the fact has been overlooked that a reasonable exercise of the police power inheres in the city council.

A citizen should not be permitted to so use his property as to thereby create a nuisance, nor to so use it that it will become a menace to the personal and physical safety of others. Plainly speaking, plaintiff has been given permission to do both. In support of the views expressed herein these authorities are cited: *Ex parte Wolf,* 14 Neb. 24; *Peterson v. State,* 79 Neb. 132; *In re Anderson,* 69 Neb. 686; *State v. Withnell,* 91 Neb. 101;

2 McQuillin, Municipal Corporations, sec. 732, and volume 3, secs. 890-924.

For the reasons herein stated, I respectfully dissent from the opinion of the majority of the court.

BESSIE CRAVER ET AL., APPELLANTS, V. THOMAS B. MCPHERSON, APPELLEE.

FILED JULY 15, 1921. No. 21449.

Bills and Notes: SUFFICIENCY OF PETITION. The petition, the substance of which is set out in the opinion, *held* to state a cause of action.

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

Morsman, Maxwell & Haggart, for appellants.

Baker & Ready, contra.

Heard before MORRISSEY, C.J., DAY, DEAN and LETTON, JJ.

DAY, J.

This action is based upon a promissory note given by defendant to one Kate McGinness, together with a contemporaneous memorandum signed by the payee. The case was called for trial, a jury impaneled, a witness sworn, whereupon defendant objected to the introduction of any testimony, for the reason that the petition did not state a cause of action. The objection was sustained, and the case dismissed. The plaintiff appeals.

The only question presented by the record is the sufficiency of the petition to state a cause of action. The objection of the defendant to the introduction of any testimony upon the ground that the petition failed to state a cause of action is equivalent to a demurrer to the petition and must be tested by the same rules. The petition is in the usual form, and such portions only will be set out as appear to be necessary to understand the precise question presented by the defendant's objection.

It is alleged that on November 27, 1908, the defendant executed and delivered to Kate McGinness his promissory note as follows:

"$37,000. Omaha, Neb., November 27, 1908.

"One year after date, for value received I promise to pay to the order of Mrs. Kate McGinness, at the Union Stock Yards National Bank, South Omaha, Nebraska, thirty-seven thousand dollars, with interest at the rate of 6 per cent. per annum from date until paid.

"Thos. B. McPherson."

At the time of the execution of the note, and as a part of the same transaction, Kate McGinness executed and delivered to the defendant a writing, which was accepted by the defendant, as follows:

"Omaha, Nebraska, Nov. 27, 1908.

"Whereas, Thos. B. McPherson has acted as agent for many years for my late husband, Daniel McGinness, and after his death for me, in the loaning of certain money for us and in our behalf;

"Whereas, he is now holding for me notes as hereinafter described;

"Whereas, he has executed his own note of even date herewith for thirty-seven thousand dollars ($37,000) payable to me, pledging as collateral the notes above referred to, to wit:

"Walker Manufacturing Co., $18,171.98 and int. due Nov. 14th, 1909.

"A. A. Spaugh, $9,386.16 and int. due Dec. 7th, 1909.

"Prime and Tower, $12,000 and int. due Jan. 26th, 1912

"Whereas, the note for thirty-seven thousand dollars is really not his personal obligation and is only given to protect me from loss upon the notes he has taken for my account:

"Now, therefore, in consideration of the premises, I hereby agree to hold his note for thirty-seven thousand dollars, and not to transfer or dispose of it without his consent in writing.

"I further agree that the collateral notes referred to

shall be held by him; and he is hereby empowered to collect, renew or extend them, and to substitute for them other collateral at his discretion.

"I also agree to exhaust my collateral, whatever it may be, before demanding payment from him of any part of this obligation, or attempting to collect any part of his personal note, unless there should be a loss in the collateral referred to, in which case he shall be liable for such deficiency.

"Provided, however, that he shall pay me, annually, interest at the rate of six per cent. upon the whole or such part of the principal as may be unpaid from time to time.

"Witness my hand day and date first above written.

"(Signed) Kate McGinness."

The petition further alleges in detail the death of Kate McGinness on December 10, 1910, and the administration of her estate establishing that the plaintiffs herein are the residuary legatees under her will. Other facts are alleged showing the right of the plaintiffs herein to institute the suit. It is alleged that interest had been paid by the defendant up to November 27, 1911; that $12,000 on the principal of the note was paid January 27, 1912; that the said payment of $12,000 was the proceeds of the collateral note of Prime and Tower; that on November 27, 1908, the defendant substituted as collateral security the note of one W. J. McLaughlin, payable to the order of the defendant, in place and stead of the note of the Walker Manufacturing Company for $18,171.98, and the note of A. A. Spaugh for $9,386.16, and that the Walker Manufacturing Company and A. A. Spaugh notes were thereupon taken by the defendant as his personal property. The petition further alleges that suit was brought by the executor of Kate McGinness against W. J. McLaughlin upon the note above described, and judgment was duly rendered thereon on November 30, 1915, for the sum of $37,894.12; that execution was duly issued upon the judgment, and that the same was returned wholly unsatisfied; that no part of the judgment has been col-

lected, and that McLaughlin is insolvent. The petition further alleges that the defendant has been absent from the state of Nebraska for more than three years immediately preceding the commencement of this suit; that there is due and owing the plaintiffs from the defendant on the $37,000 note the sum of $25,000 with interest at 6 per cent. per annum from November 27, 1911, for which, together with costs of suit, the plaintiffs pray judgment.

It is argued on behalf of the defendant that there is no consideration to support his promise. We find ourselves unable to assent to this proposition. Without entering into an extended analysis of the petition, it seems clear that there was a detriment, or disadvantage, or forbearance, or suspension of a right on the part of Mrs. McGinness in permitting the defendant to continue to hold the collateral which he was holding on her account, and in permitting him to collect, renew or extend such collateral, and to substitute other collateral therefor at his discretion. In taking the $37,000 note she suspended at least for one year her right to call in the securities held for her by the defendant, and in agreeing to hold the $37,000 note and not to dispose of it without the defendant's consent. It also appears that there was a benefit and advantage to the defendant in being permitted to hold the collateral, and to collect, renew and extend the same, and to appropriate to his own use all interest accruing thereon in excess of the 6 per cent. which he was to pay to Mrs. McGinness.

In our view, the petition states a cause of action, and the district court was in error in dismissing the case.

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

REVERSED.

D. DAGGETT, APPELLEE, V. TOM PANEBIANCO, APPELLANT.

FILED JULY 15, 1921. No. 21612.

1. **Landlord and Tenant:** REPAIRS. "In the absence of an express contract, a landlord is not bound to repair leased premises, nor to pay for repairs made thereon by the tenant." *Murphey v. Illinois Trust & Savings Bank*, 57 Neb. 519.
2. **Evidence** examined, and *held* to sustain the action of the trial court in directing a verdict for the plaintiff.

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

Edward R. Burke, for appellant.

Gerald M. Drew, contra.

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS and MORNING, District Judges.

DAY, J.

This is an action of forcible entry and detainer brought by D. Daggett against Tom Panebianco, and was originally tried in justice court, where judgment was entered for plaintiff for possession of the premises in controversy. Defendant appealed the case to the district court for Douglas county, where the case was tried on the original complaint and answer filed in justice court. After the testimony was all in, the trial court, on motion of plaintiff, instructed the jury to return a verdict in his favor, which was accordingly done, and judgment was entered thereon. The defendant appeals.

The following state of facts appears from the record: Tom Panebianco leased the premises from D. Daggett, by written lease, for the term of one year from the 20th day of August, 1918, to the 20th day of August, 1919, at an agreed rental of $16 a month, payable in advance. The lease provided "that all plumbing, water pipes, gas pipes and sewerage shall be at the risk of the said party of the second part (defendant herein), and that said party of

the first part (plaintiff) shall not be in any way liable for any defect therein, or for any damages resulting from any defects or faults therein." The lease also contained the provision that "said party of the second part will, during the said term, keep the said premises in good and tenantable repair externally and internally, reasonable tear and wear excepted."

It appears that all rent was paid up to June 20, 1919, when the plaintiff's agent sought to collect the rent then due for the month beginning on that date. The defendant refused to pay the rent unless he was allowed to deduct the sum of $2.25 which he had paid to a plumber for repairing a leaky toilet on the premises. The plaintiff was out of the city at the time, and his agent refused to make any such allowance for the plumber's bill which defendant had paid. A like refusal on part of defendant to pay the rent occurred perhaps two or three times during the month that ensued, and on July 20, 1919, another month's rent was due, and the agent then sought to collect the two months' rent, or $32 then due from defendant. Defendant again refused to pay the $32 unless he was allowed to deduct the $2.25 for the plumber's bill. Thereafter, and on July 23, 1919, the plaintiff's agent served a three days' notice to quit on the defendant, and on July 28, 1919, this action of forcible entry and detainer was filed in justice court, as above stated.

The defendant relies upon two grounds for reversal: First, that it was error on the part of the trial court to sustain plaintiff's motion for a directed verdict; and, second, that the verdict directed by the trial court is contrary to law and the evidence.

As to defendant's first ground for reversal, we are of the opinion that it was entirely proper for the trial court to direct a verdict for the plaintiff, inasmuch as there were no disputed questions of fact. As to this principle, see *Keeley Institute v. Wade*, 61 Neb. 313.

As to the second ground for reversal, the lease provided that the tenant (defendant) should be liable for all

plumbing repairs. Nevertheless, he had some repairs made, and then refused to pay his rent unless the bill for the plumbing repairs was deducted from the rent then due. When this occurred he was in default, and it was entirely proper for plaintiff's agent to then serve the notice to quit. The defendant admitted that he had no authority whatever from plaintiff to have these repairs made, but did so on his own initiative. It is not shown by the evidence whether the condition of the toilet was occasioned by reasonable tear and wear, or through some fault of the tenant. If it was caused by reasonable tear and wear, then under the provisions of the lease it would have been the duty of the landlord to pay for the repairs. The defendant, by insisting that the repair bill be deducted from the rent, necessarily took the position that the condition of the toilet was the result of reasonable tear and wear, and in making his defense it was necessary for him to establish that fact. In our view of the testimony, he has failed to do this.

In *Murphey v. Illinois Trust & Savings Bank*, 57 Neb. 519, it was held: "In the absence of an express contract, a landlord is not bound to repair the leased premises, nor to pay for the repairs made thereon by the tenant." And, in *Turner v. Townsend*, 42 Neb. 376, the court said: "The obligation of a landlord in any case to repair or rebuild leased premises rests solely on express contract, and without an express contract to that effect a landlord is neither bound to repair leased premises himself, nor to pay for repairs made by the tenant."

By specific terms in the written lease, the defendant was liable for these plumbing repairs.

From a careful consideration of all the evidence, and applying the law applicable to such cases, we are convinced that defendant's grounds relied upon for reversal are not well founded; and that the trial court was justified in directing a verdict in favor of plaintiff, and that the verdict returned was proper under the evidence introduced.

Finding no errors prejudicial to the defendant which would require a reversal, the judgment is

AFFIRMED.

THOMAS C. HORNBY, ADMINISTRATOR, APPELLEE, V. STATE LIFE INSURANCE COMPANY, APPELLANT.

FILED JULY 15, 1921. No. 21512.

1. **Insurance**: DEATH BY VIOLENCE: PRESUMPTION. In a suit on an insurance policy, covering death caused by violent, external and accidental means, where the proof reasonably shows that an injury was produced by violent and external means, and where there is no ground for suspicion that the wound was intentionally inflicted, there is a presumption that the insured did not voluntarily inflict the injury upon himself, and it is presumed that the injury was the result of accident.
2. ———: ———: BLOOD POISONING. Where the insured sustains an injury through violent, external and accidental means, and blood poisoning sets in, finally resulting in death, it is immaterial whether the infection was introduced at the time of the accident and through the instrument operating to cause the injury, if the infection enters before the wound has become so cured as to prevent exposure to infection, and if the infection comes about naturally, without any apparent human act to produce it.
3. ———: ———: ———. The blood poisoning resulting in such a wound will be considered as the effect of the injury, and not as an additional or other cause aside from the accident, and the consequent death is *held* to be the result of the accident exclusively and independent of other causes.
4. ———: ———: TRIAL: INSTRUCTION. An instruction that the jury, in determining the cause of the injury, might consider all the facts and circumstances in evidence, and were entitled to draw reasonable inferences and conclusions from such facts and circumstances, *held* not erroneous and not misleading so as to authorize the jury to draw illogical inferences.
5. **Evidence**: EXPERT EVIDENCE. An opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support that conclusion.

APPEAL from the district court for Douglas county:

LEE S. ESTELLE, JUDGE. *Affirmed.*

T. W. Blackburn, for appellant.

Merton L. Corey and *Edward F. Dougherty, contra.*

Heard before LETTON, DAY, DEAN, FLANSBURG and ROSE, JJ.

FLANSBURG, J.

This is an action to recover on an insurance policy under a provision allowing double indemnity in case of the death of the insured, resulting from bodily injury, sustained and effected directly through external, violent and accidental means, exclusively and independently of all other causes. The company had paid the face of the policy, but denied liability for double indemnity, under the provision mentioned. Trial was had to a jury and judgment resulted in favor of the plaintiff. The defendant insurance company appeals.

The testimony upon which plaintiff's case is based stands practically without contradiction, and the defendant contends, under the facts so shown, that the plaintiff is not entitled to recover, and argues that there is no evidence that the insured sustained a bodily injury through external, violent and accidental means, and that there is no evidence sufficient to show that death was the result of the accidental injury alleged, since death is shown to have been caused by blood poisoning, and since it does not appear that the poisonous infection was introduced into the wound at the time of the initial injury.

The testimony in behalf of the plaintiff shows that insured and his son, in the latter part of October, 1918, were engaged on the farm of the insured near Valentine, Nebraska, in harvesting a crop of beans, and that the field was badly infested with sand burs. While the harvesting was going on, as insured's wife says, or shortly after it concluded, as insured's son puts it, the insured was noticed by them to be pressing and picking at his thumb. The son testifies that he looked at insured's

thumb and there appeared to be a small hole, a place like a thorn leaves after it has gone in, and that just about the little red spot in the center the skin had turned red and that a sort of callous had formed about the place. The widow's testimony was that she noticed the insured pressing his thumb and picking at it, as if to remove a sliver.

Insured was engaged in the undertaking business, to which he devoted part of his time each week. Shortly after the time the above observations were made, the insured left for Valentine, and was gone a week, engaged in his undertaking business. The testimony shows that he did not directly handle bodies, as he had a helper to do that, but that he did do embalming and inject embalming fluids. When he returned to the farm he was still pressing and working with his thumb. At that time it had become slightly swollen, and from then on the testimony fully shows the progress of an infection, resulting in the swelling of his entire arm and finally in his death, which occurred on November 17 following. The testimony of physicians in behalf of the plaintiff was to the effect that any such infection, originating underneath the skin, is always due to entrance of germs by means of some injury which has resulted in an opening of the skin, although the opening may be ever so slight, and that in this particular instance the infection must have entered through the opening in the skin of insured's thumb. That death resulted from blood poisoning, so introduced into the physical system of the insured, would seem to be beyond reasonable question.

The testimony, however, in behalf of the defendant, which stands undisputed, is that whenever an infection enters a wound it will manifest itself in a few hours, almost always within 24 to 36 hours, and never more than 3 days afterwards. It would seem, then, from the testimony as it stands, that the infection of which the insured died, though perhaps not received at the time of the original injury to his thumb, was at least received later

through that injury and before it had become entirely cured.

It is one of defendant's contentions that the evidence is insufficient to show that the insured met with an injury through external, violent and accidental means, and that, though there is evidence to show that there was a small abrasion or slight hole in the defendant's thumb, there is nothing to show how it was produced, and that its cause must rest entirely in conjecture; and in argument defendant suggests that the insured may have had a pimple or a growth in his thumb resulting from some internal cause, and may have picked at it so as to, himself, have opened the skin and caused a wound through which the poisonous infection entered, and that, since one inference is as likely to be drawn as the other, the plaintiff has not carried the burden of proof, and that the plaintiff's action should, therefore, be dismissed.

The testimony of plaintiff's physicians shows that insured's thumb had been examined, in an endeavor to find some foreign substance that had pierced the skin, but that no thorn, or other foreign substance, was discovered, and that the place where any such foreign matter might have lodged was cut away. One of these physicians testifies that when the skin is pierced by a thorn, or other foreign substance, and the foreign matter, or a part thereof, is left in the skin, a callous will form immediately about, thus walling off the foreign substance from the physical system; that nature thus provides a protective remedy.

The testimony of insured's son, describing the wound as a place like a thorn leaves after it has gone in, with a little red opening where the skin had been pierced, and with a callous about it, in connection with the circumstance of the insured's being employed at that time, or immediately before, in a field infested with sand burs, and in the light of the actions of the insured in pressing his thumb and picking at it, as if to remove a sliver, would, to the ordinary mind, it seems to us, reasonably result in the conviction that a thorn, or some such foreign matter, had

pierced insured's thumb.

This evidence, furthermore, is aided by the presumption that insured did not voluntarily inflict an injury upon himself. It is plain that the insured's thumb was pierced by some foreign substance. The wound and the nature of the wound are proved. Such an injury could only be the result of violent and external means, and, when the proof goes so far, the presumption is in favor of an accident. Under this condition of the evidence, aided by such presumption, we are unable to agree with the defendant's argument that the cause of the injury must be left entirely to conjecture, or that the jury was called upon to guess, without evidence or reasonable inference to guide it, between the theory that the wound was caused through accidental means and the theory that the insured had, himself, with some instrument, voluntarily produced it. *Caldwell v. Iowa State Traveling Men's Ass'n*, 156 Ia. 327; *Omberg v. United States Mutual Accident Ass'n*, 101 Ky. 303; *Peck v. Equitable Accident Ass'n*, 52 Hun (N. Y.) 255; 1 C. J. 495, sec. 278.

Though we do not deem it necessary to go into that question, some of the decisions are to the effect that even where the insured, through a voluntary act, pricks at a pimple and opens the skin, and in doing so unknowingly uses an instrument carrying infection, the resulting blood poisoning will be held to be the result of accident, rather than due to the voluntary act of the insured. *Nax v. Travelers Ins. Co.*, 130 Fed. 985; *Lewis v. Ocean Accident & Guarantee Corp.*, 224 N. Y. 18; *Interstate Business Men's Accident Ass'n v. Lewis*, 257 Fed. 241. And see *National Surety Co. v. Love*, 102 Neb. 633.

Defendant makes the contention, since it is incumbent on the plaintiff to prove that death resulted from an accident exclusively and independently of all other causes than the accident, that, before he can recover in this case, he must show that the poisonous infection was received as a part of the accident and at the time of the original injury.

It is argued that when there is an accidental injury, resulting in an abrasion of the skin, but no infectious matter is injected into the wound through the instrument operating to cause the injury, the injury resulting from the accident becomes complete, and, when an infection enters later through the wound produced, it becomes a new and intervening cause and one other than from the accident itself, and that, when death results in such case from blood poisoning, though, under the general rules of law on proximate cause, the death may be considered to have been caused by the accident, yet, under the specific provisions of the policy, before there can be a liability, the death must result from the accident exclusively and independently of all other causes, and it is argued that the accident is not the sole cause independent of all others, where blood poisoning later sets in and acts as a contributing cause, and that the company is not liable for the results of such several causes taken together.

The question then, as it now occurs, is whether the infection shown in this case, entering a wound which had been previously produced by accidental means, was an additional, contributing or other cause than the injury produced by the accident itself, or whether it was merely incidental to the wound and a natural consequence therefrom.

The abrasion of the skin caused a necessary exposure to such an infection. It was an exposure that could not be entirely guarded against until the foreign substance was removed, or the wound cured. It was a natural consequence that such an infection might set in, and that the wound, of slight and trivial nature in its beginning, should through natural processes develop dire results. The infection was not of some specific disease to which there had been a careless or conscious exposure (see *Maryland Casualty Co. v. Spitz*, 246 Fed. 817), but of a kind that naturally develops from the wound itself, without any apparent human act to aid it. When the infection enters through the wound, produced by the original

accidental injury, naturally and before the wound has become so cured as to prevent exposure to infection, it seems to us immaterial when the infection enters. *Rich v. Hartford Accident & Indemnity Co.*, 208 Ill. App. 506; *Delaney v. Modern Accident Club*, 121 Ia. 528; *Bell v. State Life Ins. Co.*, 24 Ga. App. 497. When it appears that the original injury continues to develop in character and grow worse, it is impossible to determine just when an infection has entered it. In the eyes of the ordinary individual it is the original injury, through the process of development, which produces the final result, and the provision of the policy must be interpreted in that light. *Lewis v. Ocean Accident & Guarantee Corp., supra; Delaney v. Modern Accident Club, supra.* There is no specific expression in the policy, as is found in some policies covering death by accident, that, whenever an accidental injury through the complication of infection shall produce death, there shall be no liability on the part of the company, unless the infection is shown to have been introduced at the time of the accident and by the instrument operating to cause the injury, and where the contract does not so provide we can see no reason for making such an exception.

It is true, as defendant argues, that when insured's son first examined the wound he said that, though there was a small hole, it appeared to have healed over. Just what he meant is somewhat indefinite, but that testimony does not show that the wound had been cured, or that the danger of infection from the original injury had passed. The insured, it was shown, continued to work at his thumb, in an apparent endeavor to remove some object from the wound. It seems quite apparent that the injury had not been cured, but continued from the beginning to be a source of irritation, though it may be true that the surface of the skin over it may have appeared to heal.

We believe that the blood poisoning shown in this case was a natural incident of the wound, and should be considered as an effect of the original injury, rather than as

an independent or additional cause. *Ward v. Ætna Life Ins. Co.*, 82 Neb. 499; *Maloney v. Maryland Casualty Co.*, 113 Ark. 174; *Caldwell v. Iowa State Traveling Men's Ass'n, supra;* 1 C. J. 430, sec. 76.

Error is predicated upon the giving of an instruction telling the jury that—"In determining the question as to whether or not the death of said George H. Hornby would have resulted from external, violent, and accidental means exclusively and independently of all other causes, you are entitled to consider all the facts and circumstances which have been introduced in evidence before you, and you are entitled to draw reasonable inferences and conclusions from such facts and circumstances."

The case of *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629, is relied upon. That was an action upon an insurance policy covering death by accidental means. Insured died from drinking carbolic acid. The lower court directed a verdict for the plaintiff, relying upon the presumption that death was by accidental means. This court, however, said, in reversing the case, that since it appeared that insured drank carbolic acid, it was presumed that he did so voluntarily, and that the evidence of suicidal intent so introduced into the case destroyed the force of the presumption of death by accidental means, and held that it was incumbent upon the plaintiff to show that the death was accidental "by evidence of the actual facts or a situation from which accident is *the* reasonable inference." In other words, the record must present to the jury such a state of facts that reasonable inferences, showing accident, can be drawn therefrom, and the case cannot be left to the jury for a guess or conjecture in arriving at a conclusion.

In a similar case, *Rawitzer v. Mutual Benefit Health & Accident Ass'n*, 101 Neb. 219, where death was also the result of carbolic-acid poisoning, the court held that the surrounding circumstances were shown to be such as to allow of reasonable inferences as to the cause of death,

and that the case was one which should have been submitted to the jury.

As before pointed out, we are of opinion that the condition of the evidence in this case presents a situation where a natural and reasonable inference could be drawn that the injury was accidental, and the matter of passing upon those inferences was for the jury. Since there was sufficient to take the case to the jury, we believe there was no error in the instruction given. *North Chicago Street R. Co. v. Rodert*, 203 Ill. 413; *Vandalia Coal Co. v. Moore*, 69 Ind. App. 311; *Wilcox v. Southern Railway*, 91 S. Car. 71; *Central of Georgia R. Co. v. Ellison*, 199 Ala. 571; 38 Cyc. 1673.

It is argued that there is prejudicial error in the admission of testimony. Doctor Jonas, who examined the insured after the poisoning had progressed up the arm, was allowed to testify in behalf of the plaintiff that the poisoning was from external means. We see nothing improper in the admission of that testimony, since the doctor testified that poisoning of that kind in that locality always came from without through an opening in the skin. On cross-examination he was asked if septicemia had been in the body prior to the injury, whether or not it might not extend to the surface and manifest itself there, to which the doctor answered that he had only one opinion about this case—that the poisoning came from without, from "an accident." No motion was made to strike out this answer, but it is now contended that the doctor was thus allowed to express his opinion that the injury was the result of accidental means, and, therefore, that the testimony was improperly received. Such an opinion as to a conclusion of fact could, of course, not be received as evidence. *Dreher v. Order of United Commercial Travelers of America*, 173 Wis. 173. We take it that the doctor meant "injury" instead of "accident," and was not attempting to give evidence as to how the injury had been caused, and we cannot see that the answer would mislead the jury.

The further objection is made that the petition did not state a cause of action, since the name of the beneficiary under the policy was not disclosed. The action was brought by the administrator, and upon a policy, the provisions of which were fully known to the defendant. The trial court allowed an amendment of the pleadings during the trial, and the name of the beneficiary was inserted. We do not see that the defendant could have been taken by surprise by this amendment, or prejudiced in any way.

The case is therefore

AFFIRMED.

LETTON, J., dissenting.

It seems to me the majority opinion rests upon an inference based upon an inference. First, the inference that a sand bur, or other substance, penetrated the thumb. Second, the inference that a malignant germ entered the body through a perforation of the skin thus created. In my opinion the evidence does not justify the recovery.

GERTIE J. WILLIAMS, APPELLEE, V. ELLIS E. WILLIAMS, APPELLANT.

FILED JULY 15, 1921. No. 21533.

1. **Homestead**: SUFFICIENCY OF PLEA. A pleading sufficiently sets forth the selection of the homestead from the wife's separate property, with her consent, where it is alleged therein that after their marriage the parties entered upon the tract in question pursuant to a prior agreement to make it their permanent home and joint homestead, that improvements were constructed sufficient for that purpose, and that it continued for several years to be the family residence.
2. **Husband and Wife**: HOMESTEAD: EJECTMENT. Where the homestead has been selected, with the wife's consent, from her separate property, she cannot withdraw from the homestead and maintain ejectment against her husband, who remains in occupancy thereof, so long as the marital relation continues.

APPEAL from the district court for Morrill county:

RALPH W. HOBART, JUDGE. *Reversed and dismissed.*

Fawcett & Mockett and *C. G. Perry,* for appellant.

Williams, Hurd & Neighbors, contra.

DORSEY, C.

Gertie J. Williams, the appellee, brought ejectment against her husband, the appellant, to recover possession of a quarter-section of land in Morrill county. Her petition contained simply the formal allegations that she had a legal interest in, and was entitled to the possession of, the land, and that since January, 1916, the appellant had deprived her of the possession thereof.

The appellant's answer, in addition to a general denial, set forth that the parties were married in 1911; that before the marriage the appellee had made entry and established her residence, in a small frame shack, upon the land under the government homestead laws; that they were married during a "leave of absence" which she had obtained, and it was agreed that immediately after the marriage they should return to and live upon her homestead, that the same should be their joint homestead, and that the appellant should break out, seed and cultivate the land and construct such improvements thereon as would make it a permanent and habitable home; that as soon as they were married they did move upon the land, which the appellant improved as he had promised, at his own expense and bestowing his own labor thereupon, making it a suitable and comfortable home; that he and his wife and the two children born to them lived there, in harmony, until January, 1916, when without just cause she left the state and has never since returned, although the appellant desired and repeatedly requested her so to do; that by reason of the foregoing he acquired a legal estate in the land of which the appellee could not deprive him, that she was not entitled to separate possession and could not maintain the action.

In her reply the appellee admitted the marriage, and

that she had made entry and established her residence upon the land as alleged, but denied all other averments of the answer. For further reply she alleged that she had been compelled to leave because of his cruelty; that the appellant told her to get out if she did not like it, and since her departure told her not to come back; that it was for those reasons that she remained away from her home, and that it was impossible for them to live together.

The case coming on for trial, the appellant's motion for judgment upon the pleadings was overruled, and the trial court sustained the objection interposed by counsel for the appellee to the introduction of any testimony on the part of the appellant for the reason that his answer did not constitute a defense. Judgment was then entered in favor of the appellee for the possession of the premises, and this appeal resulted.

The point upon which the case turned in the court below being, in effect, a demurrer to the answer, the issue here is whether or not the facts set forth therein would, if proved, support the husband's right to remain in possession of the wife's separate property when she is living apart from him and demands that he be ousted. The appellant's contention is that there was a selection of the land in question as the family homestead under section 3077, Rev. St. 1913, providing that the homestead may be selected from the separate property of the husband, or, with the consent of the wife, from her separate property; that the husband acquired a vested right of homestead therein not subject to be defeated by the wife's voluntary removal from the family residence. We shall first inquire whether or not the appellant's answer sufficiently sets forth a selection of the land in controversy, with the appellee's consent, as the homestead, and second, whether, if the allegations of the answer are sufficient in that respect, the wife may terminate the husband's homestead right and dispossess him, in case she withdraws from the family domicile of her own volition.

As to the sufficiency of the pleading, it was averred in the answer, in substance, that the parties entered upon the land after their marriage in pursuance of a prior agreement to make it their permanent home and joint homestead; that improvements were constructed sufficient for that purpose, and that it continued to be the family residence for four years. These allegations, we think, are sufficient to set out a selection of the homestead from the wife's separate property with her consent, in view of the rule that such consent may be presumed from the occupancy of the premises as a family home. *Hobson v. Huxtable*, 79 Neb. 334.

Assuming that the wife's consent to the selection of the homestead was properly pleaded, there remains the question whether, if she concludes to depart from the home for whatever reason, she may put an end to the homestead character of the premises so as to entitle her to regain exclusive possession thereof by means of an action of ejectment against her husband, on the theory that he is wrongfully withholding her separate property. Counsel for the appellee cite the following from *Cook v. Cook*, 125 Ala. 583: "Nor is it of consequence that the land of which recovery is sought was at one time occupied by the husband and wife with their children as a homestead, nor that the husband and children still reside thereon, nor that the defendant at the time of the trial is willing and all along has been for the wife to return to this homestead and occupy it jointly with him. He has no right to compel her to let him into joint possession or occupation of any of her land, nor any right to exclude her from the possession and occupation altogether, unless she assents to joint possession and occupation with him. There is no law to compel a wife to live with her husband on her land or on his. There is no legal prohibition upon her separating from him and living apart. And having separated from him and left her home in his possession, she is entitled to recover it from him as if he were a stranger. To hold otherwise would be to give the husband rights

and estates in the wife's lands which our statutes not only do not provide for, but expressly provide against."

Other cases cited in support of the same reasoning are *Buckingham v. Buckingham,* 81 Mich. 89; *Crater v. Crater,* 118 Ind. 521. To these may be added *McDuff v. McDuff,* 187 Pac. (Cal. App.) 37. It seems, however, that the conclusion of the Michigan supreme court in *Buckingham v. Buckingham, supra,* is founded, in part, upon the fact that, under the laws of that state, married women are given "such absolute right to disposition of their own separate property that she may convey the homestead by deed without the husband's joining in the instrument;" that therefore the wife may abandon her husband and sue him in ejectment. In Nebraska, on the other hand, it is expressly provided by statute that the homestead cannot be conveyed or incumbered unless by an instrument signed and acknowledged by both spouses. Rev. St. 1913, sec. 3079.

The statutory provision just cited illustrates the character of the homestead right in this jurisdiction of one spouse in land selected as the homestead out of the property of the other. Once vested, it cannot be alienated otherwise than by a joint deed executed and acknowledged by both. It is an estate or interest, and not simply a right of occupancy dependent upon the whim of the spouse out of whose property it has been selected. True, the property may lose its homestead character by abandonment, but "neither spouse can abandon the homestead for the other without his or her free consent." *Weatherington v. Smith,* 77 Neb. 363. The appellee's theory is that, notwithstanding the wife's consent to the selection of her separate property as the homestead, she may at any time thereafter, by removing from the homestead and thus making it no longer the joint residence of her husband and herself, terminate its homestead character and resume the independent control over it which the statute gives to every married woman over her separate property. This, we are convinced, is inconsistent with the interpretation

heretofore placed by this court upon the homestead right of one spouse in the property of the other selected as such. "Where a homestead has been selected by husband and wife from the separate property of the wife, the wife cannot by a conveyance of the property deprive the husband of his homestead right therein while the marriage relation exists." *Miller v. Paustian*, 79 Neb. 196. That which she is not permitted to do by a conveyance, it would be illogical to hold that she could accomplish by her mere withdrawal from the family home.

It is held in *Morrill v. Skinner*, 57 Neb. 164, that the wife's right of homestead in the husband's property is not defeated, where she remains in occupancy, and the husband abandons her and lives elsewhere. In view of the general policy of our laws in recognizing the equality and reciprocal property rights of both sexes, it follows, in our opinion, that the husband's right of homestead in the wife's property must be similarly protected. Where the homestead has been selected, with the wife's consent, from her separate property, she cannot withdraw from the homestead and maintain ejectment against her husband, who remains in occupancy thereof, so long as the marital relation continues.

The pleadings disclose a controversy as to which of the parties is responsible for the wife's withdrawal from the family home, the husband asserting that it was without just cause, and the wife alleging that it was the result of his cruelty and misconduct. If that difficulty be irremediable, relief may be obtained in an appropriate action, and if a divorce should be granted to either party, the wife would immediately become entitled to the possession of her real estate. Rev. St. 1913, sec. 1579.

For the reasons stated, we recommend that the judgment be reversed and the action dismissed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed.

and the action dismissed, and this opinion is adopted by and made the opinion of the court.

REVERSED AND DISMISSED.

OLE C. BRINGEN, APPELLANT, V. MAX WOLF ET AL., APPELLEES.

FILED JULY 15, 1921. No. 21595.

Fraud: REMEDIES: WAIVER. A person who has been induced by fraud to purchase property, when he discovers the fraud, may, at his election, rescind the contract and recover back all that he has parted with thereon, or, when the contract of sale has been executed, in whole or in part, before the discovery of the fraud, he may affirm the contract and maintain an action for his damages resulting from the antecedent fraud, or, when sued for the purchase price, he may plead said damages by way of recoupment. The question of waiver is a question of intention, and this right of action for deceit will not be held to have been waived unless the intention of its possessor to make such waiver clearly appears. Obtaining an extension of time and the renewal of a note given for the purchase price of said property is not a waiver of such right of action as a matter of law.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

Albert & Wagner, J. S. Armstrong, and V. E. Garten, for appellant.

Williams & Williams, contra.

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS and MORNING, District Judges.

CLEMENTS (E. J.), District Judge.

This is an action for damages alleged to have been sustained by plaintiff in consequence of the sale of cattle, infected by a disease known as "pink-eye," to plaintiff by defendants, who, it is alleged, had knowledge of the condition of the cattle, but represented to the plaintiff that they were all right and sound. At the close of the evi-

dence, on motion of defendants, the court instructed the jury to return a verdict for defendants, which was done, and a judgment for defendants was entered thereon. From said judgment, the plaintiff appealed.

By admissions and undisputed evidence it is established that on Saturday, the 1st day of May, 1915, the defendants sold to plaintiff 39 head of yearling cattle, then in the stock-yards at Albion, Nebraska, for $36 a head, and plaintiff gave defendants his promissory note for the purchase price thereof, payable in six months and secured by chattel mortgage on said stock. The sale was completed on the following Monday by the defendants delivering said cattle to plaintiff at his pasture situated ten miles from Albion. When said note became due, on November 1, 1915, plaintiff gave a renewal note therefor, due in six months, with some additional security, and defendants retained both the original and renewal notes. When the renewal note became due and payment was requested, plaintiff, for the first time, notified defendants that said cattle were diseased when he bought them and demanded a reduction in the amount of the note for that reason. This was refused and, under pressure, plaintiff paid the note in full.

While the evidence is conflicting, there is sufficient, if believed, to show that, at the time of said sale, the defendants represented to the plaintiff that said cattle were all right; that he relied on said representation in purchasing the cattle; that the cattle were not all right, as some of them were afflicted with a disease commonly known as "pink-eye;" that plaintiff did not know that they had any disease until after they had been delivered and placed in his pasture and commingled with plaintiff's other cattle therein; that he first discovered that they were diseased the next day after they were so delivered; that three of the cattle so purchased of defendants died from said disease, many others, including cattle which plaintiff owned before said purchase and with which cattle they had been commingled, became infected with said disease

and plaintiff sustained damages in consequence thereof. Plaintiff testified that at the time the sale was made it was agreed that he should have a year's time, and that the renewal of the original note was made in pursuance of that agreement. Defendants deny this, and say that they extended the time of payment at plaintiff's request.

In its peremptory instruction to the jury the court said: "Gentlemen of the jury. The court holds that when the plaintiff gave the renewal note he had knowledge that the cattle had the pink-eye, and thereby waived any fraud in the original contract. You are, therefore, directed to return a verdict for the defendants." It will be noted that this instruction is based wholly on the proposition that the giving of the renewal note constituted a waiver of the alleged fraud as a matter of law. No other basis for said instruction or reason for giving it is suggested by the court or is urged by counsel for defendants, and the determination of this case rests wholly on whether said proposition correctly states the law.

It is a well-established and familiar rule that one who has been induced by fraud to purchase and agree to pay for property has, at his election, one of two remedies. (1) He may rescind the contract and recover back whatever he has parted with thereon. (2) He may affirm the agreement and maintain an action for damages resulting from the deceit, or, when sued by the vendor to recover the price for which the property was sold, may plead such damages by way of recoupment. *Pollock v. Smith*, 49 Neb. 864; *Kaup v. Schinstock*, 88 Neb. 95. That this is a general rule which applies in all cases where the contract has been fully executed before the discovery of the fraud is held by practically all authorities. By the weight of authority, said rule is not applicable in a case where the fraud is discovered while the contract is wholly executory. The reason given for this limitation of the general rule is that, where a person discovers the fraud when he is still wholly at liberty to save himself from its effects, what he thereafter does to his own injury is self-inflicted, and

one may not recover damages which resulted from his own acts instead of the act of the other party to the contract. *Bean v. Bickley,* 187 Ia. 689, and authorities cited.

There is, however, a sharp conflict in the authorities as to whether said general rule is applicable in a case where, at the time of the discovery of the fraud, the contract has been executed in part and a part is still executory. Some authorities seem to hold that, where the injured party discovers the fraud before the contract has been fully executed and continues to carry it out, he thereby condones the fraud and may not maintain an action for deceit. The principal case holding this doctrine is *Ponder v. Altura Farms Co.,* 57 Colo. 519, which is cited and quoted from in defendants' brief. In the opinion several cases are cited as supporting said proposition. Some of them, as well as some cited in defendants' brief, are not authority therefor, as the contracts under consideration therein were wholly executory when the fraud was discovered.

The other rule is that, if the contract be executed in whole or in part before the fraud is discovered, the purchaser need not rescind, but may, at his election, affirm the contract, retain the property, and also bring his action for damages on account of the deceit; in other words, that the general rule above stated applies in cases where the contract has been executed in part only. This is the doctrine announced and followed in *Bean v. Bickley, supra,* and *Koch v. Rhodes,* 57 Mont. 447. In the opinions in said cases the authorities supporting or bearing upon both of the foregoing rules are collated, discussed and analyzed.

The question as to which of the foregoing conflicting rules shall obtain in Nebraska does not appear to have been heretofore determined by this court and we are therefore at liberty to choose the one which appears to us to be right; and, after due consideration, we have concluded that the latter one is supported by the weight of authority and is more consonant with reason and justice.

We therefore hold that the general rule above stated applies where the contract is partly executed before the discovery of the fraud as well as where it is wholly executed.

In the instant case, the sale was completed, the purchase price settled for by the giving of a promissory note, and the cattle were delivered and commingled with other stock before plaintiff discovered that they were diseased. All that remained to be done was the paying of the note, and, under the foregoing rule, the plaintiff had the right to affirm the contract and sue for the damages resulting from defendants' alleged deceit. Counsel's contention that this right was waived by obtaining an extension of time and giving a renewal note, although supported by some of the authorities cited, is, we think, without merit. It would seem that in the cases cited the distinction between the effect of rescission and that of affirmance is not properly recognized. Where one denies the validity of a contract, rescinds, he cannot maintain that position if he seeks and obtains a change in its terms advantageous to himself, for this would be inconsistent with his position that there is no contract; but when, on discovering the fraud, he elects to affirm the contract, it becomes his duty to carry out its provisions, and there is no inconsistency in asking a betterment of the terms of the contract which, by his affirmance, he admits is valid. *Bean v. Bickley, supra.*

An independent right of action for damages, sustained as the result of defendants' fraud, accrued to plaintiff as soon as he discovered same and elected not to rescind. Waiver depends upon intention, and it cannot be held that plaintiff has released or waived said right of action unless his intention to do so clearly appears; and the obtaining an extension of time and giving the renewal note, while it may be evidence of an intention to waive, is not a waiver as a matter of law.

It follows that the action of the trial court in directing a verdict for the defendants was error for which its

judgment should be reversed; and said judgment is therefore reversed and remanded for further proceedings.

REVERSED.

FRANCES KULHANEK ET AL., APPELLEES, V. EMMA KULHANEK ET AL., APPELLANTS.

FILED JULY 15, 1921. No. 21617.

1. **Pleading**: PROOF. A party will not be permitted to plead one cause of action and at the trial rely upon proof establishing a different cause. The allegations and proof must agree.
2. **Judgment**: DEFAULT: VACATION. Statements to the defendant in an action by a third person, not a party to the suit, of which the plaintiff knows nothing, to the effect that said action has been settled, because of which statements the defendant fails to appear or to plead and a default judgment is entered against him, do not constitute a ground for setting aside said judgment after the term under the provisions of section 8207, Rev. St. 1913, nor any recognized source of equity jurisdiction.

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

A. H. Murdock, for appellants.

James E. Bednar and *Joseph T. Votava, contra.*

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS and MORNING, District Judges.

CLEMENTS (E. J.), District Judge.

On November 25, 1919, Emma Kulhanek, defendant in the present suit, obtained a judgment for $2,500 by default in the district court for Douglas county, Nebraska, against the plaintiffs herein for the alleged alienation of the affections of her husband, Joseph Kulhanek. The plaintiffs are the father and stepmother of said Joseph Kulhanek. An execution issued on said judgment was levied on plaintiffs' property and on February 24, 1920, said property was sold by the sheriff to satisfy said judgment. On May 24, 1920, this action was brought to vacate and

set aside said judgment and sale and to permit the plaintiffs to answer and make their defense to the action in which said judgment was obtained. The trial court found for plaintiffs and entered a decree setting aside said judgment and sale and granting them a new trial in said case. From said finding and judgment, defendants herein appeal.

In plaintiffs' petition it is alleged that, after the commencement of said alienation action, said Emma Kulhanek agreed with plaintiffs to drop said suit; that, relying on said agreement, plaintiffs paid no further attention thereto; that, in violation of her said agreement, said Emma Kulhanek fraudulently caused said judgment to be entered without any notice to or knowledge of the plaintiffs, and that plaintiffs did not know of the entry of said judgment until after said sale was made. The foregoing is the substance of all the allegations of the petition stating the ground or reason for setting aside said judgment. This is clearly a pleading of "fraud practised by the successful party in obtaining the judgment or order," which is one of the grounds for vacating a judgment under the provision of subdivision 4, sec. 8207, Rev. St. 1913. Counsel in their brief also assert that the petition alleges unavoidable casualty or misfortune within the meaning of subdivision 7 of said section, but we find no allegations in the petition which sustain said contention, and, if there were such, the record contains no evidence to support such allegations. Plaintiffs' petition therefore sets up but a single cause of action or ground for setting aside said judgment and sale, and that is the alleged fraud of Emma Kulhanek in procuring the judgment to be entered in violation of her agreement to drop the case. The making of this alleged agreement was denied by the answer and the issue thus joined was decided by the trial court in favor of the defendants.

There is not a scintilla of competent evidence in the record to support plaintiffs' allegation of fraud on the part of the defendant and the trial court rightfully found

that said Emma Kulhanek "acted in entire good faith in having judgment entered against the plaintiffs, * * * and in causing an execution to be issued and levied by the sheriff on the property of the plaintiffs herein, and was entirely without fraud in any of her proceedings in said action." This finding for the defendants on the only ground or reason for setting aside said judgment alleged in the petition would seem to compel a judgment in their favor. But the trial court proceeded to make another finding, as follows: "The court further finds that the plaintiffs herein relied upon the representation made by their son, Joseph Kulhanek, to the effect that he had settled the cause of action so filed against them by the defendant, Emma Kulhanek, and that by reason of their relying upon the representations so made by their son, Joseph Kulhanek, they suffered a judgment to be entered against them." And it is upon this finding that the judgment for plaintiffs herein is based. The court also found that "Emma Kulhanek knew nothing of the representations made by Joseph Kulhanek to the plaintiffs herein." There is evidence in the record, admitted over the objections of defendants, which supports the above finding in favor of plaintiffs, but there are no allegations in the petition which justify the admission of such evidence or upon which such a finding can be based.

It is an elementary rule of law that the allegations and proof must agree. "There can be no recovery if there be a material variance between the allegations and the proof." *Elliott v. Carter White-Lead Co.*, 53 Neb. 458. "A party is not allowed to allege in his petition one cause of action and prove another upon the trial." *Imhoff v. House*, 36 Neb. 28. "A party will not be permitted to plead one cause of action and upon the trial rely upon proof establishing a different cause." *Luce v. Foster*, 42 Neb. 818. The action of the trial court in making a finding of facts not pleaded and basing its judgment thereon was a violation of the foregoing rule and clearly erroneous.

If the evidence on which such finding is based had been introduced without objection, we might permit the plaintiffs to amend their petition to conform to the proof, but as it was all admitted over the defendants' objections this cannot rightfully be done.

But even if the facts so found had been pleaded in the petition the pleadings and evidence would not have been sufficient to support the judgment of the trial court. The facts so found are to the effect that plaintiffs suffered the judgment sought to be set aside to be entered against them because they relied upon the statements of their son, Joseph Kulhanek, that he had settled the action in which such judgment was obtained and that it would be dropped. Joseph Kulhanek was not a party to said action. Although he was the husband of Emma Kulhanek they had been separated for some time and he was living with the plaintiffs when said statements were made. His wife had begun an action against him for divorce which was then pending. There is no evidence tending to show that he was authorized to act for her as her agent or otherwise, nor that he assumed to do so. On the contrary, his statement to his parents that he had settled said suit indicates that he had assumed to act for and on behalf of the plaintiffs. In making said statements Joseph Kulhanek was not in any sense the agent of Emma Kulhanek and the court specifically found that she knew nothing of them.

Is the fact that a defendant fails to make a defense to an action and a default judgment is taken against him without his knowledge because of his reliance on the statements of his agent, relative or friend, not a party to the suit, that same has been settled a sufficient ground for setting aside said judgment after the adjournment of the term at which it was entered, where plaintiff knew nothing of said statements? It is obvious that such a state of facts does not constitute "fraud practised by the successful party" or "unavoidable casualty or misfortune," and is not therefore within any of the provisions

of section 8207, Rev. St. 1913, relied upon by plaintiffs. But this is not decisive of the question because such statutory provisions are not exclusive. The right to an independent equitable action to vacate a judgment also exists. *Meyers v. Smith,* 59 Neb. 30. Such statutory provisions are concurrent with independent equity jurisdiction. *Abbott v. Johnston,* 93 Neb. 726. Such an action for a cause other than those mentioned in said section 8207 must be founded on some recognized source of equity jurisdiction. *Douglas County v. Connell,* 15 Neb. 617. Do the facts disclosed by the evidence and found by the court constitute a recognized source of equity jurisdiction?

In some of the cases cited in plaintiffs' brief the order setting aside a judgment by default was made in the original action and before the adjournment of the term at which the judgment was rendered. Among these are *Milwaukee Harvester Co. v. Schroeder,* 72 Minn. 393; *Board of Education v. National Bank of Commerce,* 4 Kan. App. 438, and *Reilley v. Kinkead,* 181 Ia. 615. Cases of this character are not authority on the question involved herein.

In many of the cases cited the defendant's failure to defend the action was occasioned by the acts, statements or representations of the plaintiff in said action or his attorney, which the courts have quite generally held constitute constructive if not actual fraud. Such were the facts and the holding of this court in *Klabunde v. Byron Reed Co.,* 69 Neb. 126, and *Arnout v. Chadwick,* 74 Neb. 620, which are cited and relied on by plaintiffs herein. Since there is no evidence in the instant case that Emma Kulhanek was guilty of either active or constructive fraud, such cases have no bearing upon the question under consideration.

The only authorities cited by counsel which appear to sustain the judgment of the trial court are Minnesota cases, among which are *Flannery v. Kusha,* 147 Minn. 156, and *Glaeser v. City of St. Paul,* 67 Minn.

368, but an examination of said cases shows that they were brought and decided under a statute of Minnesota which provides: "The court * * * at any time within one year after notice thereof, in its discretion, may relieve a party from any judgment * * * taken against him through his mistake, inadvertence, surprise or excusable neglect." (Gen. St. 1913, sec. 7786.) Under this statute the court is expressly authorized, in its discretion, to set aside a judgment because of the plaintiff's own mistake, inadvertence or neglect. There is no such statute in Nebraska, and this court, in *State v. State Journal Co.*, 77 Neb. 771, held that the discretion of the court to set aside a judgment ends with the term at which it was rendered. The Minnesota cases cited cannot therefore be considered as authority in Nebraska.

From a careful examination and consideration of the authorities cited in the briefs and many others we have reached the conclusion that the facts disclosed by the evidence and found by the court do not constitute any statutory ground for setting aside the judgment in question or any recognized source of equity jurisdiction, and that the court erred in holding otherwise and in entering judgment for plaintiffs herein.

The judgment and decree of the trial court is therefore reversed and the case dismissed at plaintiffs' costs.

REVERSED AND DISMISSED.

FRANK O. SJOGREN ET AL., APPELLEES, V. LIBERTY CLARK ET AL.: JAY HASTINGS, APPELLANT.

FILED JULY 15, 1921. No. 21688.

1. **Principal and Agent:** REVOCATION OF AGENCY. "Where an agent is vested with a mere naked authority not coupled with an interest, his principal may revoke that authority before performance." *Staats v. Mangelsen*, 105 Neb. 282; *Hallstead v. Perrigo*, 87 Neb. 128.

2. **Appeal:** ISSUES: PLEADING. Record examined, and *held* that the issue of rescission of the agency contract was, without objec-

tion, limitation or restriction, fully tried out in the district court, and that objections made in this court for the first time that a rescission of the contract was not pleaded in the court below will not be considered as a ground of reversal. *Boyd v. Lincoln & N. W. R. Co.*, 89 Neb. 840.

3. **Evidence** examined, and *held* to sustain decree of the lower court.

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

Mills, Beebe & Mills, for appellant.

John C. Martin and *E. E. Stanton, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., DICKSON and TROUP, District Judges.

DICKSON, District Judge.

From the record it appears that the appellees, plaintiffs below, were owners of a quarter section of land in Polk county; that on the 17th day of May, 1919, they executed and delivered to the appellant, Jay Hastings, an agency contract, authorizing and empowering him to sell this land; that on the 13th day of June following, the appellant, as agent for the appellees, entered into a contract for the sale of the land with Liberty Clark, defendant below. In October following, this action was commenced by appellees against Liberty Clark, the alleged purchaser of the land, Jay Hastings, their agent, and J. J. Peters, a tenant of Clark.

It is alleged in the petition, in substance, that the appellees are the sole owners and entitled to the possession of the land; that on the 17th day of June the defendants caused to be placed of record the contract of sale to Clark; that they never executed or authorized the execution of the contract by Hastings, and that the same casts a cloud upon the title, and they pray for a cancelation thereof and the quieting of the title in the appellee Frank O. Sjogren.

The appellant, Hastings, filed his separate answer and cross-petition, setting forth what he claims to be a copy

of the contract of sale with Clark, which does not materially differ from that set forth by the appellees, also, attached is a copy of the agency contract between him and the appellees, and he states that, in pursuance of the terms thereof, he sold the property to Clark for $18,400, he paying $2,400 in cash, the remainder to be paid March 1, 1920, and that of the money paid to him by Clark he tendered $1,000 to the appellees, which they refused to accept; that Clark was ready, willing and able to perform all the terms of his contract, but that the appellees refused to complete the sale and had brought an action to cancel the contract that he made with Clark as their agent, and that they are indebted to him in the sum of $1,400 as commission, and he prays judgment therefor. To this answer the appellees replying deny all the allegations, save only such allegations of the answer as admit allegations of the petition.

In view of the fact that Clark and Peters have not appealed from the decree of the trial court, it is unnecessary to notice their pleadings, except to say that Clark pleaded the contract made by Hastings on behalf of the appellees, and that Hastings was authorized by the contract in writing to execute for the appellees the contract of sale, and that he stood ready to and had the ability to perform said contract. The defendant Peters also, in a general way, answers the petition, and alleges an oral lease with Clark for the land. Replies were filed to the answers of Clark and Peters which are similar to the reply filed to the answer of Hastings. A trial was had which resulted in a decree finding generally for the plaintiffs and against all the defendants, and the Clark contract of sale was set aside and canceled, the title quieted and confirmed in the appellee Frank O. Sjogren, and Hastings' cross-petition was dismissed. Hastings filed a motion for a new trial, which was overruled, and he only appeals to this court.

The record presents for consideration two questions: First, that the attempted sale of the land by appellant was not upon the terms of the agency contract and within

the scope of his authority granted thereby; that is, that the contract of sale made other and different terms and provisions from those granted to Hastings in his contract. Second, that the appellant had no right or authority to proceed to act as agent for the appellees at the time he executed the Clark contract; in other words, that the agency contract had been revoked before the alleged sale agreement had been entered into with Clark.

A consideration of the first question is unnecessary if we find for the appellees on the second proposition. This requires an examination of the record. The pleaded contracts of agency and sale are not in dispute; that is, the appellees admit executing the contract of agency, and the contract of sale made by Hastings to Clark was not controverted except in so far as Hastings had authority to enter into the same and bind the appellees. It is urged by appellant, Hastings, that rescission is an affirmative defense and must be pleaded if relied upon as a defense; while the appellees contend that one of the issues tried and determined by the lower court was whether or not the contract of agency executed by the appellees had been revoked prior to the making of the claimed sale to Clark by Hastings. A careful examination of the record shows that the question of rescission was fully gone into by the parties without objection. The appellees testified that a short time after the making of the agency contract, and before the making of the Clark sale, they told Hastings that they had decided not to sell, and that he told them he would not as he had plenty of land to sell. This was denied by Hastings. Both offered evidence in support of their contentions. This question of fact was fully, and without objection, limitation or restriction, tried out before the court and determined. The rule is well settled in this state that—"Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either that the issue is not sufficiently pleaded, such objection will not be considered

in this court as ground for reversal." *Boyd v. Lincoln & N. W. R. Co.*, 89 Neb. 840.

This now brings us to the question, Did the appellees have the right to revoke the agency contract before sale? The right of rescission before sale is also well settled in this state. The court said in *Hallstead v. Perrigo*, 87 Neb. 128, and *Staats v. Mangelsen*, 105 Neb. 282: "Where an agent is vested with a mere naked authority not coupled with an interest, his principal may revoke that authority before performance."

Was there a rescission of the contract before sale? The evidence is conflicting upon this question. The appellees both testified that, before the Clark contract was executed by Hastings, they told him, in substance, that they had decided not to sell, and the record shows that when the Clark contract was presented to them for signature by W. O. Mickey, Hastings' partner, they refused to sign, and assigned as a reason that they had told Hastings not to sell. Yet, with full knowledge of their refusal to sign or authorize the contract, Hastings undertakes to bind his principals by signing the contract for them, which was an unusual thing for an agent to do. Instead of going out and ascertaining why they refused to sign the contract, he proceeded to sign the same, disregarding their wishes. Such conduct has the appearance of bad faith, to say the least, and to ask its enforcement in a court of equity is expecting much under the circumstances disclosed by the record. While the revoking of the agency contract is denied by appellant, Hastings, and some evidence is offered by him tending to show that there was no rescission, yet, after a careful consideration of all the evidence, we do not hesitate to find and say, independently of the findings of the lower court, that the decree is sustained by ample and sufficient evidence. The contract of agency having been rescinded before sale, the appellant could not maintain this action against the appellees. The appellant having an exclusive agency, the appellees might, in a proper action, be liable to the appellant in some

amount, but such liability is not presented by the pleadings and evidence. *Hallstead v. Perrigo, supra.*

The agency contract having been revoked before sale, and that issue of fact having been tried by both parties without objections, and the other assigned errors being without merit, it follows that the decree of the trial court must be, and it is,

AFFIRMED.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, V. NEBRASKA LUMBERMEN'S MUTUAL INSURANCE ASSOCIATION, APPELLEE.

FILED JULY 15, 1921. No. 21729.

Insurance: POLICY: CONSTRUCTION. In an action on an insurance policy to which an average clause is attached covering a stock of lumber, coal and such other merchandise as is usually carried and kept for sale in a retail lumber yard, also the buildings used in the business, and where a part of the insured property is situated on one block and the remainder on another block, the blocks being disconnected and separated by a street, and there being no designation in the policy where any particular property insured is situated, *held*, that the property insured was situated in one general location, and that the property situated on one block will be regarded as one of the premises or places mentioned in the average clause, and the other property disconnected therefrom on the other block will be regarded as a separate "premises" or place within the terms of the policy. *Mangold v. American Ins. Co.*, 99 Neb. 656.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Courtright, Sidner & Lee, for appellant.

C. C. Flansburg, contra.

Heard before MORRISSEY, C.J., DAY and ROSE, JJ., DICKSON and TROUP, District Judges.

DICKSON, District Judge.

The facts in this case are not in dispute From the

record it appears that appellee, defendant below, issued to the appellant, plaintiff below, its policy of insurance for $3,000, on its stock of lumber, lath, coal and other merchandise usually kept in retail lumber yards. The policy contained, among others, these conditions or stipulations: "The words 'premises occupied' are to be understood to mean the land owned, leased or otherwise occupied by the assured in not more than one general location in handling their business. * * * It is understood and agreed that, where the property covered by this policy is located in more than one place, the amount insured by this policy shall attach in each of the premises occupied in proportion to the whole amount insured that the value of the property covered by this policy contained in each of the places occupied shall bear to the value of the property contained in all of the premises occupied." It further appears that the insured property was situated on the south half of block eight and the south half of the block immediately west. On block eight plaintiff had its office and kept its stock of lumber and building material of all kinds, and on the block west thereof its coal shed and elevator; there being a street between these two half blocks of the usual width. A loss occurred which destroyed all the property on the south half of block eight, but none on the west half across the street. The insurance company claimed that it should only pay such percentage of the face of its policy as the amount of the loss bore to the value of the property burned and unburned, and this amount it paid; plaintiff's contention being that it was entitled to recover the full amount of the policy, leaving in dispute $643.46, for which sum suit was brought in the district court for Dodge county, there tried without a jury, and plaintiff's action dismissed.

The question to be determined is the amount of defendant's liability under its policy. It conceded it was liable for $2,353.57, which it paid. If we place the construction on the policy contended for by plaintiff, then it has not discharged its full liability. On the other hand, if we con-

strue the policy as did the trial court, the judgment was right and affirmance must follow.

The appellee contends that the defendant's liability has been determined by this court in *Mangold v. American Ins. Co.*, 99 Neb. 656. The defendant in this case was a party defendant in that case, and contended there, as it does here, as to the construction that should be placed upon the policy, and its contentions in that case were sustained. The appellant insists that the *Mangold* case is not analogous or decisive of the case under consideration, and that the question in the *Mangold* case was not whether there were one or two locations, but whether there were two or five locations. The record does not warrant this contention. It is true that in that case the adjusters for a part of the insurance companies arbitrarily undertook to, and did, divide the property into five different premises, and on that basis they reached the conclusion set forth in the opinion in that case. But it was the contention of the appellees, as is contended in this case by the appellee, that there were two premises, places or risks, not five, covered by the policy, and the trial court took the view contended for by the defendant insurance companies, and the judgment was affirmed by this court. In the *Mangold* case the average clause does not differ from the policy in suit. They are substantially the same. To construe one is to construe the other. The question involved in the case under discussion was fully discussed and decided by this court in the *Mangold* case. Chief Justice Morrissey, in the opinion, says: "Appellees contend that the main yard (lots 6, 7, 8 and 9), which constituted a single inclosure, was one 'premises' or risk. * * * The (trial) court took the view contended for by appellees, and after a careful examination of the record we are constrained to believe that this yard or inclosure is not susceptible of the arbitrary division which the adjusters attempted to make." The appellee in this case makes the same contention; that is, that the property insured and destroyed on block eight was one "premises"

or risk, and that the insured property across the street and not destroyed constituted another "premises" or risk. The trial court in the *Mangold* case adopted the theory of the appellees that lots six, seven, eight and nine constituted one "premises" or risk, and that the property disconnected therefrom and lying across the street constituted another "premises" or risk, and that the property covered by the policy in that case was located in more than one "premises" or place.

The proper construction to be placed upon the policy in suit is that the appellee should pay only such percentage of the face of the policy as the amount of the loss bore to the value of the property insured. Any other construction would not give effect to the average clause as clearly expressed in the policy. This case presents for consideration the same question considered and decided in the *Mangold* case, and the holding in that case controls this case.

The judgment of the district court is right and is

AFFIRMED.

OTHO STUART, APPELLEE, V. HERBERT TORREY, APPELLANT.

FILED JULY 15, 1921. No. 21732.

1. **Pleading**: VARIANCE. Where the plaintiff's cause of action is based upon a running account, and the answer pleads a full and complete settlement, and the reply is a general denial, the issues presented by such pleadings are the correctness of the account and the settlement thereof; and a finding and judgment on such pleadings that "there was an unintentional mistake made by plaintiff and defendant in the computation of their several accounts when making settlement" *held* not to be sustained by the pleadings, and a material variance from the issues presented by the pleadings.

2. **Compromise and Settlement**: PLEADING: BURDEN OF PROOF. The presentation and auditing, from time to time, of accounts by parties having business dealings and transactions with each other, and the making of new notes for the balances and the surrender of old notes given and payment of the last note given constitute

a settlement between the parties. And where suit is brought by the maker of the notes on an account between the same parties covering the same period of time, and settlement of the item sued upon is alleged by the giving of notes by the plaintiff, the plaintiff must allege that the items sued for were not included in the settlements made, and the burden of proof is on the maker of the notes to show that the settlements did not include debts owing to him from the adverse party.

3. **Evidence** examined, and *held* not to sustain the judgment.

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

John A. Miller and *J. M. Fitzgerald,* for appellant.

H. M. Sinclair and *W. A. Stewart, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., DICKSON and TROUP, District Judges.

DICKSON, District Judge.

This action was commenced and tried in the county court of Dawson county, appealed to the district court, and there tried by the court without a jury. The plaintiff below, appellee herein, charged in his petition that, from May 13, 1913, until about the 26th day of March, 1919, he continuously dealt with and had business relations with the appellant, defendant below, in the buying and selling of horses and cattle, corn, feed and seed, and that during each year he performed work and labor for the defendant at his request, and the defendant performed work and labor for the plaintiff. Plaintiff further alleges that no settlement of the alleged running account between him and defendant was ever made, and, as an excuse for overpaying the defendant, he alleges that the defendant falsely and fraudulently represented to him that he owed him large sums of money in excess of what was actually due, which he paid. The petition contains an itemized statement of the account, including debits and credits, and prays for an accounting and judgment thereon. By agreement it appears from the judgment of the court that the case was tried in the district court upon the answer

and reply filed in the county court. The answer of the defendant admits the dealings with the plaintiff during the times set forth in plaintiff's petition, and avers that each year he made final and full settlement with the plaintiff for every item that he owed the plaintiff, and that their settlements included items due the defendant from the plaintiff; that many items set forth in plaintiff's account are inaccurate and incorrect, but that all items of the account between plaintiff and defendant which were justly due to either one or the other were fully settled; that on the 29th day of March, 1919, he settled fully and entirely with plaintiff for everything that was owing by defendant to plaintiff, and everything that was owing by plaintiff to defendant, and that in such settlement the plaintiff owed the defendant $440, which was paid by plaintiff. The reply of the plaintiff was a general denial. The case was tried on the 11th day of June and taken under advisement until the 23d day of June, and on that day judgment was entered by the court against the defendant for $564.50, the court finding that "there was an unintentional mistake made by plaintiff and defendant in the computation of their several accounts when making settlement, and that plaintiff, by reason thereof, overpaid the defendant the sum of $564.50." A motion for a new trial was filed, in which the judgment was attacked for the reason the same was not supported by sufficient evidence, was against the evidence, and that the same was contrary to law. This was overruled, and an appeal taken to this court.

From a careful reading of the record in this case it appears that the first transaction between the parties was the purchase of a team of horses by plaintiff from defendant for $120 in May, 1913. The next transaction was in 1914, the renting of a farm by plaintiff from defendant. From that time on, and up until 1918, the parties had numerous transactions, in which the plaintiff purchased from the defendant grain of different kinds, also other articles of personal property, and performed

and exchanged work and labor with defendant; the defendant performing for and exchanging work and labor with the plaintiff. The first alleged and claimed settlement between the parties was in 1914. During that year the plaintiff purchased from the defendant a team of horses, work was performed on both sides, and a note was taken for some $300. This note included the note for $120, given for the team purchased in 1913, and the interest thereon, the note for $120 being surrendered to the plaintiff. The next settlement was on April 23, 1915, when the plaintiff gave to the defendant his note for $276 and received his 1914 note. They next settled on March 23, 1916, and on that date the plaintiff gave to the defendant his note for $365, that being the amount then due after allowing all credits, and the note of April 23 was surrendered to plaintiff. In January following, another settlement took place, the plaintiff giving the defendant his note for $930. Later, August 4, 1917, this note was taken up and surrendered to the plaintiff, and he gave the defendant his note for $900, the difference, $30, being on account of a transaction in relation to the sale of one team and the purchase of another whereby the plaintiff had an agreed credit of $30. On February 22, 1918, the plaintiff gave the defendant his note for $397.80; that being the amount then due the defendant. Some time later there was a horse transaction between them whereby the plaintiff's indebtedness to the defendant was increased to the extent of $50, and later the plaintiff gave to the defendant his note for $447.80 and received the note for $397.80, and by agreement dated the last named note for $447.80 as of the date of the note for $397.80. When the note for $397.80 was given, the plaintiff was moving away from the farm he had rented from defendant, and the note for $447.80 was given after he had moved. The giving of this last note ended the dealings between them except the payment of this note; payment being made on March 29, 1919, and the note being surrendered to the plaintiff.

There is no dispute between plaintiff and defendant

as to the giving of these notes, and they both testify that when the notes were given settlements were made, and the trial court in effect so found. It also found that plaintiff would at these times present his accounts, the defendant also presenting his demands, and that they were examined by the parties and the amount due ascertained and a new note taken for the balance and the old note surrendered. The plaintiff in his testimony tells of the final settlement between him and Torrey and the payment and settlement of the last note for $447.80. It seems that plaintiff was at Torrey's place helping him, staying there until he moved, and at that time Torrey figured up his credits and put them on the back of the note, as well as charging the plaintiff with certain items that he owed; both parties believing and intending this to be a full and final settlement.

A careful reading of the evidence in this case convinces the writer that, at the time of the giving of the several notes, the parties audited their accounts and agreed on the amount that the plaintiff owed, and that the payment of the last note for $447.80 was in final settlement of their transactions. There is an absolute failure of proof in the record of fraud, error, or mistake in the alleged settlements between the parties. In a review of the evidence, we are mindful of the fact that the trial judge had a much better opportunity to determine the facts than we have; but it is our duty to examine the record and enter judgment as we find the facts to be. After a careful and studied examination of the record, we have reached the conclusion that the finding by the trial court that there was "an unintentional mistake made by the plaintiff and defendant in the computation of their several accounts when making settlement" is not sustained by the evidence. To read the record is to be convinced. The parties agree that they met once a year, or thereabouts; that they had their accounts before them, and that debits and credits were demanded, given, and refused, resulting in the giving of a new note for the ascertained balance and the sur-

render of the old note. The law favors and encourages settlements, and in the absence of fraud, error, or mistake, they should not be set aside. The record conclusively shows a meeting of the parties, a presentation, examination and adjustment of their accounts, the making of new notes for the found balance and the surrender of the old ones. Such acts constitute settlements. The notes reflect but a part of the transactions, yet they were given to evidence the amount due. To set aside their deliberate acts six years thereafter ought to require more than a mere suspicion of error. If such settlements are to be set aside by a single stroke of the pen, no man will be safe until the statute of limitations has run in his behalf. The plaintiff's cause of action was based upon a running account covering a period of nearly five years; the defendant by his answer admits having dealings with plaintiff during this time, but charges that his account, as set forth in the petition, was not complete, and as a defense alleges a settlement of all the items sued for and others not included therein. The plaintiff, not only in his reply, but in his petition, denies the alleged settlements, so that we have presented by the pleadings a suit upon an account, a plea of settlement, and a denial thereof. The rule is well settled in this state that fraud or mutual mistake cannot be shown under a general denial in a reply to an answer pleading settlement. *Gandy v. Wiltse*, 79 Neb. 280. Appellee, in a way, admits that the judgment is not sustained by the pleadings, but insists that the parties should be restricted in this court to the theory upon which the cause was tried in the court below (this rule being announced by this court many times), and he says: "But the issue tendered by the answer was an account stated, settled, and paid. This issue was not tried. As before stated, both parties went into their business transactions from beginning to end and tried the question of debits and credits arising thereon regardless of the issue tendered by the answer." The record, in some respects, justifies this statement by coun-

sel for the appellee in this: That some incompetent, irrelevant and immaterial evidence was received by the court without objection. If the record disclosed the fact, as claimed by appellee, that the entire business transactions from beginning to end between the parties had been tried out in the action regardless of the issues tendered by the pleadings, and without objection, then, without doubt, both parties would be bound by the record in this court. But an examination of the record shows to the contrary. The plaintiff first offered evidence of such items of his account as it was agreed between the parties were in dispute, and rested. The defendant, without objection, offered evidence in contradiction of the disputed items in the plaintiff's account. After so doing, the record shows that, during the examination of the defendant Torrey, the plaintiff admitted owing him $100, paid by him to plaintiff's corn huskers, also for a quarter of beef, $17.50; neither being shown as credits due the defendant. At this state of the record, the defendant stated he had his bills for corn and feed furnished to the plaintiff, and the defendant then offered to show that, in addition to his credits admitted, he furnished corn and hay to the plaintiff which were not included in the credits given in by him. Whereupon, the plaintiff objected to this offer for the reason it was incompetent and immaterial, and not an issue in the case, and not within the pleadings and questions raised between the parties. This objection was by the court properly sustained. It is therefore evident from the record that the business transactions from the beginning to the end were not tried, and that the court tried the case on the pleadings as made, and that the bars were not thrown down and the case tried without regard to the pleadings, as contended by the appellee. The court, when objections were made, restricted the parties to the issues as made by the pleadings. Having done so, it was error to render judgment on an issue not involved and without the pleadings. Such a judgment must be set aside.

This court said in *Traver v. Shaefle*, 33 Neb. 531, 548: "There is no more inflexible rule of law than that, to sustain a verdict or judgment, the pleadings and the proof, *allegata et probata*, must agree." The record conclusively shows that many of the items of debit and credit were included in the notes given by the plaintiff, and that the account sued upon covers the same period of time that the notes did. In no place in the record does the plaintiff pretend to point out and show what items of credit, if any, were not included in the balances evidenced by his notes. Under such circumstances, the presumption is that all the items of debit and credit existing between the parties at the time of the giving of the notes were included, and before the plaintiff can recover on any of the alleged items he must allege that the items sued for were not included in the settlements made, and the burden of proof is on the maker of the notes to show that the settlements did not include debts owing to him from the adverse party. *Keller v. Keller*, 18 Neb. 366. The plaintiff not only failed to make such allegations in either his petition or reply, but absolutely failed in his proof. A further consideration of the assigned errors is unnecessary.

It follows, for the reasons given, that the judgment is reversed and the cause remanded.

REVERSED.

LE ROY BROWN, APPELLEE, V. FIREMEN'S INSURANCE COMPANY, APPELLANT.

FILED JULY 15, 1921. No. 21534.

1. **Insurance: PROOF OF LOSS: WAIVER.** A provision in a fire insurance policy whereby the insured is required, in the event of loss, to furnish written proof thereof, signed and sworn to by him, within 60 days after the fire, is for the insurance company's benefit, and is waived by it by a course of conduct on its part, during such period of time, which reasonably induces the insured to believe that settlement will be made without such proof, if the insured, acting on such belief, fails to comply with said provision.

2. ———: ———: ———. Under the facts stated in the opinion, *held*, that the provision of the policy requiring the insured to furnish written proof of loss, signed and sworn to by him, within 60 days after the fire, was waived.

3. **Appeal:** FINDINGS. Where a cause was tried to the court without a jury, and there was but a single question of fact, the determination of which was decisive of the case, the trial court did not commit prejudicial error in denying the defendant's request for separate findings of fact and conclusions of law.

APPEAL from the district court for Antelope county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

Williams & Kryger and *Montgomery, Hall & Young*, for appellant.

Jackson & Rice, contra.

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS (E. J.) and MORNING, District Judges.

MORNING, District Judge.

Action by Le Roy Brown, in the district court for Antelope county, against the Firemen's Insurance Company of Newark, New Jersey, to recover on a fire insurance policy issued to the plaintiff by said defendant on an automobile, which was destroyed by fire during the life of said policy. By stipulation of the parties the cause was tried to the court without a jury. There was a judgment for plaintiff, and defendant appealed.

While plaintiff was driving the insured car on a country road, near Deloit, at about 9 or 10 o'clock at night, it was stalled in the mud and broke down. Plaintiff endeavored to get some one to pull his car out, but failed. He then procured a car from a garage at Deloit and started home, but found the car he had borrowed did not work well, and he returned it and got another car. While he was making this exchange, some one came along and told him of the fire. It was then about midnight. Owing to the nature of the defense presented, the circumstances of the fire are not disclosed by the record and are not material to a consideration of the case.

The policy of insurance sued upon provided: "In the event of loss or damage the assured shall forthwith give notice thereof in writing to this company or the authorized agent who issued this policy, and shall protect the property from further loss or damage; and within sixty days thereafter, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said assured, stating the knowledge and belief of the assured as to the time and cause of the loss or damage, the interest of the assured and of all others in the property."

Said policy also provided that failure on the part of the assured to render such sworn statement of loss to the company within 60 days of the date of loss shall render a claim thereon null and void; that the company shall not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to the examination herein provided for; and that the sum for which the company should be liable upon the policy "shall be payable sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company," and that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the foregoing requirements."

The sole defense insisted upon by defendant is that written proof of loss, sworn to by the assured, was not furnished as required by the policy. No proof of loss was made by plaintiff other than notice of the fire given to the local agent, and the communication of the same to the state agent; but plaintiff insists that, under the facts shown by the evidence, the defendant waived written proof of loss. Whether the proof of loss called for by the policy was waived or dispensed with by the company is the decisive question in the case, and our answer to this question must depend upon the legal consequences to be

attached to the conduct of the parties as disclosed by the evidence.

The evidence shows, quite conclusively, that the next day after the fire Mr. Van Kirk, the defendant's local agent at Neligh, who wrote this policy, was notified of the fire by plaintiff, and the plaintiff gave him such information as he had on the subject; that, immediately, the local agent wrote to Mr. Wilcuts, the defendant's state agent, at Omaha, notifying him of the loss, and within five or six days thereafter the state agent went to Neligh, and he and the local agent drove out to where the burned car was stalled in the mud; that they spent 20 or 30 minutes looking the car over and discussing how to get it out of the mud; and the state agent made some inquiry of residents of the vicinity as to the names of the parties who were in the car when it was stalled and abandoned; that the local agent communicated to the state agent the information he had received from plaintiff concerning the fire; that, while at Neligh, the state agent made some inquiry about plaintiff and about the car, and then left. The local agent testified that the state agent told him before he left Neligh that the company was liable, and that it was only a question of the amount, and that he would be back again and settle, and that he informed plaintiff of the visit and investigations of the state agent, and that the state agent had said the company would settle, and that the state agent would be back again for that purpose. The state agent in his testimony denied that he made any statement to the local agent to the effect that the company was liable and would settle, and the evidence offered by the company is to the effect that the local agent had no authority to make any such statement to the plaintiff or to do anything in connection with the claim, but that, on the contrary, the local agent was expressly instructed by the state agent to do nothing in connection with the matter and to refrain from discussing it. A member of the law firm employed by plaintiff to look after this claim testified that he talked with the local

agent after the inspection of the damaged car by the state agent, and that the local agent informed him that the state agent had stated that the company was liable, that the claim would be settled, and that it was only a question of the amount. Plaintiff and his attorney both testified that they had been told by the local agent that the claim would be settled and that it was not necessary for plaintiff to do anything further. After the visit of the state agent to Neligh the matter of this fire seems to have been referred to a special examiner by the name of Pipkin, at Omaha, but what, if anything, he did in connection with the claim the record does not disclose.

The letter of the local agent notifying the state agent of the loss was dated March 23, the day after the fire. On March 24 the state agent sent the following letter to the local agent:

"Mr. C. B. Van Kirk, Agent, Neligh, Nebraska.

"Dear Sir: I am duly in receipt of your letter of the 23d advising that you have had a loss on a car, and that the proposition does not look good to you. In this instance, permit me to advise you to say nothing about the loss other than that you have reported the matter to the company. I will endeavor to reach Neligh tomorrow or possibly Wednesday. Yours truly, S. E. Wilcuts."

On April 23, after the state agent had been out to inspect the car, the local agent wrote him that plaintiff was in and was anxious to have his claim adjusted, and to let the local agent hear from him at once and get this matter settled up. To this letter the state agent replied under date of April 27:

"Mr. C. B. Van Kirk, Agent, Neligh, Nebraska:

"Dear Mr. Van Kirk: Re auto loss, Roy Brown. I am in receipt of your letter of the 23d reading as follows: 'Mr. Brown was in this morning and is very anxious to have this claim adjusted, so please let me hear from you at once as we must get this matter settled up. Yours truly, C. B. Van Kirk. P. S. Please come up.' Mr. Brown seems more to be in a hurry than he did when I

was in Neligh with you. However, I thank you for your letter and am obliged to advise you that the company has taken the matter entirely out of my hands and I can do nothing until instructed by them. You can rest assured, Mr. Van Kirk, that the matter has and is receiving proper attention by the Chicago office. Yours very truly, S. E. Wilcuts, State Agent."

On May 12, 1919, the company wrote to the attorneys for plaintiff as follows:

"Messrs. Jackson & Rice, Attorneys for Le Roy Brown, Neligh, Nebraska. Policy 1-Roy Brown, Neligh, Neb.

"Gentlemen: I am in receipt of your letter of April 29 regarding above policy and regret that circumstances have delayed answer. I beg to advise that we have referred this claim to Mr. Charles W. Pipkin of Omaha, Nebraska, who is the only one who has authority to represent us in this matter except, of course, this office and our Nebraska state agent, Mr. S. E. Wilcuts. Yours truly, Neal Bassett, Vice-President."

Aside from the conflict in the evidence as to what the state agent told the local agent while the former was at Neligh to look at the car, there is no dispute as to what was done. Notice of the loss having been promptly given and the company having acted upon it and entered upon the work of inspecting the property and investigating the circumstances to the extent shown by the evidence, can the company now be permitted to escape liability because formal proof of loss was not given? We think it cannot. In *Union Ins. Co. v. Barwick*, 36 Neb. 223, 231, Chief Justice Maxwell said: "A company may have notice from their own agent at a given point that a certain loss has occurred, and if it acts upon that information and sends an adjuster to estimate the amount of the same, etc., it is no doubt a waiver of proof." This language of Judge Maxwell was quoted with approval in *Farrell v. Farmers & Merchants Ins. Co.*, 84 Neb. 72. In the case last cited it was held that an agent of an insurance company charged with the duty of adjusting its losses has au-

thority to waive the giving of notice and proof of loss, and in the syllabus it is said: "And if such an adjuster, after property covered by a policy of insurance issued by his principal has been destroyed by fire, goes to the scene of the conflagration, and informs an agent of the assured, who was directed to look after an adjustment of said loss, that said loss is total, and the company will be compelled to pay it, and that, if the policy-holder were present, they would have no trouble in settling, such conduct and statement, if the assured relies thereon, amount to a waiver on the part of the company of notice and proof of loss, and will estop it from insisting on a forfeiture based upon the nonreceipt of such notice and proof."

It is the established doctrine of this court that provisions in insurance policies requiring waivers to be in writing have no application to proofs of loss and stipulations to be performed after loss. *Morgenstern v. Insurance Co. of North America*, 89 Neb. 459. In the *Morgenstern* case, Judge Barnes said (p. 464): "It is contended by the defendant that there is no competent evidence in the record upon which to predicate a waiver, and it is insisted that there could be no waiver unless the same was indorsed in writing on the policy by some one who was authorized to make such indorsement. This contention cannot be sustained, for the more recent authorities hold that the company may, by its conduct, waive proof of loss when it has notice of the breach of such condition; that notice to the agent is notice to the company, and such waiver need not be in writing."

The requirement of the policy that the insured should furnish, within 60 days, written proof of loss verified under oath was for the company's benefit, and could be waived by the company, either expressly or by such conduct as would lead the insured to believe that settlement would be made without it.

The whole course of conduct of defendant and those representing it in connection with this loss, after receiving notice of it, was well calculated, if, indeed, it was not

intended, to lull plaintiff into the belief that nothing further was required of him to bring about an adjustment and settlement of his claim, and that if any further information was desired it would be called for by those in whose hands it had been placed for investigation and "proper attention." Having started its investigation and having given plaintiff to understand that the claim was in the hands of a special examiner and that the home office had been and was giving it "proper attention," the defendant cannot, after the time fixed by the policy for furnishing written proof of loss has expired, be permitted to defend against liability on this policy on the sole ground that proof of loss was not furnished in the form and within the time called for by the policy.

Before the submission of the cause in the district court, the defendant requested the court to state his conclusions of fact separately from his conclusions of law. This request was denied, and defendant now insists that this was error under the holdings of this court in *Wiley v. Shars*, 21 Neb. 712, and *Lyman & Co. v. Waterman*, 51 Neb. 283.

The amount of defendant's liability, if any, was stipulated by the parties, and the only defense presented was failure to give formal proof of loss as required by the policy, and this depended upon whether, under the circumstances, technical proof of loss had been waived. The sole question of fact for the court to decide was, therefore, whether the defendant had so conducted itself in relation to this loss as to constitute a waiver. The judgment of the court could not have been in favor of plaintiff without finding that proof of loss had been waived. An affirmative finding on that question is implied in the general finding and judgment for plaintiff, and the court did not deprive defendant of any substantial right by refusing to make an express separate finding as to such fact. If error was committed, it was without prejudice to the rights of defendant.

It follows that the judgment of the district court must be, and is AFFIRMED.

ANNIE ALSTON, APPELLEE, V. PHILIP ALSTON ET AL., APPELLANTS.

FILED JULY 15, 1921. No. 21654.

1. **Vendor and Purchaser:** CONTRACT. Contracts upon which this action is predicated *held* to be executory contracts for the sale of real estate, and not leases.
2. **Homestead.** Where the purchaser of real estate under an executory contract of sale partially performed occupies such real estate with his wife and family as his home, his wife may become vested with a homestead interest in the same.

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

E. R. Leigh, for appellants.

Benjamin S. Baker and *William M. Burton, contra.*

Heard before LETTON, DAY and DEAN, JJ., SHEPHERD and STEWART, District Judges.

SHEPHERD, District Judge.

The plaintiff sued the defendants in equity to cancel an assignment of contracts relating to real estate in South Omaha, said contracts having been made by the Midway Investment Company to Philip Alston, and said assignment being by him alone to the defendants Lustgarten and Cohn. The plaintiff, who is the wife of Philip Alston, contends that said contracts conveyed to him an interest which could be made the subject of homestead, and that she lived on the property with her husband and children and made it her homestead, and that the assignment by her husband without her signature or consent was of no force and effect.

Defendants assert that neither the plaintiff nor her husband acquired any right under said contracts to which a claim of homestead could attach; that said contracts were nothing more than contracts of letting for rent, and that, construed most favorably for the Alstons, they gave

only an option to purchase, which was never exercised; and that, in the second place, neither of the Alstons ever made, or claimed to make, the property their homestead. They say that defendant Philip Alston received a valuable consideration for his assignment to Lustgarten and Cohn, and that since said assignment said Lustgarten and Cohn have paid a total of $140 on the said contracts, and have been, by their tenants, in continuous possession of the property. And they further say that when the assignment was made plaintiff and her husband were not occupying the premises, but had abandoned the same as their home. The court found for the plaintiff, canceled the assignment, and decreed ouster of the defendants.

Examination of the record discloses that the contract (there were two contracts identical as to wording, one for one lot and one for another) is very much like those commonly used in selling out additions upon monthly payments. Though the language of the instrument is "has agreed to let" and "has agreed to take," and though the monthly payments are described as "rent," the full amount promised to be paid is the full sale price of the lot. The following excerpt gives some aid to understanding it:

"All rent paid hereunder for the use of said property, together with interest at the rate of six per centum per annum, shall be deducted from the agreed purchase price, but should the said Phil Alston fail to make the payment of rents as agreed (time being the essence of this agreement) he shall forfeit his right to purchase said property, together with all payments as rent hereunder, which amounts shall be understood to be fully earned, and said tenant may be at once dispossessed and shall quit and surrender the premises in as good state and condition as they were at the commencement of the term, reasonable use and wear thereof and damages by the elements excepted."

Philip Alston had made some payments upon the contract. It is in evidence that he had applied to the com-

pany for a computation of the balance to be paid to secure a deed. Mr. Merrow, the president of the company, testified that he stated that the company would not be inclined to deed to the assignees without assignment from the plaintiff as well as from her husband, thereby indicating to some degree that the company construed the contract as conveying a right to which the wife's claim of homestead might attach. However, he elsewhere states that the company desired to avoid entanglements and to be on the safe side.

In the case of *Jackson v. Phillips*, 57 Neb. 189, this court said: "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 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." The court continues: "The instrument in suit has some direct earmarks of a lease. It contains some terms and expressions which would, taken literally, stamp it as a lease; but, when its substance is examined critically, the apparent character of the instrument is destroyed. The arrangement of the consideration in reference to the payment by instalments being $60 for each of the four years succeeding the time of the execution of the contract, and $660 at the expiration of the fifth year, the $60 payments being each the one year's interest at 10 per cent. per annum of the $600, which it seems more than probable was a principal sum of the consideration for the contract between the parties, furnishes a strong indication of a sale. There is a further strong indication of a sale in the feature of the agreement in relation to a conveyance of the property to the contractee by the contractor on full payment of all sums stated in the contract, as evidenced by the notes. All things considered, we are forced to conclude that the instrument declared upon in

the petition was an executory contract for the sale of the land."

It seems plain in this case that the instruments in question were, according to the intention of the parties and within the rules of law, instruments of like character. And we so hold, approving the decision of the trial court in that regard.

It remains to consider if the plaintiff ever made the premises her homestead, and whether she continued to claim the same as such at the time of the assignment. It is clear from the record that she lived there with her husband and children for a considerable time after the purchase of the place under these contracts. Then she made a hurried departure to Texas to visit her sick sister there, taking the children with her. Her husband followed later, as he puts it, to get the children. There was evidently some trouble between the husband and wife. While in Texas the matter of staying there on a farm was considered, but the plaintiff decided against this and returned to Omaha, finding the furniture removed from the house and the defendants in possession, and later learning of the assignment by her husband to Ben Lustgarten and Louis Cohn. She says that immediately upon her return she went to the premises intending to continue her occupation of the same.

The plaintiff's story is corroborated by a number of witnesses and by some documentary evidence. It is strongly denied by Philip Alston, by his sisters, and some other witnesses, and in a measure by some circumstances. But there is not enough evidence on the part of the defendants to justify us in reversing the finding in this particular of the experienced judge who saw the witnesses and heard their testimony as it came from their lips. The finding of the trial court was that the plaintiff had a homestead in the premises. From a careful examination of the record it does not appear that he erred in his conclusion.

The contracts in question being executory contracts of

sale partially performed, and the plaintiff rightfully claiming a homestead in the premises involved, it follows that the assignment to the defendants, without her knowledge and consent, was void and of no effect.

The defendants ask that they be reimbursed, in any event and as a matter of equity, for the $140 in payments made by them upon the contracts, saying that plaintiff must have made them if defendants had not. Under the circumstances, the court is of opinion that the plaintiff should bear this burden. Asking equity, she should be willing to do equity. Within 60 days of the final determination of the case upon mandate in the district court, she is required to pay defendants said sum of $140 with interest at 7 per cent. per annum from the date of her original decree, and the same is hereby made a lien upon her interest in the property in defendants' favor. As so modified, the judgment and decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

JOHN T. BAUGHAN, APPELLEE, V. RICHARD E. SCHUELKE, APPELLANT.

FILED JULY 15, 1921. No. 21716.

1. **Contracts: REFORMATION: JURISDICTION.** Where the plaintiff properly brought an action before a court of equity for the reformation of a written instrument, and in the same action sought to recover a money judgment against the defendant upon said instrument so reformed, and the defendant objected to the jurisdiction of the court and moved that the case be transferred to a law docket and the defendant be awarded a jury trial, but without making any offer to consent that the instrument in question might be corrected as requested, but, on the contrary, opposed it by objections and exceptions thereto, *held* that the court, having properly acquired jurisdiction over a subject-matter peculiarly cognizable before a court of equity, might lawfully retain the case for all purposes and proceed to a final determination of all matters, whether legal or equitable, arising out of the issues presented by the pleadings before it.

2. **Brokers:** ACTION FOR COMMISSIONS: DEFENSES: EVIDENCE. In a suit by a real estate broker for commissions alleged to have been earned by virtue of a written contract between himself and the owner of the land listed, one of the defenses was that the contract had expired by limitation of time, and another that it had been expressly revoked before the plaintiff produced a purchaser for the land, and the trial court found against the defendant upon both points. *Held*, upon a review of the testimony, the court was justified in so finding and the same should be sustained.

3. **Pleading:** LOST INSTRUMENT: SECONDARY EVIDENCE. Where the original written instrument sued upon was in existence and in the possession of plaintiff's counsel at the time the suit was commenced, but afterwards became lost or destroyed, without the fault of, and by means unknown to, any one having the same in custody, and its loss or destruction is accounted for to the satisfaction of the court, it is not necessary for the plaintiff thereafter to amend his petition so as to declare upon a lost instrument as a prerequisite to proof of the contents of such instrument by secondary evidence.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

R. J. Greene and *Hugh C. Wilson*, for appellant.

Burkett, Wilson, Brown & Wilson, contra.

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., DICKSON and TROUP, District Judges.

TROUP, District Judge.

The plaintiff, as a real estate broker, claiming to have a written contract with defendant authorizing him to find defendant a purchaser for certain land belonging to defendant, on certain specified terms, for which service plaintiff was to receive a certain specified commission, and further claiming that at a time within the life of the contract upon producing a person able, ready, and willing to purchase defendant's land on the terms specified, defendant refused to sell and likewise refused to pay plaintiff his commission, and plaintiff thereupon preparing to bring suit for his commission discovered that his broker's contract was defective in that, by mutual mistake of the

parties, a misdescription of the land had been inserted, instituted this action in equity for a reformation of the contract in that respect, and at the same time and in the same action asked to recover his commission upon the contract so reformed. The defendant objected to a trial to the court upon the right of plaintiff to recover commission and demanded a jury for the trial of that issue. Upon the demand being overruled, the defendant answered denying that he ever entered into the contract set forth in plaintiff's petition or agreed to the terms therein specified. Upon a trial of the case the court found generally for the plaintiff, reformed the contract in the particular required, and rendered judgment for plaintiff for his commission. The defendant appeals.

It does not appear that at any time, either before or after plaintiff's action was instituted in the equity court, the defendant agreed, or offered to agree, that the contract in question might be corrected or reformed as plaintiff desired. Whether the misdescription in the contract of the property listed with plaintiff for sale would have greatly embarrassed, if not entirely defeated, plaintiff in an action at law upon the contract, as it stood without reformation, was something which plaintiff could not foretell. At all events the plaintiff was not obliged to take any chances in that respect. It was certainly plaintiff's right to go into a court of equity to have his contract corrected according to the fact and the manifest intention of the parties. It does not appear that the defendant had an opportunity, before plaintiff's action was commenced, to consent that the desired correction in the contract might be made. But even after suit had been instituted in the equity court, if the defendant had frankly agreed, or offered to agree, in open court or by written admission, that the correction in the contract might be made as requested, without contest or trial upon that issue, and then appealed to the court to transfer the case to a law docket for a jury trial, it is the opinion of the writer, at least, that this court might well have held that

the trial court would have erred had it not granted the request. But such is not the case here. The attitude of the defendant from the very beginning, as disclosed by the record, was to deny everything. He not only denied the right of plaintiff to reform the contract, but he denied the very existence of the contract itself and vigorously contested its reformation by objections to the evidence upon almost every point. Under these circumstances it is impossible to say that the plaintiff did not act both lawfully and wisely in seeking a reformation of his contract in a court of equity. The plaintiff having a right to bring the action in the court he did, and the court having properly acquired jurisdiction over the parties and the subject-matter, it had the right to retain the case for all purposes and proceed to a final determination of all matters, whether legal or equitable, arising out of the issues presented by the pleadings before it. This rule is so well and universally established, and the reported decisions show that the right under the rule has been exercised in almost every variety of case, that it would seem needless to cite authorities in its support. A few only must suffice: *Bank of Stockham v. Alter*, 61 Neb. 359; *Disher v. Disher*, 45 Neb. 100; *Bell v. Dingwell*, 91 Neb. 699; *Kelly v. Galbraith*, 186 Ill. 593; *Union Central Life Ins. Co. v. Phillips*, 102 Fed. 19; 16 Cyc. 106-109.

Upon the issue as to plaintiff's right to recover for commission, the defendant claims that the time in which plaintiff was given to produce a purchaser was limited to ten days from the listing of the property, and that the clause appearing in the written contract giving plaintiff six months in which to do so was inserted by the plaintiff without the knowledge or consent of the defendant. We think there is no merit in this contention. In the first place, it is altogether improbable that any real estate broker would go to the trouble of entering into a written contract for the privilege of producing a purchaser for land with only a ten-day period in which to do so. Certainly this would seem to be true unless the broker already

had a purchaser in view who was, or at least was supposed to be, ready, able, and willing to make the purchase without delay. But no such circumstance appears in this case, nor in our opinion was it contemplated by either party. More than five months elapsed after the signing of the contract before the plaintiff was able to produce a purchaser for defendant's farm. It is in evidence that the plaintiff had more or less negotiations with the defendant respecting the sale of his farm during a period of three years prior to entering into the contract in question. The plaintiff, upon being asked how it come that the present contract was entered into, testified: "Mr. Schuelke came into my office with reference to selling his place, and I told him that he had his place pretty high, and that he changed his mind so often on it that I wouldn't handle it any longer unless he would give me a written contract. He says, 'I will give you six months on it at $200 an acre,' and I says, 'Will you sign a contract?' and he says, 'Yes;' and the result was he signed a contract on it for six months time at $200 an acre." The defendant himself testifies that the contract was read over to him at the time it was prepared, and that he signed it, and he does not claim that any fraud or deception was practiced upon him, either in the drafting or the reading of said contract, or, if he does, there is no evidence to support such claim.

Nor do we think the defendant's claim that he revoked the contract before plaintiff had produced a purchaser is supported by the weight of evidence. Indeed, it would seem that the weight of the evidence is against such claim. The defendant testifies that in May, a month before plaintiff produced a purchaser for the farm, he told plaintiff that his place was not for sale. This is expressly denied by the plaintiff. Resting thus it would seem to be a question of veracity between the plaintiff and defendant as to which one was speaking the truth in this respect, but circumstances occurring in subsequent events lead us to believe that the defendant is mistaken upon this point. In

June when the plaintiff and the proposed purchaser were at defendant's home, first for the purpose of looking over the farm, at which time they agreed with the plaintiff to take it, and three days later, for the purpose of completing the purchase, the defendant at no time placed his refusal to consummate the sale on the ground that plaintiff's contract to find a purchaser had expired or been revoked. Nor did this fact seem to be mentioned or referred to. On the first occasion, upon being told by the plaintiff that he had the Munns out looking at the farm with a view to selling it to them, the defendant said, as testified to by plaintiff, "He didn't care much about selling the farm now." Upon being told by plaintiff that, if he did not care to sell, it was all right with him, and he would take 1 per cent. for his commission, instead of 2 per cent. called for by the contract, but if the Munns bought he would have to pay 2 per cent., the defendant replied, according to plaintiff's evidence, "I will take my chances, I do not think they will buy it." The defendant denies making the latter statement. On the second occasion the defendant became a little more emphatic, and upon being told that Mr. Munn, the proposed purchaser, had come over to complete the purchase of the farm, the defendant testified, "He can't have it," that the farm was not for sale—"absolutely, it wasn't for sale;" but at no time on these occasions did defendant claim to plaintiff or the proposed purchaser that plaintiff had no authority to negotiate for a sale of his farm. It is true that in this connection the defendant testified that he had told the plaintiff, on a previous occasion, that his farm was not for sale, which is denied by the plaintiff, but the point, as bearing upon the credibility of the defendant's claim in that respect, is that he did not make that claim known on either of the occasions in June when it was incumbent upon him to assign a reason for his refusal to sell.

These parties were both before the court in person, the judge heard their testimony and witnessed their manner

of testifying and was best able to determine the probable truth of their respective statements. The court resolved the disputed question of revocation in favor of plaintiff, and we are of the opinion that the evidence justifies the finding.

It appears without serious dispute that the original contract sued upon was in existence and in the possession of plaintiff's attorneys at the time they prepared and filed plaintiff's original petition in the case, to wit, August 13, 1919, and to which they attached what purported to be a true copy of the card form of said contract, and also at the time plaintiff's amended petition was prepared and filed, November 8, 1919, in which is set forth what purports to be the contents of said contract, and also, apparently, attached to said amended petition a card copy of said contract. Thereafter, and some time before the trial of said case, it appears that the original contract became lost or destroyed. No fraud or deception was charged or attempted to be proved against either the plaintiff or his counsel as a reason for withholding or concealing the original contract, and without the slightest doubt it was a *bona fide* case of where the instrument had disappeared beyond recovery without the intentional act or fault of any one who had its custody.

At the trial, and after accounting for the loss or destruction of said instrument to the satisfaction of the court, plaintiff was permitted to introduce secondary evidence as to its contents by oral testimony and by the use of the card form copy above referred to. The defendant objected to the introduction of secondary evidence to prove the contents of the contract without first requiring the plaintiff to amend his petition so as to declare upon a lost instrument, and that a resort to such evidence constituted a material variance between the allegations of the petition and the proof. We do not believe this point is well taken. It is true that the case of *Chamberlain v. Sawyer*, 19 Ohio, 360, cited by the defendant, and the only one in point, seems to sustain the

defendant's contention. But this case cannot overcome the long and uniformly established practice in this country to the contrary. The Ohio court evidently based its decision upon the old English case of *Smith v. Woodward*, 4 East (Eng.) 585, the only case cited in the opinion, and in doing so we think must have overlooked the case in our own country of *Renner v. Bank of Columbia*, 22 U. S. 581, in which the supreme court of the United States announced a contrary doctrine. The case last cited was a suit upon a promissory note which appeared to have been lost, although perhaps not destroyed, and secondary evidence was admitted as to its contents. In speaking of the exceptions taken by the defendant to the ruling of the trial court in this respect, Justice Thompson, in delivering the opinion of the supreme court of the United States, said:

"It is objected, lastly, that secondary evidence was not admissible, without a special count in the declaration upon a lost note. The English practice on this subject has not been adopted in this country, so far as our knowledge of it extends, and to require a special count upon a lost note, would be shutting the door against secondary evidence, in all cases where the note was lost, after declaration filed. We do not think any danger of fraud is to be apprehended from the admission of such evidence, under the usual count upon the note; and, the practice in the court below not requiring a special count in such cases, no error was committed in the admission of the evidence."

The case of *Board of Supervisors of Livingston County v. White*, 30 Barb. (N. Y.) 72, was a suit upon the bond of a defaulting county treasurer for the sum of over $28,000. The defendant denied the execution and delivery of the bond sued on. It appeared that the bond had been lost sometime before the trial, and secondary evidence was admitted to prove its contents. At the close of plaintiff's testimony the defendant moved for a nonsuit on the ground, in substance, of a failure of proof

to sustain plaintiff's cause of action. The motion was overruled and judgment rendered against the defendant. On appeal to the supreme court of New York that court said:

"It was not necessary to allege in the complaint the loss of the bond, to entitle the plaintiff to prove its loss and give secondary evidence of its contents. Under the former system of pleading, in cases like the present, profert of the bond, or an excuse for the omission of profert, in the declaration, was required, and if the declaration contained the usual statement of profert, and the defendant pleaded *non est factum*, the production of the bond at the trial could not be excused by proof of its loss previous to declaring; but the doctrine of profert has no place in the present system of pleading, ample provision otherwise existing for the production and inspection of papers. Independent of profert, there never was any necessity or reason for saying anything about the loss of the bond, in stating the cause of action."

The above decisions undoubtedly state correctly the rule of practice that generally prevails in this country on the point in issue as it arises in cases under circumstances similar to those existing in the cases last-above cited, and which rule in all its force applies to the case at bar.

Having covered all of the points complained of in appellant's brief, and finding no reversible error in the record, the decree of the district court is

AFFIRMED.

HARRY T. JONES V. JOHN J. THOMAS, APPELLANT: JENNIE LOWLEY, ADMINISTRATRIX, ET AL., APPELLEES.

FILED JULY 20, 1921. No. 20727.

1. **Attorney and Client:** CONTINGENT FEES: DISTRIBUTION. Where several attorneys engage in the prosecution of litigation for a contingent fee, in the absence of any other agreement, they will

be held, upon the successful result of the suit, to share equally in the distribution of the fee.

2. ———: ———: ———. But this principle may be varied by a subsequent agreement between the parties, and where it is afterwards agreed between counsel that one of them shall take no further steps in the case, and that another shall receive extra compensation for carrying on the litigation, the latter is entitled to a reasonable sum for such additional services, and the former is only entitled to the reasonable value of his services up to the time of the agreement as measured by the ultimate amount of the fee realized.

APPEAL from the district court for Seward county: EDWARD E. GOOD and GEORGE F. CORCORAN, JUDGES. *Affirmed as modified.*

Benjamin F. Good, E. A. Coufal, Thomas, Vail & Stoner, R. R. Schick, H. D. Landis and *Stewart, Perry & Stewart*, for appellant.

Jacob Fawcett, contra.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

PER CURIAM.

This appeal is concerned mainly with a controversy between attorneys with respect to the division of fees.

The Capital National Bank of Lincoln failed in 1893 Afterwards certain actions were begun by different creditors of the bank against the directors, seeking a recovery from them for neglect of duty, violation of the national bank act, and other wrongful acts committed by them in their official capacity. The actions were begun in 1895, the litigating creditors being the Jones National Bank, the Bank of Staplehurst, the Utica Bank, Thomas Bailey, and Isaac Holt. The firm of Biggs & Thomas were attorneys for the Jones National Bank and the Bank of Staplehurst. The firms of Pound & Burr, and Norval Brothers & Lowley represented the other creditors named. The contract between the several attorneys and their clients provided for a contingent fee of one-third of the

gross receipts. For some years the attorneys each aided and assisted the others in the legal work and in the general prosecution of the actions, except as hereinafter mentioned. There is a conflict as to whether a specific agreement was made as to this, but the direct evidence, the course of conduct of these attorneys during a long series of years, the signing of their names to papers and briefs and legal documents, and their appearance in the cases of other than their nominal clients, all convince us that the several cases were prosecuted by them as a joint adventure. Comparatively early in the litigation recovery was had of over $20,000 collected from Stuart, one of the directors. The suits proceeded as to the others. Many vicissitudes occurred in the litigation during the long series of years. Finally a judgment for plaintiffs was obtained in the district court for Seward county, which was afterwards reversed by this court, following, as the court thought, former decisions of the supreme court of the United States. *Jones Nat. Bank v. Yates*, 93 Neb. 121. Afterwards the judgment of this court was reversed by the supreme court of the United States, 240 U. S. 541, and the cause remanded, with directions to affirm the judgment of the district court, which was done. Afterwards all the judgments were sold to one Mullen for $95,000. This was paid to Harry T. Jones as trustee for the interested parties. Jones filed a bill of interpleader, asking the court to apportion the amount due to each of the attorneys. The trial court held that the proceeds of the Stuart judgments should be divided in four equal parts, of which Burr is entitled to one-fourth, Thomas one-fourth, Norval Brothers one-fourth, and the estate of George W. Lowley one-fourth. The court also found that, after the reversal of the judgment in this court, agreements were made between Burr and Thomas, and between Norval Brothers and Thomas, with the consent of the clients, that Thomas should receive additional compensation for extra services in the further conduct of the case; that after that time "Norval Brothers performed no more

than nominal services," but the court also found that they did not withdraw as attorneys in the case; that the reasonable value of such extra services of Thomas was $9,500; and that, after the payment of $9,500 to Thomas, the remainder of the fee arising from the sale of the judgments to Mullen should be divided into three equal parts, one-third to Thomas, one-third to Burr, and one-third to Norval Brothers, or their assignees.

Mr. Thomas appealed, mainly from the allowance of any compensation to Norval Brothers derived from the Mullen sale, urging as a ground for reversal "that the contract of the clients with Norval Brothers was an entire and indivisble contract for compensation contingent upon success in the litigation; that, having abandoned their contract prior to its completion and permitted its execution to be taken over by Thomas under a new agreement with the clients, Norval Brothers forfeited all right to demand compensation thereunder."

The evidence establishes that, after the judgments had been reversed by the supreme court of this state, Norval Brothers, who had performed many and valuable services, and had expended much time and labor in the prosecution of the several suits, became convinced that the judgment of this court could not be reversed, and that further prosecution of the actions would be fruitless, and so expressed themselves to the other attorneys, and that thereupon the agreement with Thomas was made. Mr. Lowley had died before the recovery of the judgment in the district court.

We think that neither the evidence nor the law justifies fully the contentions made by Mr. Thomas. While Norval Brothers are entitled to share in the distribution of the proceeds, we are convinced from the testimony as to the labor performed and time expended by Mr. Thomas that the amount awarded to Norval Brothers by the district court should be reduced, and that awarded Mr. Thomas and Mr. Burr increased. The evidence shows that the determination to take the case to the supreme court of

the United States the second time after the adverse decision in this court was largely brought about by the energy and persistence of Mr. Burr. However, the greater part of the work, after this conference and agreement between the attorneys, was performed by Mr. Thomas, and he should have, as the district court found, the larger portion of the compensation.

Appellant Burr contends that in such an enterprise no one attorney is entitled to greater compensation than another; that the alleged contract between the attorneys as to the appeal to the supreme court of the United States is void for want of consideration, is so uncertain and incomplete as to be unenforceable, and had not been established by the evidence, and that no extra compensation should be allowed Thomas. We are satisfied with the decision of the district court upon these points. We agree with appellant that, in a controversy between attorney and client as to fees, an attorney employed on a contingent-fee basis is entitled to nothing if he abandons the case and recovery is finally procured by another attorney. No client is complaining, and the principle is not applicable. The relations to be examined are those existing among the attorneys themselves who were engaged in a joint enterprise and occupied a special partnership relation. Under the general principles of law applying to the division of fees between attorneys who are associated together in the conduct of litigation, and in the absence of any special agreement, each is entitled to an equal share of the fee. *Underwood v. Overstreet*, 188 Ky. 562, 10 A. L. R. 1352, and cases cited in note on page 1357. Also, see *Lamb v. Wilson*, 3 Neb. (Unof.) 496, on rehearing, 505. In view, however, of the peculiar circumstances of the case, and of the facts in evidence in regard to the nonparticipation by Norval Brothers in the later conduct of the case, and the agreement between the attorneys, we are satisfied that Norval Brothers are entitled to no compensation for services performed after this agreement was made. They should, however, be allowed the reasonable value of their

services before that time, the value to be based in proportion to the services rendered, and the amount of the ultimate recovery from the sale of judgment to Mullen. The district court awarded $8,165.32 to the assignees of Norval Brothers. From this amount we deduct $3,000, and award $2,000 thereof to Mr. Thomas, in addition to the sum awarded him by the district court, and $1,000 thereof to Mr. Burr, in addition to the amount awarded him by the district court. The remainder, $5,165.32, is awarded to the assignees of Norval Brothers in the proportion as their interest appears under the assignment of Norval Brothers.

As to the cross-appeal of Mrs. Lowley, we are convinced that under the evidence the district court properly found that the estate of George W. Lowley was not entitled to any share of the proceeds of the Mullen sale.

Burr was made a party to the appeal by Thomas. He afterwards dismissed his appeal as to Burr. He now contends that Burr is not entitled to appear as a cross-appellant in the case, and that the decree is final as to him. We are convinced that, where the relations between the parties, the issues, and the facts are so interwoven as in this case, the appeal of Thomas brought up the whole question as to the proper distribution of the fund, and that Burr has a right to appear.

With respect to the cross-appeal of Bailey, we find that the book of accounts kept by Jones, trustee, is not fairly subject to the animadversions made upon it by Mr. Burr. It is true that the entries in the book are made with pencil, but the items, except in a few instances, follow consecutively, and the trustee testifies they were made in accordance with the facts. Much is said about the payment of certain money to Mr. E. T. Wade of Washington, D. C., but we think there is sufficient evidence to justify the expenditure to him for his services in procuring evidence.

The trial court found in favor of the trustee upon the items set forth in the book, and we believe no sufficient

ground has been shown for setting the same aside. Its judgment in this respect, therefore, is affirmed.

The judgment of the district court, except as modified by what has been said with reference to the compensation of Norval Brothers, and the distribution of the money on hand after deducting $3,000 from the amount awarded their assignees, is affirmed, and the cause remanded, with directions to enter judgment in accordance with this opinion. It is further ordered that all costs, except briefs in this court, be paid from the common fund, and each party shall pay the costs of his or its own briefs.

AFFIRMED AS MODIFIED.

FLANSBURG, J., dissenting.

The suits, in which the attorneys' fees here in controversy were earned, were brought by several plaintiffs: The Jones National Bank, the Bank of Staplehurst, the Utica Bank, and Thomas Bailey, and Isaac Holt, in February, 1895. The firm, of which Mr. Thomas was a member, originally represented plaintiffs whose claims amounted to more than 63 per cent. of the total amount claimed by all. This firm originally represented the Jones National Bank and the Bank of Staplehurst. The firms, of which Mr. Burr and Mr. Norval were members, represented the other plaintiffs. The cases involved identical questions of law, and there was, therefore, a common interest and object among the several plaintiffs, and it seems, according to the conclusions of the trial court, that after the prosecution of the cases had commenced the attorneys for the various clients reached an understanding that the prosecution of the several cases should be carried on jointly, that the fees recovered should be pooled, and that a division of the fees should be made between the three firms.

The cases were pending in court, from the time of filing until their final conclusion, some 25 years. They were, at first, won in the trial court, and those judgments were affirmed in the supreme court, but reversed by the United States supreme court. On a second trial in the district

court judgments were again recovered, and, on appeal to the state supreme court, the judgments were reversed and the cases dismissed. That was in 1914.

After this reversal, and when it appeared that the chance for winning by a second appeal to the United States supreme court was a desperate one, if not entirely hopeless, a meeting was had by the attorneys, Mr. Thomas, Mr. Norval, and Mr. Burr, at which meeting Mr. Jones, of the Jones National Bank, was present, and Mr. Norval, as the trial court found, "stated, in substance and effect, that he did not think the Capital National Bank cases could be won, and that he was opposed to prosecuting said cases further, and that he was unwilling to devote any more time to said Capital National Bank cases, and, in substance, stated that he was not willing to have anything further to do with said Capital National Bank cases." It is further shown by the record that Mr. Norval then advised his client to make no further expenditure in the matter, and his client thereupon sold and assigned his claim to the Jones National Bank. From that time forth, it appears that Mr. Norval had nothing whatsoever to do with these cases, as an attorney, and that he utterly abandoned any further participation in them and gave no further assistance in their prosecution. The trial court found that from that time on "Norval Brothers performed nothing *more* than nominal services." If the trial court, by that recital, meant to infer that Norval Brothers did perform "nominal services," I do not believe that finding is sustained by the record. Such a finding could have been based upon one isolated fact only, and that is that Mr. Thomas casually met Judge Norval, a member of the firm of Norval Brothers & Lowley, but not the Mr. Norval who had been actively participating in the cases, and suggested to him a proposition as to whether or not findings by the supreme court in the case could be treated as independent and original findings of fact by that court, or whether they should be treated simply as a review of ultimate findings of fact by the trial court, and Judge Norval,

as attorneys are accustomed to do, in a casual way expressed some opinion upon that question. It does not appear that this was done with any idea or intention, on the part of Judge Norval, to render it as an attorney in the case, and, in fact, it seems to me clear that Norval Brothers considered their connection with the case definitely terminated immediately following that conversation, which took place after the reversal and dismissal by the Nebraska supreme court in 1914. From that time forward, Mr. Burr and Mr. Thomas appear to have been the only attorneys representing the interests opposed to the Capital National Bank. From that time forward they appeared as the only attorneys of record. They prepared the briefs and did all the work necessary for the final appeal and presentation of the cases to the United States supreme court, and all the work necessary for an ultimate and favorable decision from that court.

Upon this condition of the record, the trial court concluded, *as a proposition of law,* that Norval Brothers had not withdrawn as attorneys in the case. With that conclusion of law I cannot agree. The legal effect of the facts, as above set forth, seem to me, conclusively and unequivocally, to establish a definite and complete severance of their relation as attorneys from all further connection with the litigation.

The contract, such as was found by the trial court, for a pooling and division of fees between the various attorneys connected with the litigation was an entire contract, by which it was necessarily understood that each should take his remuneration from funds which were entirely contingent upon their joint efforts, and that the joint service of all should contribute to the ultimate result. Under such an agreement, no one of them would be entitled to recover from the other what he believed, or even what he might be able to prove, his own services were reasonably worth. The services of each contributed to a common cause, and the value of those services, which value was not determined by any agreement between the

parties, was not apportionable. It was an entire and not a divisible contract for services, and the services rendered were not of such a kind that the value of the service of one could, by any definite standard of value, be measured in comparison with the value of the services of the other associates in the enterprise, as would be the case, for instance, where a man is hired to plow a field, or husk corn, and where each hour's work brings its direct benefit to the employer in results, and where its value and its benefit may be measured by a common and well-recognized standard of wages per hour, or per day. If an attorney could not recover the reasonable value of his service should he have remained in the case, he certainly cannot be privileged to have that recovery because of the fact that he has voluntarily and, as it proves, wrongfully withdrawn from the case. In order that any one of these attorneys should be allowed to recover upon the final outcome of the cases, in the event of victory, it was necessary that he should, throughout, perform his part and share in the undertaking. When any one of them threw up his hands and abandoned further prosecution, voluntarily and of his own volition, and without excuse or justification, because he believed the case hopeless and because he was unwilling to further participate and share in the burden of continuing in the performance of his agreement, and because he was unwilling to see his client expend further moneys in what he considered a hopeless venture, it certainly must be that he should be held to have withdrawn entirely from the arrangement, and to have precluded himself from ever sharing in the profits and remuneration earned by those attorneys who remained steadfast to their task, and who successfully carried forth the work to its final and favorable conclusion. It seems to me that neither in law nor as a matter of abstract justice is Mr. Norval, or the assignee, to whom he has transferred his interest in this lawsuit, entitled to any recovery.

The controversy, however, yet to be determined, is be-

tween Mr. Thomas and Mr. Burr. It must be conceded that Mr. Thomas was always very actively engaged in the work of prosecuting these cases, that, as time went on, he assumed more and more a larger burden of the work, and that continuing from the time the case was reversed by this court in 1914 he has performed much the greater part of the work, and has assumed the larger control in the prosecution and presentation of the case on final appeal to the United States supreme court. This was done, as the trial court finds, by an understanding with Mr. Burr, by which it was agreed that Mr. Thomas should assume the major portion of the labor of the continued prosecution of the cases. It appears that Mr. Burr always had faith in a favorable outcome of these cases, and that, when Mr. Norval withdrew, he urged the further prosecution of them, and that Mr. Thomas agreed to continue with him. Mr. Burr was willing, not only to continue with his services, but to furnish expense money, and it was the finding of the trial court that an arrangement was made between Mr. Burr and Mr. Thomas, whereby Mr. Thomas, by reason of his agreed added service, should receive also extra compensation out of the fees to be ultimately recovered. Mr. Thomas and Mr. Burr are not in accord as to just what that agreement was, but Mr. Burr by his testimony shows that Mr. Thomas was to receive something extra. He testified that he had agreed that Thomas should take Norval's share of the fees; that is, the share that Mr. Norval would have recovered, had he remained in the case. There is also a letter in evidence, wherein Mr. Burr wrote Mr. Thomas as follows: "I feel we have further cast the burden of this case upon you, and I sincerely hope that some day, not so far away, you will receive the lion's share of remuneration for all your extra labors in these cases."

It is contended by Mr. Burr that, even though the trial court has made a finding of fact that there was an agreement between himself and Mr. Thomas whereby Mr. Thomas was to receive extra compensation for his serv-

ices, such an agreement would be wanting of any consideration and, therefore, unenforceable. It is argued that Mr. Thomas was already obligated to his clients to do everything that his good judgment dictated toward attaining a successful result, and that when, in the opinion of Judge Thomas, it appeared to be possible and probable that a successful outcome of the cases might result by a further appeal to the United States supreme court, then it became his positive duty to conduct and prosecute such an appeal, by reason of an obligation owing to his clients to do whatever his judgment might dictate should be done for their best interests. His agreement to assume a larger proportion of the work, since Mr. Norval had withdrawn from the case, necessarily increasing the burden to be borne by the two remaining attorneys, would seem to have been a good consideration for the alleged agreement made with Mr. Burr. When Mr. Norval withdrew from the joint employment and left the two attorneys alone to conduct the further prosecution of the cases, they were entitled to arrange between themselves for a distribution of the increased burden. The arrangement, therefore, by which Mr. Burr and Mr. Thomas agreed to continue the prosecution of the cases alone, and Mr. Thomas to assume a larger proportion of the work, not theretofore assumed by him, was, it seems to me, not lacking of consideration and should be held to be legal and binding between the parties.

According to Mr. Burr's statement, it appears that he was willing, at one time at least, that Mr. Thomas should take the share of the fees which would have been allotted to Mr. Norval, had he maintained his relations as attorney in the cases. This would have been one-third of the total contingent fee recovered. It also appears that Mr. Thomas was the representative originally of clients who had some 63 per cent. of the total amount claimed by all the plaintiffs, taken together. Had his employment continued to be several, he would have recovered, then, 63 per cent. of the total contingent fee available. It seems

to me, under the circumstances, that this court can arrive at no fairer distribution of the fund than to allow to Mr. Burr one-third of the fee and to Mr. Thomas two-thirds.

It is therefore my judgment that Mr. Burr should be given $10,643.18, and Mr. Thomas $21,286.37.

The amount available as attorney's fees from the Stuart judgment of $7,302.08 should have been equally divided between the three firms mentioned.

ALDRICH, J., dissenting.

The issue involved in this case is whether or not the contract btween the attorneys was an entire contract requiring full services to be rendered by an attorney in order to entitle him to recover anything for services done and performed. From the nature of the case the contract for services was entire and the fees were contingent.

It appears that the firm of Norval Brothers abandoned the case and rendered no service after April, 1914. Their duties devolved upon Mr. Thomas and Mr. Burr. The issue presented is whether or not Norval Brothers are entitled to recover any fees after having abandoned the case.

It is the rule of this state, as said in *McMillan v. Malloy*, 10 Neb. 228: "One Malloy entered into a contract with one McMillan to thresh his entire crop of wheat and oats at forty cents per acre. After threshing about one-third of the crop he refused to thresh the remainder, and after the time limited for the completion of the contract brought an action to recover the value of his services. *Held*, first, that the entirety of the contract having been severed by part performance, beneficial to the employer, the employee was entitled to recover the value of his labor over and above the damages sustained by a breach of the contract; second, when a contract has been established, the measure of recovery in each case is the price agreed upon in the contract less the damages sustained by the employer by the breach of the same." In this case just cited some benefit accrued from services rendered by the plaintiff, while there was no benefit aris-

ing from services rendered by Norval Brothers. Norval Brothers are subject to the general rule that, while a special contract remains open or unperformed, the one whose part of it has not been performed cannot recover for what he has done until the whole contract has been completed. Norval Brothers under this rule cannot recover. In *McMillan v. Malloy, supra,* some equity was done by those threshing grain. A contract was made to thresh a certain number of acres of grain at 40 cents an acre. When plaintiff threshed about one-third of the grain he rendered service to the defendant for which he should pay on the doctrine of *quantum meruit,* but in the instant case the whole basis of the position of Norval Brothers is on services rendered, but from the nature of the transaction it follows they could not render any services. The case of *McMillan v. Malloy,* 10 Neb. 228, has no application to the instant case and is not to be considered in determining the issues herein. *McMillan v. Malloy* was based upon the famous case of *Britton v. Turner,* 6 N. H. 481. The books show that the case has been criticized by the court which rendered it. It was distinguished and modified by Massachusetts. The supreme court of Ohio said: "The case of *Britton v. Turner* is itself an innovation upon the long-established principles governing *entire* contracts, lessens the sanctity of agreements, and tends to encourage their violation." *Larkin v. Buck,* 11 Ohio St. 561.

As further elucidating the doctrine of entire contracts see *Johnson v. Fehsefeldt,* 106 Minn. 202. The court castigates in substance the rule laid down by the court in the following language: "It would be obviously inconsistent with common justice that plaintiffs should recover *pro tanto* on the contract which they had substantially violated. They were in the wrong. They were not in a position to say to the defendant: 'We will perform the contract we have agreed to if it prove profitable. If we find it unprofitable, we will abandon it.' That would be to contradict the contract. Such reasoning is forbidden by its terms. Defendant did not agree in advance to a

breach of the contract and to accept in lieu of performance the requirement that he pay plaintiffs for what they had done under the contract and for the balance, to accept the right to try damages before a jury."

In fact this quotation is in line with the great weight of authority and follows the majority of the cases. We should follow the rule of the courts that one who breaches his contract cannot base an action thereon against the other party thereto. The decisions are practically unanimous in holding that neither in entire contracts nor in the units into which divisible contracts can be divided can there be any recovery on the contracts themselves when such entire contracts or units of divisible contracts have been only partly performed at the time of abandonment. This is on the theory that part performance is a condition precedent to the right of demanding anything on the contract. See note L. R. A. 1916E, 790, 795. It is said in *Hibbard v. Kirby,* 38 Ark. 102: "The rule seems to be that if the contract of the servant to labor, be for a specified period of time, and payment is to be made, either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master improperly, without sufficient cause, and without his consent, before the termination of that time, he can recover no compensation for his services, either on the contract or on a *quantum meruit.*" Then, again, in *Badgley v. Herald,* 9 Ill. 64, it was said that a contract to work for six months for $8 a month is an entire contract, and where the employee abandons the service before the expiration of that time he cannot recover for the services rendered. This meets the issue of the instant case, as does *Hofstetter v. Gash,* 104 Ill. App. 455, and has the approval of the great weight of authority. It has been universally held that a contract to work a stated period at a specified rate per month is entire, and that the employee cannot, upon abandoning his employment without excuse or justification before the termination of the period, recover upon the contract compensation for his

part performance. *De Camp v. Stevens,* 4 Blackf. (Ind.) *24; *Larkin v. Buck,* 11 Ohio St. 561; *Davis v. Maxwell,* 12 Met. (Mass.) 286.

In the principles of law laid down in *Huyett & Smith Co. v. Chicago Edison Co.,* 167 Ill. 233, it was stated that a contract to put in and complete a ventilating system for a given sum of money, all of which is to be paid in 30 days after acceptance of the work, is an entire contract. It is also a rule that, if the subject-matter of an entire contract has been destroyed by fire or otherwise without the fault of either party before the contract is fully performed, there can be no recovery on a *quantum meruit* or otherwise for a part performance. This is the rule supported by the overwhelming weight of authority. It has been followed and seems to render precise justice in the instant case. Norval Brothers abandoned their contract and plaintiffs were forced to procure other attorneys to carry out what Norval Brothers had undertaken. That would be unjust and inequitable.

In *Faxon v. Mansfield,* 2 Mass. *147, it was held that one who abandons the contract for the construction of a barn before the completion thereof cannot recover any part of the compensation which under the contract he was not entitled to receive until the barn was done. *Cronin v. Tebo,* 71 Hun (N. Y.) 59; *Jennings v. Camp,* 13 Johns. (N. Y.) 94, 7 Am. Dec. 367. There can be no recovery on an entire contract to do an entire piece of work for a specified sum unless the work is performed; and it is evident that, when a conclusion is reached as to what constitutes an entire contract, there is little left for the court to determine. *Norris v. Harris,* 15 Cal. 226.

The entirety of a contract depends upon the intention of the parties, as well as upon the fact that the consideration is single. The divisibility of the subject-matter or the mode of receiving the price does not affect the question. The covenants of the contract are of course mutual and dependent according to the intention and meaning of the parties. It was the manifest intention

to employ Norval Brothers in their work on this case to continue until they got results. Without cause or reason on their part they arbitrarily quit the employ of their clients because they thought they could not recover. R. S. Norval said that he knew a lawsuit when he saw it, knew when he had enough, and that he had done his full duty by his client, and did not believe they could win and was ready to quit. This was said in April, 1914, at Mr. Burr's office, and from then on Burr and Thomas made a new contract and entered into new employment with respect to these cases. In support of these propositions laid down we cite *Pollak v. Brush Electric Ass'n,* 128 U. S 446, and *Morris v. Wibaux,* 159 Ill. 627. In this connection it is the general rule of law, deduced from the cases recorded and gleaned as a result of our reading, that while a special contract remains open or unperformed the one whose part of it has not been performed cannot recover until his whole contract is completed. *Dermott v. Jones,* 23 How. (U. S.) 220; *McClurg v. Price,* 59 Pa. St. 420; 98 Am. Dec. 356; *King v. Mason,* 42 Ill. 223, 89 Am. Dec. 426. A discussion of the principle is found in a note to *Sargent v. McLeod,* 52 L. R. A. (n. s.) 381, and is as follows: "It is well settled that an attorney employed on a contingent fee, who, without any fault on the part of his client, neglects or refuses to perform the contract of employment, and abandons or withdraws from his client's case, thereby forfeits all his rights under the contract (*Morgan v. Roberts,* 38 Ill. 65; *Holmes v. Evans,* 129 N. Y. 140, affirming 27 Jones & Sp. 136, 13 N. Y. Supp. 614), and he cannot, after the client has succeeded in the case through another attorney, recover the fee contracted for (*Potts v. Francis,* 43 N. Car. 300); nor, in the absence of good and sufficient cause or excuse for his withdrawal, can he recover any compensation for the services which he has rendered (*Houghton v. Clarke,* 80 Cal. 417; *Parish v. McGowan,* 39 App. D. C. 184; *Johnson v. Clarke,* 22 Ga. 541; *McDonald v. De Vito,* 118 App. Div. 566, 103 N. Y. Supp. 508; *Southern Nat. Bank v. Curtis,* 36 S. W. (Tex.

Civ. App.) 911; *Farwell v. Colman*, 35 Wash. 308)."

The principle of law has been well set forth in the following statement: "If an agent or attorney, having undertaken to collect a debt for a certain share of what he may recover, finally abandons further effort as useless, and, at a subsequent period, the principal receives payment through new instrumentalities, or from causes with which the agent has no connection, he cannot claim the share to which his contract would have entitled him if payment had been secured by his efforts." *Scoville v. Trustees*, 65 Ill. 523. This same principle is well stated in 6 C. J. 743, 744, secs. 318, 319. Also it is held in L. R. A. 1916E, 790 *et seq.*, that recovery cannot be had on such a contract by one who has abandoned without just cause or excuse, nor can such a one recover on a *quantum meruit*. Also for a complete discussion of these matters see the note generally, L. R. A. 1916E, 790. There can be no doubt from these authorities cited that this was an entire contract. Also, as further elucidating the same principle, see *Potts v. Francis*, 43 N. Car. 300; *Cahill v. Baird*, 138 Cal. 691, and *Holmes v. Evans*, 129 N. Y. 140. The contract of an attorney to perform legal services in a litigation is entire and he cannot recover if he abandons without justifiable cause. *Halbert v. Gibbs*, 45 N. Y. Supp. 113; *Cary v. Cary*, 89 N. Y. Supp. 1061. Where one continues for an indefinite time until a part service is accomplished, he cannot recover where he wilfully and without cause abandons the work before the expiration of the time for the performance of the service; and this is especially applicable to the engagement of attorneys with their clients. *Blanton v. King*, 73 Mo. App. 148. On the theory that an attorney under such circumstances cannot recover on the principle of *quantum meruit*, see note L. R. A. 1916E, 790, 800. There we find the rule laid down as follows: "According to the rule adopted by the majority of the courts, there can be no recovery upon the common counts for the value of work and labor performed by a servant or person engaged to perform certain work who

has, without excuse, abandoned the service of his employer, or person who engaged him."

We should heartily concur and give our assent to this rule. It states the law with reference to the intention of the parties who made this contract and elucidates the idea that contracts of retainer of attorneys are entire, especially where the fee is contingent upon the result of the action. In support of this proposition see *White v. Wright,* 16 Mo. App. 551; *Blanton v. King,* 73 Mo. App. 148; *McDonald v. De Vito,* 103 N. Y. Supp. 508; *Houghton v. Clarke,* 80 Cal. 417. These cases well establish and maintain the propositions contended for. They give application to the true utterance of what is right and just under the facts herein admitted. Norval Brothers, as appears of record, abandoned this case and did not further appear after April, 1914, and yet their services would have been helpful to a successful termination of this long and tedious litigation. The kind of contract they were working under appears to be what is known in the law as an entire contract, and it clearly was the intention of the parties that they should stay in the case until it was successfully terminated before they got their pay, and having abandoned it before its successful termination they cannot be counted in on the final payment for services rendered. As a condition precedent to getting their pay it is obvious from the great weight of authority, quoted and cited, that it is necessary for them to stay to the end. Such being the undisputed state of facts, we should adhere to the rule almost universally held that one to reap the advantages of his labor must do as he agrees and stay to the finish of his contract, and not abandon his clients when half way across the stream.

I am therefore compelled to come to the conclusion that the decree, so far as it finds in favor of Norval Brothers assignees, should be reversed. But in this connection it should be borne in mind that Norval Brothers' assignees obtained $8,165.32, and that $7,443.18 was realized upon the judgments obtained after Norval Brothers

abandoned the cases. In the division of the fees derived from the Stuart judgment in the settlement made by the attorneys among themselves, Mr. Thomas received less than one-third, while the decree of the court reduced it to one-fourth, thus requiring him to refund a part of the fees paid him in 1902 and 1903. We should reverse as to the fees allowed Norval Brothers' assignees for services from judgments obtained after the abandonment and affirm as to the fees obtained before abandonment. The record shows that Norval Brothers rendered no service to their clients herein after April, 1914. That service was rendered in the supreme court of Nebraska in April, 1914, is not supported by the evidence. The contract under which Norval Brothers were working was an entire and indivisible contract and no recovery could properly be had thereon without conferring a corresponding benefit, and it is in recognition of that principle that we should allow Norval Brothers to retain the fee they received in the Stuart case, and this also applies to the services rendered by Judge Lowley. It has been conceded by Norval Brothers and Mr. Burr that Mr. Thomas took the laboring oar, expended the nervous energy and industry necessary to win this case, and that he should have the "lion's share" paid in fees necessary to win the case and for labor and services performed. I concur in that view of the case, and hold that Thomas should receive two-thirds of the fee granted and allowed to Norval Brothers' assignees, and Burr should have the remaining one-third added to his fee. In all other respects the decree of the court should be affirmed.

WILLIAM WIDENER ET AL., APPELLANTS, V. W. E. SHARP ET AL., APPELLEES.

FILED JULY 20, 1921. No. 21647.

1. **Insurance: BENEFICIAL ASSOCIATIONS: LEGISLATIVE SESSIONS: DELEGATES.** Delegates elected to serve at a regular quadrennial

session of the supreme legislative and governing body of the Royal Highlanders, a fraternal beneficiary association, cannot lawfully serve at a special session two years later, where no provision is made for electing delegates to a special session.

2. ———: ———: INCREASE OF RATES. The record examined, and *held* that the Royal Highlanders, a fraternal beneficiary society, was without power to legislate or to adopt the new table of rates that is complained of by plaintiffs.

3. ———: ———: ———: INJUNCTION. Where the executive officers of a fraternal beneficiary society are about to enforce certain rates that have been adopted at a special session of the supreme governing body of the society, and it appears that no provision has been made by the society for electing the delegates who adopted the rates, such executive officers will be enjoined from enforcing such rates on application by a member of the society who is aggrieved.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Reversed, with directions.*

J. C. McReynolds, for appellants.

Hainer, Craft & Lane, contra.

O. B. Clark, amicus curiae.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

DEAN, J.

This is a suit for an injunction. Plaintiffs are members of the Royal Highlanders, a fraternal beneficiary association organized under the laws of Nebraska. It is required by statute to have a representative form of government. It has a lodge system with a ritualistic form of work. Its lodges are called "castles" and its laws "edicts." Its lawmaking body meets in regular session quadrennially. It raises funds to pay benefits and expenses by requiring members to pay assessments and dues. Defendants are its principal administrative officers and its executive committee. The purpose of the suit is to perpetually enjoin defendants from enforcing a new table of rates adopted by the supreme legislative and gov-

erning body of the association at a special session held at Denver in October, 1919. The new rates increase the assessments of plaintiffs and are alleged to be void. On issues raised by the pleadings the parties were heard by two district judges who dismissed the suit. Plaintiffs have appealed.

The decisive point in the case is this: Did the representatives who were elected in 1917 as delegates to the quadrennial session of the supreme executive castle of the Royal Highlanders for that year, and who, on the call of the executive committee, attended a special session of the executive castle in 1919, have the power at that session to adopt the new table of rates, then adopted, of which complaint is made by plaintiffs? If the delegates were not clothed with such power the judgment should be reversed and the injunction be made perpetual, and if for that reason reversed, further discussion of other contested features is needless.

The lodge system of the Royal Highlanders is composed of tributary castles, representative castles, and the executive castle. The tributary castles, many in number, are the local lodges and they elect delegates to 25 representative castles. The latter elect delegates to the executive castle which is the supreme legislative and governing body of the association. The statute and the edicts require a session of the executive castle as often as once in four years.

Judged by an edict that the Royal Highlanders adopted in 1901, and that was in full force and effect in 1919, it seems clear that the called special 1919 session of the Royal Highlanders that met at Denver and adopted the rates and made the changes that are in issue here was without power to do so. The edict in question provides generally that the power of the "representative castles" with respect to the election of representatives shall be: "To elect representatives to the executive castle to serve at the next session thereof, and to elect alternates for such representatives to serve in the event of the inability of

the representatives to attend." Section 70, Original Edicts 1901.

Section 70 was effective continuously from the date of its adoption in July, 1901, until and including October, 1919, when the representatives who were elected to serve at the regular quadrennial session of the executive castle in 1917 were called by the executive committee to assemble in special session in 1919. In October of that year the representatives, so called in special session, went through the form of amending the edicts and of adopting the rates in question here and of which complaint is made by plaintiffs. Under section 70 it seems clear that the official terms of the representatives who attended the special session in 1919 expired with the adjournment of the preceding regular quadrennial session in 1917, to which they had been elected. It follows, as we have seen, that the delegates were therefore without power at the called special session to perform any legislative or executive function or to adopt a new table of rates. The defendant society argues to the contrary.

An edict was adopted by the defendant society in 1897 that, but for the fact that it was amended in 1901, or perhaps superseded is a better term, would have given to the representatives in 1919 the power to amend the rates. The 1897 edict provides generally that the delegates to the executive castle shall be elected from the membership of each respective district, "to represent such district at the following regular convention of the executive castle, and all special conventions of the executive castle, until their successors are elected and qualified." Section 94, Original Edicts 1897.

It will be noted that section 70, that is in effect amendatory of section 94, merely provides that the representatives shall be elected "to serve at the next session," and that it omits the following words that are found in the repealed section 94, namely, "and all special conventions of the executive castle."

There must have been, there doubtless was, a reason

for adopting the 1901 amendment. Why it was adopted is perhaps not necessary to inquire. It is sufficient that the amended edict was adopted and that it was in full force and effect in 1919. It appears too that at least three quadrennial sessions of the Royal Highlanders were subsequently held and section 70 of the 1901 Original Edicts remained unamended and unrepealed. By the adoption of section 70 a material change was deliberately made, with respect to the duration of the official term of office of the elected representatives, that did not theretofore exist. It follows that the society, and the defendants, were bound by its provisions until it was lawfully changed. Clearly it was the intention of the authors of the amendment that the former rule, with respect to the holdover privileges of elected representatives, should no longer obtain. It is evident that the adoption of the amended section was not an accident.

It may be observed in a general way, and merely as illustrative of the point, that a litigant in a law action, for obvious reasons, might not care to have his case tried to a jury that had been selected two years, or even two weeks, before his case is to be called for trial. And doubtless, by the same token, and for obvious reasons too, the representatives to the 1901 executive castle deliberately concluded that four continuous official years of the same representatives in office, with power unlimited for special sessions of the executive castle, might not inure to the good of the order.

Had edict numbered 94 not been supplanted by edict numbered 70, plaintiffs would have had no cause for complaint with respect to the legality of the 1919 session. The fact is apparent that the 1917 representatives in 1919 attempted to effect a vital change in the policy of the Royal Highlanders under authority of a repealed edict that had not been in force for about 16 years. It seems clear that the executive committee was without authority to summon the representatives who were elected in 1917, for the convention of that year, to meet in special session

in 1919. The delegates who responded to the call in 1919 could not lawfully serve at that session, for the reason that direct and explicit authority to do so was long before repealed.

With respect to the status of the 1919 executive castle, and its authority to adopt the rates in question, defendants draw attention to section 7 of the 1913 Original Edicts. So far as applicable here it reads: "The executive castle shall have jurisdiction over all members of the fraternity and over all representative and tributary castles instituted and governed by its laws, and the term of its existence shall be perpetual." In their brief defendants contend that the following words in section 7, namely, "and the term of its existence shall be perpetual," negative the assumption that the term of office of the representatives of the executive castle of 1917 terminated upon the adjournment of the regular session in that year. They argue: "If such adjournment vacated the offices of the executive castle representatives, the existence of the executive castle would not be perpetual, as is provided in said section 7 of the edicts."

It will be presumed that the ordinary and usual meaning of the word "perpetual" in section 7 was intended. Following is a standard definition: "Never-ceasing, continuing forever or for an unlimited time; unfailing; everlasting; continuous." Webster's New International Dictionary. Another definition of "perpetual" follows: "Continuing forever in future time; destined to continue or to be continued through the ages; everlasting; as, a perpetual statute." Century Dictionary and Cyclopedia, vol. 7. It is, of course, common knowledge that, as applied to corporations generally, a by-law that purports to provide for perpetuity cannot insure perpetuity. To illustrate: A common expression in the organization of corporations is that they shall continue for a designated number of years. But it does not follow that the continued existence of the corporation is thereby assured for the designated length of time.

Section 31, Original Edicts 1896, provided for the calling of special conventions "by the most illustrious protector at any time and place, when requested to do so by a majority of all tributary castles." That section was amended in 1897 by the adoption of section 28, so that under it the most illustrious protector of the Royal Highlanders could call a special convention "when requested to do so by the high prudential chiefs." The edict, as now in force, and which was in force in 1919, was again amended in 1901, and provides: "Special sessions of the executive castle shall be called by the most illustrious protector at any time and place, when he deems it necessary to do so, or upon the request of two-thirds of the executive committee; such special sessions to have all the powers of regular sessions, except as herein restricted." Section 11, Original Edicts 1901.

There is, however, no edict providing for the election of representatives to a special convention. It follows that section 11 is without force. Standing alone, as it does, it is ineffective for any purpose. In this respect, and as illustrative merely, it may be likened to a constitutional provision that is not self-executing and that requires an act of the legislature to make it operative. Again to illustrate: A penalty could not lawfully be imposed for the violation of a criminal statute unless the legislature fixed a penalty for such violation. Whether under section 11 representatives could lawfully have been elected at a special election to serve as representatives at a special convention, under a call duly made by the most illustrious protector of the Royal Highlanders, is not presented by the record, nor is it discussed in the brief. We do not therefore decide the question. The authorities cited by defendant with respect to the holdover privileges of those who are elected to office generally, and for the most part to public office, to which no successor has been elected or appointed, do not, in view of the record and of the premises, seem to be applicable to the facts before us.

We conclude that the delegates elected to serve at a

regular quadrennial session of the supreme legislative and governing body of the Royal Highlanders were not, under the edicts of the society, clothed with authority to serve at a special session holden two years later, where no provision was made for election of delegates to a special session. That the Royal Highlander society was without power to legislate or to adopt the new table of rates that is complained of by plaintiffs sufficiently appears.

Where the executive officers of a fraternal beneficiary society are about to enforce certain rates that have been adopted at a special session of the supreme governing body of the society, and it appears that no provision has been made by the society for electing the delegates who adopted the rates, such executive officers will be enjoined from enforcing such rates on application by a member of the society who is aggrieved. Other questions are presented by the briefs that, in view of our conclusion, we do not find it necessary to discuss, nor to decide.

The judgment of the district court is reversed and remanded, with directions that the injunction be made perpetual.

REVERSED.

THOMAS J. MILLER, APPELLEE, V. FRANK VANICEK, APPELLEE: FRANK J. PIMPER, INTERVENER, APPELLANT.

FILED JULY 20, 1921. No. 21664.

1. **Vendor and Purchaser:** BONA FIDE PURCHASER. A *bona fide* purchaser of land is one who purchases for a valuable consideration paid or parted with, without notice of any suspicious circumstance which would put a prudent man upon inquiry.

2. ———: CONTRACT: REFORMATION. Where it is shown by clear, satisfactory, and convincing testimony that a mutual mistake in the description of property in a contract of sale has been made, a court of equity will reform the instrument so as to reflect the real contract between the parties; and this rule will also be ap-

plied as against a third party purchaser chargeable with notice of such mistake.

3. ———: ———: MISTAKE: EVIDENCE. Evidence examined, and *held* that the intervener was not a *bona fide* purchaser; that he was charged with notice of such facts as would put a prudent man upon inquiry, and which, if followed up, would have disclosed that there was a mistake made in the contract in describing the land.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Courtright, Sidner, Lee & Jones, for appellant.

J. J. Harrington and *J. A. Donohoe, contra.*

Heard before LETTON, ALDRICH, DAY and DEAN, JJ., GOOD, District Judge.

DAY, J.

Thomas J. Miller, the plaintiff, commenced this action in the district court for Holt county, Nebraska, against the defendant, Frank Vanicek, for the purpose of reforming a written contract for the sale of real estate, entered into between the parties on July 8, 1919. The petition alleged that the plaintiff and the defendant entered into a contract whereby the plaintiff agreed to sell, and the defendant agreed to buy, the S.W.¼ of section 5, township 29, range 10, in Holt county, Nebraska; that by a mutual mistake of the parties and the draftsman the land was described as being in range 11, when it should have been range 10. The specific reformation asked was to have the contract read "range 10," instead of "range 11," and to have the purchaser's name spelled correctly.

Frank J. Pimper intervened, alleging that he was interested in the result of the controversy adversely to the plaintiff. He further alleged that on August 28, 1919, he entered into a contract with the defendant to purchase the S.W.¼ of section 5, township 29, range 11, in Holt county, at the agreed price of $70 an acre, $1,000 of which was paid at the time of the making of the contract; that

at the time he examined the contract between the plaintiff and the defendant, and relied upon the same as containing a correct description of the land purchased by the defendant; that of the $1,000 paid by him to the defendant $400 was paid by the defendant to the plaintiff as a part of the purchase price upon defendant's contract with plaintiff. The intervener prayed that the reformation of the contract be denied, or, in the event a reformation was decreed, that the plaintiff be required to pay intervener $1,000 with interest from August 28, 1919, and also the further sum of $1,600 as damages.

The reply of the plaintiff to the petition of intervention alleged that prior to the making of the contract between intervener and defendant, and prior to the paying of any part of the purchase price, the intervener examined the land described in his contract and ascertained facts sufficient to put him on inquiry, which would have disclosed the mistake in the description of the land.

The trial court found the issues in favor of the plaintiff; entered a judgment reforming the contract as prayed; and dismissed the intervener's petition. From this judgment the intervener has appealed.

It appears that on July 2, 1919, the plaintiff contracted to purchase of one C. M. Daly the S.W.¼ of section 5, township 29, range 10, in Holt county; that shortly thereafter the plaintiff entered into negotiations with the defendant to sell the above described premises At that time the defendant was shown on a plat the location and description of the land, was informed of the nature of the improvements thereon, and the distance from O'Neill, the county seat. The parties then entered into a contract which was to be left in escrow at the bank until such time as the defendant could examine the property. It further appears that shortly thereafter the defendant examined the land so described in range 10, and expressed himself as being entirely satisfied therewith, and thereupon paid $600 of the purchase price; that through a mistake of the scrivener the land was described in the contract as being

situated in range 11. It is perfectly clear that the plaintiff and defendant in making their contract had in mind only the land located in range 10. No disinterested person can read the testimony without coming to the conclusion that the land which the plaintiff sold and the defendant purchased was the S.W.¼ of section 5, township 29, range 10, and that there was a mutual mistake in describing it as being in range 11. Under the facts shown a court of equity could do no less than to reform the written instrument as between the plaintiff and defendant so as to reflect the real contract between the parties.

We come now to a consideration of the issue presented by the petition of intervention, which turns upon whether the intervener is to be regarded as a good-faith purchaser. If he was, then, notwithstanding the mutual mistake of the plaintiff and defendant in drafting their contract, a court of equity would refuse to reform the contract, or, if it did order a reformation, would amply protect the intervener's rights. A *bona fide* purchaser of land is one who purchases for a valuable consideration paid or parted with, without notice of any suspicious circumstance which would put a prudent man upon inquiry. *Carpenter Paper Co. v. Wilcox,* 50 Neb. 659. No doubt the general rule is as argued by the intervener, that a mutual mistake will not be corrected in equity as against the rights of innocent third parties. But it is also the settled rule that mutual mistakes in the description of land in written instruments will be reformed, not only as against the parties to the contract, but also against subsequent purchasers chargeable with notice of the mistake. *Carpenter Paper Co. v. Wilcox,* 50 Neb. 659.

Without attempting to quote at any length the testimony, it is fairly shown that intervener resided at Howells, a short distance from Dodge, where the defendant lived. Intervener for several years had been engaged more or less extensively in selling land in Holt county for one McKillip, who had a large quantity of land for sale in that county, and in this manner intervener became

familiar with the value and character of land in that county. The defendant, being desirous of selling his land, and learning that intervener was selling land in Holt county, called upon the latter for the purpose of securing his assistance in disposing of defendant's land. At first intervener told the defendant that there was no use trying to sell any land that Miller had sold because he always sold too high. Before parting, however, it was agreed that defendant was to send to intervener a description of his land, and intervener then said that the next time he was up in Holt county he would look it up. Upon receiving the description of the land from defendant, intervener examined a plat which he had of Holt county, and immediately wrote to the defendant to send him his original contract for inspection. Upon receiving the original contract he immediately went to Dodge and entered into a contract with the defendant to purchase the land described therein, agreeing to pay an advance of $5 an acre above the price paid by the defendant. It was agreed that the papers were to be left in escrow at the bank until intervener could personally examine the premises. Shortly thereafter intervener, in company with Mr. Hrabak, a banker of Howells, and also a real estate agent who had been selling land for McKillip, and a third party, visited the premises and inspected the land. Intervener ascertained that the W.½ of the quarter section had valuable improvements thereon, and was in the possession and occupancy of a Mr. Page. In order to satisfy himself of the location, he secured from Mrs. Page a tax receipt which disclosed the location to be the W.½ of the S.W.¼ of section 5, township 29, range 11. There was a large field of alflafa growing upon the west eighty; a line fence separated the east and west eighties of the quarter section. It was also shown that the land described as being in range 11 was worth approximately $120 to $125 an acre. It also appears that the selling agents of McKillip were each furnished with a plat of Holt county upon which the McKillip land was indicated in dark colors. One of the

plats in evidence shows McKillip to be the owner of the S.E.¼ of section 5, township 29, range 11, and also the east eighty of the S.W.¼ of section 5, township 29, range 11. While the testimony is not entirely clear that the plat which intervener examined was the McKillip plat, the inference is very strong that it was. If it was, he would have seen at once that a part of the land which he was purchasing was owned by McKillip. It is also shown that Mr. Hrabak knew that the S.E.¼ of section 5, township 29, range 11, had been owned by a man residing in Howells, and that a short time prior to this inspection of the land the owner had sold it to McKillip. The intervener thereupon filed his contract for record, and on returning went immediately to defendant, told him that he was satisfied with the land, and paid $1,000 upon the contract. The defendant thereupon paid the plaintiff $400 out of this $1,000 upon his contract.

Without entering further into the details of the evidence, in our view the intervener was charged with ample notice which would have put a prudent man on inquiry, and which, if followed up, would have disclosed that there was a mistake in the description of the land.

Under the facts as disclosed by the record, we are convinced that the intervener is not a *bona fide* purchaser, and that, therefore, the trial court was right in dismissing his petition of intervention.

The judgment is

AFFIRMED.

RAY A. LOWER V. STATE OF NEBRASKA.

FILED JULY 20, 1921. NO. 21780.

1. **Information**: SIGNATURE. Under the provisions of chapter 205, Laws 1919, an assistant attorney general has no authority to make and sign an information in his own name, and an information so signed is a nullity.

2. **Attorney General**: ASSISTANT. The assistant attorney general is

the agent of the attorney general, and not an independent officer, and his official acts must be performed in the name of his principal.

ERROR to the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Reversed, with directions.*

Jamieson, O'Sullivan & Southard and *Slama & Donato,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

Heard before MORRISSEY, C.J., DAY, DEAN, LETTON and ROSE, JJ.

DAY, J.

Ray A. Lower was convicted of a felony in the district court for Saunders county, and sentenced to the penitentiary under the provisions of the indeterminate sentence law. As plaintiff in error he has brought the record of his conviction here for review.

A number of errors are assigned, and argued in his brief; but, in the view we have taken of the case, only one need be considered.

It is first argued that the information is insufficient to charge an offense, particularly so, because the same was not made and signed by a proper prosecuting officer authorized by law so to do. The information was made and signed by "Cecil F. Laverty, assistant attorney general for the state of Nebraska," and the question is squarely presented whether the assistant attorney general of the state has legal authority to make and sign an information in his own name.

It is the policy of the law, as expressed in article I, sec. 10 of our Constitution, that no person shall be held to answer for a criminal offense (except in certain cases named), unless on a presentment or indictment by a grand jury. A proviso is made in the Constitution "that the legislature may by law provide for holding persons answerable for criminal offenses, on information of a

public prosecutor." Acting under this power the legislature of 1885 made provision for prosecuting criminal offenses by information, and, among other provisions, enacted section 9063, Rev. St. 1913, which was amended by chapter 164, Laws 1915, and reads as follows: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same." The term "prosecuting attorney" and "county attorney" signify the same. Rev. St. 1913, sec. 8904. The legislature, by chapter 205, Laws 1919, constituted a department of justice, and placed the attorney general as head thereof. By the terms of the act the general control and supervision of all actions and legal proceedings in which the state of Nebraska is a party or interested, and the control of all of the legal business of all of the departments and bureaus of the state, or of any office thereof which requires the services of an attorney in order to protect the interest of the state, is given to the attorney general. Section 3 of the act provides: "The attorney general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interested."

Section 4 provides: "The attorney general and the department of justice shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties."

Section 6 provides: "The attorney general shall have power to appoint a deputy attorney general, and such regular and special assistants as he may deem necessary. The deputy attorney general shall give bond to the state of Nebraska in the sum of ten thousand dollars with good and sufficient sureties to be approved by the governor, which bond together with a copy of his appointment shall be deposited in the office of the secretary of state. The

deputy may do and perform in the absence of the attorney general all the acts and duties that may be authorized and required of the attorney general. The attorney general shall be responsible for the acts of his deputy."

An examination of the foregoing sections clearly indicates that it was the intention of the legislature to clothe the attorney general with power to prosecute criminal actions in any county in the state, and, as a necessary incident, the power to make complaints, to make, sign, and file informations, and in fact to exercise any power in each of the several counties of the state as is given to the county attorneys in their respective counties. It is also clear that the deputy is authorized, in the absence of the attorney general, to do and perform any act which the attorney general is authorized to perform. It will be noted, however, that while the legislature has made provision for the giving of bond by the deputy attorney general, and has prescribed that he may exercise all the acts and duties of the attorney general, in the absence of the latter, it has not attempted to define or prescribe the powers and duties of the assistants. The only reference to the "assistants" is that the attorney general is given power to appoint "such regular and special assistants as he may deem necessary." If by this act it was the intention of the legislature to authorize the assistants to do and perform such acts as the attorney general is authorized to do, as independent officers, it seems strange that it did not say so, especially in view of the fact that the powers of the deputy are set out in the same section of the act in which the authority to appoint assistants is given.

In Mechem, Public Officers, sec. 584, the rule is stated as follows: "The question in whose name a deputy officer should act is one of much importance and of considerable apparent uncertainty. * * *. In several of the states the authority to act in an official capacity is given to the principal alone, or, if the appointment of deputies is recognized or authorized by law, they are regarded as the

mere private agents or servants of the principal and not as independent public officers deriving independent authority from the law. Where such is the case, the authority exercised by the deputy is, manifestly, a derivative and subsidiary one—it is the authority conferred upon the principal, and not an authority inherent in the deputy. It follows then, logically and legally, that the authority should be exercised in the name of him in whom it exists and not in his name who of himself has no recognized authority at all. The execution should, therefore, be in the name of the principal alone or in the name of the principal by the deputy.

"In other states, as has been seen, the deputy is recognized as an independent public officer and is endowed by law with authority to do any act which his principal might do. In these cases where the authority exists in the deputy himself by operation of law and is not derived solely through the principal, it is well executed in the name of him in whom it exists, the deputy himself.

"Under either state of facts, the authority of a special deputy, who, as has been seen, is regarded as the mere private agent or servant of the principal, would, unless otherwise provided by statute, be properly exercised in the name of the principal."

An officer, in whom the official discretion and powers of the office are vested, may, when authorized by law, perform the functions of his office through the services of assistants, acting under his direction and supervision, but he cannot delegate to them, where such assistants are not by law given the authority, the power to perform his official duties independently of any control or direction by him, and according to their own individual judgment and discretion. 18 C. J. 1346, sec. 88. An assistant is one who stands by and aids or helps another in the performance of the latter's duties. *State v. Longfellow*, 95 Mo. App. 660. And, unless there is a clear expression in the statute to the contrary, it will be presumed that the legislature intended that public duties, which require the

exercise of discretion, should be performed by the public officers themselves, and not by their assistants. *Commonwealth v. Smith,* 141 Mass. 135.

It was said in *McGarrah v. State,* 10 Okla. Cr. 21: "There are many reasons why a power of this kind should be confined to the prosecuting officer. He is expected to be impartial in abstaining from prosecuting, as well as prosecuting, and to guard the real interests of public justice in favor of all concerned. It is therefore of the highest importance to the public that this power should be carefully exercised, and that the responsibility should rest upon the officer to whom it is confided."

And, in *Engle v. Chipman,* 51 Mich. 524, the court said: "The prosecuting officer is a very responsible officer, selected by the people and vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. * * * This discretion is official and personal, and our laws have only allowed its delegation on special grounds, where an assistant has been provided for by carefully guarded legislation. It is directly contrary to public policy to allow any general delegation of a prosecutor's powers, and the courts cannot recognize any such arrangement as forming a basis for personal compensation."

It has been pointed out that section 4 of the act (Laws 1919, ch. 205) provides that the "attorney general and the department of justice" shall have the same powers and prerogatives in the several counties as the county attorneys themselves have in those counties, and it is argued that this is an expressed delegation of official power to the assistants, who are to be appointed by the attorney general, since such assistants, through their appointment, become a part of the department of justice. We cannot so interpret that provision. The first provision of the act recites that "there is hereby constituted an executive department to be known as the department of justice and the attorney general shall be the head of this department." The law does not attempt to specifically enumer-

ate the official members who shall be taken to constitute that department, other than the above recital. As to what officers shall be interpreted to constitute the department of justice must be gathered from the general provisions of the act. As before stated, the attorney general and his deputy are by the statute expressly vested with official powers. Such powers are confined to them alone. They are the only persons, spoken of in the act, who can be deemed to be officers connected with the department of justice. In the eyes of the law these officials, so far as the exercise of the powers of the department is concerned, constitute the department of justice. Many other persons—assistants, clerks and stenographers—are employed in that department, but their mere connection with it vests in them no official power. We must look to the provisions of the law to determine in whom the powers of the department of justice are vested, and those official powers cannot be extended by presumption to others than those in whom such powers are expressly delegated.

It is quite clear that the legislature has not made the assistant attorney general an independent officer, and clothed him with power to act in his own name. At best, he is a mere agent of the attorney general, and, as such, must perform official acts in the name of his principal.

It follows from what has been said that there is no authority under the statute for the assistant attorney general to file an information in his own name, and that, therefore, the information as filed in this case is a nullity.

The judgment is reversed and the cause remanded, with directions to enter a *nolle prosequi*.

REVERSED.

JULIUS SCHUSTER ET AL., APPELLANTS, V. NORTH AMERICAN HOTEL COMPANY, APPELLEE.

FILED JULY 20, 1921. No. 21509.

1. **Corporations**: SUBSCRIPTION FOR STOCK: UNAUTHORIZED REPRESENTATIONS BY AGENT. Where an order contract for the purchase of

stock in a corporation provided "No conditions, agreements or representations, other than those printed above, shall bind said company," and the corporation on the faith of said order, and without knowledge of any oral promises, representations and agreements made by the agent to the purchasers, issued the stock and received payment therefor, the corporation was not bound by any such promises, representations and agreements outside of those contained in the written order.

2. **Principal and Agent:** AUTHORITY OF AGENT: NOTICE. A person dealing with one known to be an agent is held to the exercise of reasonable prudence, and, if an agent makes an agreement, representation or promise so unusual and unreasonable as to arouse the suspicion of a man of ordinary or average business prudence, he is put upon notice and must ascertain if actual authority has been conferred.

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

Stewart, Perry & Stewart and *Will H. Thompson & Son*, for appellants.

Baker & Ready, contra.

TIBBETS, C.

This is an action brought by plaintiffs against the defendant to recover $2,000 paid by the plaintiffs to defendant for stock in the defendant company. Trial was had to a jury. At the close of plaintiffs' testimony the defendant moved for an instructed verdict and for a dismissal. The motion was sustained, and judgment was rendered accordingly. Plaintiffs appeal.

The petition alleges that the plaintiffs are farmers and partners in the farming business in Polk county, Nebraska; that defendant is an Iowa corporation; that on or about June 19, 1917, the defendant, by its stock-sales agents, N. E. Blair and Henry Lachnit, solicited plaintiffs to purchase stock in defendant corporation; that plaintiffs informed said agents that they had no knowledge of defendant's company, but knew of the Bankers Realty Investment Company, a Nebraska company, at Omaha; that said agents informed plaintiffs that the two

companies were one and the same company; that stock in defendant company was in fact stock in the realty company; that the defendant company, if requested, gave a contract to pay back upon a return of the stock certificate the purchase price with 6 per cent. interest thereon, at any time after two months and within ten years from the date of such subscription, and that this would apply to plaintiffs; that on the 19th day of June, 1917, plaintiffs made and delivered to defendant, through its agent, a written subscription for ten shares of defendant's preferred stock, and plaintiffs paid therefor $1,000; that on the 3d day of July, 1917, plaintiffs subscribed for an additional ten shares of stock under the same understanding and agreement as was had concerning those purchased previously, and paid therefor $1,000. Plaintiffs further allege that they were induced to sign said written subscription for stock and pay said $2,000 by reason of the said representations by defendant, through its said agents, coupled with the promise to send to plaintiffs a writing evidencing the written agreement for repayment of the purchase price of said stock after two months and within ten years. Plaintiffs also allege that the defendant and the Bankers Realty Investment Company are separate and distinct corporations; that the statement by the agent that the stock in the Bankers Realty Investment Company and in the defendant company was the same, and that the defendant shared in the business and profits of the realty company was untrue; that such representations were the inducements leading them to subscribe for said stock; that they did not learn that such representations were false until about February 1, 1919, when they elected to return to defendant said stock certificates, and tendered the same to defendant and demanded of it the repayment of said $2,000, which defendant refused to accept; that plaintiffs also offered to return the sum of $46.96 received by them as dividends January 1, 1918, and pray for judgment for the sum of $2,000, with legal interest thereon from January 1, 1919.

The defendant, for its answer, admits that it is a corporation, and alleges that the plaintiffs have improperly joined in their petition several causes of action, and files a general denial, except as to those matters which are expressly and specifically admitted, admits all that part of the allegations of the petition relating to the purchase by the plaintiffs from the defendant of the stock in question and signed written contracts of subscription for the same, and alleges that said written contracts were fully explained and understood by the plaintiffs before their signatures were affixed thereto. Defendant, further answering, alleges that said contracts, among other provisions, contained the following clause: "No conditions, agreements or representations, other than those printed above, shall bind the said company." Defendant denies that any misrepresentations were made as alleged in the petition. The contracts of subscription contained the following: "It is understood that said certificate of stock will be issued subject to the constitution and by-laws of the North American Hotel Company." And there is nothing in said constitution or by-laws providing for the repurchase of the said stock of said company, except as contained in article 5, section 1 of the by-laws, which was plainly and legibly printed on the reverse side of the subscription contract signed by the plaintiffs, and was plainly and legibly printed on the face of the certificates of said stock received by the plaintiffs; and, further, that no officer, servant, agent or employee of the defendant company was authorized, instructed or permitted to make any contract with reference to the sale of said stock, other than that as printed on the subscription contract signed by plaintiffs, and that said defendant furnished to its agent the said printed form, and that the defendant had no knowledge of any verbal agreement or representations made or entered into by its said agents otherwise than contained in said subscription contracts. Defendant, for further answer, alleges that approximately two years expired between the date of said subscription contracts

and the date upon which plaintiffs claimed to this defendant that any of said misrepresentations set forth had been made, or claimed that any such oral contract set forth had been made, or that any notice thereof of any claim had been received by the company, and that by reason thereof the plaintiffs have waived said claims and are estopped from setting up or asserting said claims, and ask that the action be dismissed.

It will be seen that the pleadings summarized would indicate that, under the issues made, the plaintiffs are relying upon the representations as to the relation between the realty company and the defendant, and also that there was an agreement upon the part of the agents to furnish a written contract in reference to the repurchase by the defendant of the stock and the failure so to do, and the defendant is relying upon the contract, in which it is expressly set forth that the company shall not be liable for any representations not included in the contract, and also the question of estoppel.

The plaintiffs in their reply brief say: "Plaintiffs' action is not as defendant's counsel contend, an action on a contract or for damages on account of deceit in obtaining a contract, but the petition clearly shows that the plaintiffs rescinded the contract for fraud, tendered back the stock received from defendant, and demanded the repayment of the money received by defendant therefor." The first proposition under this statement of the plaintiffs to which we direct our attention is: Does the plaintiffs' petition bear out the statement? Second, did the representations of the agents, as shown by their evidence, bind the defendant?

As to the first proposition, the fact that plaintiffs allege in the petition that they were induced by fraud and misrepresentations to purchase the stock in question, and that they tendered the stock back to defendant and made their tender good by bringing it into court, and by their asking that there be returned to them the purchase price thereof, is simply a rescission of the contract on the

ground of fraud and misrepresentation. In the case of *First Nat. Bank v. McKinney*, 47 Neb. 149, it is held: "A vendor who is induced to part with possession of property through the fraud of the purchasers has his election to rescind the contract and reclaim the property sold, or to ratify the sale and pursue his ordinary remedy by an action on the contract. But such remedies are not concurrent, and by electing to pursue one with a knowledge of the facts, he waives his right to the other." This principle was adhered to in the cases of *Pollock v. Smith*, 49 Neb. 864; *Hawver v. City of Omaha*, 52 Neb. 734, and *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434. We are therefore of the opinion that the action was one for rescission.

We now come to the vital proposition arising in this case: Were the misrepresentations made by the agent binding upon the defendant? The uncontradicted evidence was that the defendant had no knowledge of such misrepresentations having been made for some considerable time after the transactions between the plaintiffs and the defendant were concluded. The crucial test is, did the agent exceed his authority in making such statements, and did the plaintiffs have such knowledge as would indicate that the agent was not authorized or empowered by the principal to make them. On the face of the subscription contracts appears the following: "No conditions, agreements or representations, other than those printed above, shall bind the said company." This was notice to the signers. The order was to the North American Hotel Company, in large print. The certificates of stock were also from the hotel company. Plaintiffs state that they did not read all of the order, but took Blake's word for a considerable part of what it contained. Their negligence could not be attributed to the defendant. The defendant had given all the notice it could give. If plaintiffs had done what the ordinarily prudent business man would and should have done, they would have read the contract, and their failure so to do was at their own

peril. The case of *Kaley v. Northwestern Mutual Life Ins. Co.*, 102 Neb. 135, bears directly upon the proposition arising as to the powers of the agent. This court held in that case: "An agent of a life insurance company, the limitation of whose power is set forth in the application for insurance, which limitation is expressly called to the attention of the applicant, cannot vary the terms of the policy by an estimate of results of the policy attached by him thereto." Another very recent case, that of *Omaha Alfalfa Milling Co. v. Pinkham*, 105 Neb. 20, sustained the same proposition, and it was held in that case that, where the party entering into the contract is informed of the limitation of the agent, if the agent exceeds those limitations, the contract will not be binding upon his principal. This is only in line with former decisions of this court, as in the case of *Wilson v. Beardsley*, 20 Neb. 449, and *Gregory v. Lamb*, 16 Neb. 205. And it is in accord with holdings of courts of last resort in nearly all of the states that have acted upon that question. *Holt Mfg. Co. v. Odenrider*, 61 Wash. 555; *Bybee v. Embree-McLean Carriage Co.*, 135 S. W. (Tex. Civ. App.) 203; 21 R. C. L. 909, sec. 85. In fact, we find no cases holding, under the conditions as they exist in the instant one, contrary to those cited above.

Counsel for plaintiffs cite us to a number of decisions where representations made, being fraudulent, would vitiate a contract, but that is not the question at issue here. The question at issue is whether the misrepresentations and fraud were binding upon the defendant, and in nearly all, if not all, of the cases cited by counsel the controversy was between the parties themselves or with agents with general, and not limited, powers. In the instant case, if our conclusion be correct, there were no misrepresentations made of any character that would bind the defendant, as it was expressly provided that any representations should not be binding upon the defendant except those contained in the contract. And some of the cases heretofore cited are conclusive upon that question.

We have been cited by counsel for plaintiffs to the case of *Griffin v. Bankers Realty Investment Co.*, 105 Neb. 419. That case arose, not upon the representations of an agent, but the representations made by the party itself, and it is therein stated: "Defendant cannot be heard to say that the sale is valid as far as the contract for purchase of stock is concerned and void so far as repurchase is concerned, since the entire contract is one and indivisible." That does not apply in the instant case. The contract for purchase was the written contract. The agreement for a contract to repurchase was an unauthorized contract between agent and plaintiff, just as much so as it would be for a contract between the two parties concerning an entirely different and separate matter, as the defendant had no knowledge whatever of the representations at that time.

We are compelled to come to the conclusion that the district court was right in sustaining the motion of defendant and rendering judgment for a dismissal, and we recommend that its judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and the opinion is adopted by and made the opinion of the court.

AFFIRMED.

The following opinion on motion for rehearing was filed December 21, 1921. *Rehearing denied.*

1. **Evidence:** WRITTEN CONTRACT: PAROL EVIDENCE. Where a written contract for the subscription of stock, which is, on its face, a complete contract, and which, by its terms, declares that no agreements, not expressed therein, shall be binding between the parties, is executed and delivered, parol evidence is not admissible, in an action on the contract, to show an oral agreement made at the time, though the oral agreement may have been an inducing cause to the execution of the written instrument.

2. ———: ———: ———. The rule that evidence of a parol promise cannot be shown for the purpose of enlarging or changing the written contract, where the action is one to enforce the contract, is not applicable where the action is in fraud for damages or to

rescind the contract and to prove the oral promise as the fraudulent representation which acted as an inducement to the contract.

3. **Corporations: SUBSCRIPTION FOR STOCK: UNAUTHORIZED REPRESENTATIONS BY AGENT.** Where such a contract contains the provision that "no conditions, agreements or representations," other than those printed in the instrument, shall bind the company, the agents of the company, who sell the corporate stock and procure the execution of the subscription contract, clearly act outside the limits of their ostensible authority when they make an oral promise, as an additional stipulation and obligation of the company, that the company will, upon request, accept a return of the stock and repay the consideration, with interest.

4. ———: ———: ———. A provision in such a contract, to the effect that the agent cannot bind the company by any representations, statements or agreements, will not relieve the principal from responsibility for the fraudulent representations, made by its agents, concerning the subject-matter of the contract, as distinguished from the agreements and promises which are to be undertaken, for a sales agent has ostensible authority to make representations as to the subject-matter of the sale, and his fraud, committed within the limits of such authority, will fix responsibility upon his principal.

5. ———: ———: ———: NOTICE. When such an agent makes an oral agreement, as supplemental to the written agreement of the company, and which oral agreement is, by the terms of the written agreement, one which the agent has no authority to make, the fact that he misrepresented the present attitude of the company and did not intend or expect that the promise would be carried out, though this might fix liability for fraud upon him, would not fix responsibility upon the company, for the purchaser of the stock had notice that the agent was acting beyond his authority in making such an oral promise.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG and LETTON, JJ.

FLANSBURG, J.

The issues in this case are fully set out in the former opinion. It was a suit based either on fraud or upon contract. From the plaintiffs' petition it is not clear upon which theory the suit was brought.

The plaintiffs had purchased corporate stock in the North American Hotel Company, and, as a basis for their action to recover back the purchase price of the stock, set

up two representations made by the agents of the said company; one representation being that the American Hotel Company and the Bankers Realty Investment Company "were the same company and the same people, and the other, an oral promise that the American Hotel Company, if requested, would after two years return the money paid for the stock, with interest, and alleged that these representations were false. The petition does not allege the value of the stock, nor the condition of the company, nor does it allege that the plaintiffs were damaged or injured in any way by the purchase, but alleges that plaintiffs tendered their stock to the defendant and requested a repayment of the purchase price, that defendant refused, and that there is $2,000, with interest, due from the defendant to the plaintiffs. A motion was made by the defendant to require the plaintiffs to elect upon which theory they desired to proceed, whether for fraud or upon the alleged oral promise made by the defendant's agents. This motion should have been sustained, for the plaintiffs could not both affirm the contract and seek to enforce it, and, at the same time, bring an action declaring that the contract had been vitiated by fraud and seek either its rescission or damages. The lower court, on the trial of the case, directed a verdict in favor of the plaintiffs, and the case has been presented here as if it were an action based both upon fraud and upon contract.

The subscription contract, signed by the plaintiffs when they purchased the stock, contained a provision that "no conditions, agreements or representations, other than those printed above, shall bind the said company." The subscription contract was complete on its face, and evidence of any parol agreement, to add to or qualify or condition the contract of purchase expressed in the writing, was entirely incompetent. *Security Savings Bank v. Rhodes,* 107 Neb. ——. Any action, therefore, to enforce the alleged oral promise must fail for the want of legal proof to establish such a contract.

Plaintiffs rely upon the case of *Griffin v. Bankers*

Realty Investment Co., 105 Neb. 419. In that case it was pointed out in the opinion that there were written provisions in the contract which were open to interpretation, and the opinion says that the company had paid to the plaintiff $300, in recognition of an interpretation placed upon the contract by the parties. The general rule is emphasized "that parol evidence is not admissible to change, add to, vary or modify a written subscription for stock in a corporation."

Though it is proper to resort to parol and other extrinsic evidence to explain ambiguities or to interpret written contracts, which are plainly open to explanation or construction, still we think it is stating the rule too broadly, as seems to have been done in that case, to say that when the execution of a written contract, which is complete on its face and certain in its terms, has been induced upon the faith of an oral stipulation, made at the time, such oral stipulation may properly be shown to supplement the writing, and that such oral stipulation may be enforced as a part of the contract, in order to prevent fraud. We do not so understand the rule. The very purpose of putting contracts in writing is to attain complete certainty of obligation and to prevent fraud. The stipulations of oral contracts depend for their proof, not only upon the memory, but largely upon the truthfulness and moral character of the parties bound. Hence, oral contracts give more opportunity for fraud. To allow oral stipulations to be added to written contracts would largely destroy the salutary effect of the parol evidence rule. When fraudulent promises act as the inducement to the execution of a written contract, the remedy is for fraud, and not upon the oral promise as a contractual obligation, for the oral promise as an obligation has become merged in the written agreement and cannot, as such, legally be proved.

The case of *Fairbanks, Morse & Co. v. Burgert*, 81 Neb. 465, was a suit to recover the purchase price of machinery sold, and it is not clear whether the defense made was

based on fraud or upon an oral agreement supplementing the writing. The court said that the machinery sold was represented to be capable of doing certain work, and that, if the machinery did not meet the representation, the defendant had the right to "rescind" the purchase. It does not appear what the terms of the written contract were, but the opinion declares that the writing was simply an order, and did not, on its face, purport to be a complete contract between the parties. The conclusion that parol evidence was admissible to show and to enforce an oral agreement, supplemental to the writing, could not otherwise have been justified.

Where an agent presents a subscription contract to a prospective purchaser, and where the subscription contract does not provide for a repurchase of the stock, and contains a provision that the agent can make no other agreement or condition than those which are contained in the subscription contract, the representations by the agent or agreements by him in parol cannot be shown in order to vary the terms of the subscription contract, or to add an agreement that the company will repurchase the stock.

Furthermore, entirely aside from the parol evidence rule, the agents in this case could not have bound the company to an agreement to repurchase the stock, for an attempt to do so was clearly outside the limits of their authority as expressed in the subscription contract. *Kaley v. Northwestern Mutual Life Ins. Co.*, 102 Neb. 135; *Omaha Alfalfa Milling Co. v. Pinkham*, 105 Neb. 20.

The rule that evidence of a parol promise cannot be shown for the purpose of enlarging or changing the written contract, where the action is one to enforce the contract, is, however, not applicable where the action is in fraud to rescind the contract and to prove the oral promise as the fraudulent representation which acted as the inducement to the sale. The question then, if this action is to be considered an action in fraud, is whether such oral promise, being shown, even though made in violation of the limitation of the agent's authority, as ex-

pressed in the written contract, will constitute a fraud for which the company is responsible and which will afford the purchaser the basis for an action against the company in rescission or for damages.

It is quite generally held that a provision in a contract, to the effect that the agent cannot bind the company by any representations, statements or agreements, will not relieve the principal from responsibility for the fraudulent representations, as to the subject-matter of the contract, made by the agent, since such representations are within the scope of the agent's actual or ostensible authority. It is a self-evident fact that, in order that an agent sell corporate stock for a company, he must make representations to the buyer as to the character of the business of the company, the amount of its earnings, its financial condition and assets, and many other representations of fact which materially affect the value or desirability of the stock. An agent, even though the contract which he presents contains a clause declaring that the company will not be bound by the representations that he may make, is known to be an agent sent out for the express purpose of making representations as an inducement to the sale of stock, and the provision in the contract, therefore, is not considered as limiting the scope of his ostensible authority. Where he makes false representations concerning the subject-matter of the contract, as distinguished at least from the agreements and promises which are to be undertaken, the company is responsible, and the buyer, when injured, may rescind the contract on the ground of fraud. *General Electric Co. v. O'Connell,* 118 Minn. 53; *Edward Thompson Co. v. Schroeder,* 131 Minn. 125; *Shepard v. Pabst,* 149 Wis. 35; *Roseberry v. Hart-Parr Co.,* 145 Minn. 142; *State v. Dick,* 125 Wis. 51; *Landfried v. Milam,* 214 S. W. (Tex. Civ. App.) 847; *Remington v. Savage,* 148 Minn. 405; *Bent v. Furnald,* 159 Ill. App. 552; *Jones v. Minks,* 188 Ill. App. 45.

In all of these cases just cited it will be noted that the

fraudulent representations were representations as to the subject-matter involved in the transaction. It is true that in the cases of *General Electric Co. v. O'Connell, Remington v. Savage,* and *Jones v. Minks,* the false representations made by the agent were in the form of oral warranties, but those warranties, instead of being purely matters of promissory obligations, constituted also express representations of the capacity and character of the goods to be sold, and were, to that extent, misrepresentations of existing facts and of the subject-matter of the transaction. The agent, of course, had ostensible authority to describe the goods that he was to sell, and when he made representations as to their quality and character he was acting within the scope of his authority.

In the case of *Pease v. Fitzgerald,* 31 Cal. App. 727, the company was held not responsible for the agents' representations. In that case, however, corporate stock was sold through means of a written prospectus. All representations necessary for the information of the stock-buyer were set out therein, and the buyer notified by the terms of the company's written contract that the agent had no authority to make representations other than as set out in the written statements of the company. Where the company's written representations fully cover the subject-matter of the transaction and are declared to be the only ones the company wishes to make, and where these representations are brought to the knowledge of the buyer, further representations by the agent would not appear to be necessary to the performance of the agent's duties, nor within his apparent authority to make.

It would be quite a different matter to apply this rule so as to make the company, in spite of the written limitation in its contract, responsible for the oral promises and stipulations which the agent should attempt to add to the proposed agreement. The company does not, in any sense, hold out the agent as authorized to make contracts for it, or to change the proposed written contract. On

the other hand, the written contract sets out specifically that the company will assume no other obligations than those expressed in the writing. Though the agent may describe what he has to sell, he has not, in the face of such written limitation of authority, the power to make a contract or to add stipulations to the written contract which the company has furnished. Clearly, when he fraudulently assumes to act for the company in adding stipulations to a contract, which the company says shall be the limit of its obligations, he is acting outside the scope of his ostensible authority, and the company will not be responsible for his fraud. *Commonwealth Bonding & Casualty Ins. Co. v. Bomar*, 169 S. W. (Tex. Civ. App.) 1060; *Reagen v. National Equitable Society*, 202 S. W. (Tex. Civ. App.) 157; *Gordeen v. Pearlman*, 91 N. Y. Supp. 420; *Commonwealth Bonding & Casualty Ins. Co. v. Barrington*, 180 S. W. (Tex. Civ. App.) 936; *Guth Piano Co. v. Adams*, 114 Me. 390; 2 C. J. 857.

The case of *Boncwell & Co. v. Jacobson*, 130 Ia. 170, relied upon by the plaintiffs, was based on the fraud of the agents of the defendant, they having made, it is true, promissory representations, but among the representations complained of were statements that the defendant company was in the practice of setting out sample orchards, had actually set out orchards in other places, and was desirous of setting out such an orchard in the locality where the plaintiff lived. These representations were more than simple promises which the agents attempted to add to the written contract, but were representations as to the existing business practice of the defendant company. The specific question as to whether promissory representations could be held to come within the scope of the agents' authority, regardless of a contractual provision that the agents could make no promises or agreements, was not discussed in the case.

In the case of *Jones v. Bankers Trust Co.*, 239 Fed. 770, the court construed a somewhat similar contractual provision as the one involved here, to cover only representa-

tions amounting to warranties, promissory in character, and not other representations going only to material existing facts involving the subject-matter of the transaction, and held that, as to these latter representations, the company would be responsible.

We do not mean to say that the principal will never be liable for promissory representations made by his agent, when those promises are fraudulent, and when the agent misrepresents the present attitude of the company and does not, at the time, expect or intend that his promises shall be carried out, for when the agent, in making such promissory representations, acts within its actual or ostensible authority, such fraudulent representations, even though of a promissory character, would be as binding upon the company as any other.

Though a representation, promissory in its nature, when made with the present intention of not carrying it out, may be fraudulent and actionable, it must be remembered that this case is not brought against the agents, who actually made the representations, but against the company, and when the company had no knowledge that such representations were being made. As pointed out in the former opinion, where the matter has been thoroughly discussed, the plaintiffs were put upon notice as to the limitation of the agents' authority, expressed in the written subscription agreement, and were charged with knowledge that such a promise, made by the agents, was outside the limitation of that authority. The plaintiffs have no right to consider the promise made as being the promise of the company, for the company had restricted its obligation to the stipulations contained in the writing. Promissory representations are considered fraudulent when there is a misrepresentation of the present intention or attitude of the promisor as an existing fact. Where, however, the principal has put his attitude specifically in writing, so as to expressly describe and limit his intention concerning his willingness to assume promissory obligations, the misrepresentation of that at-

titude, so as to become in any way binding upon the principal, is placed beyond the power of the agent to make. Such promissory representations, were they held to be fraudulent in this case, could not, in the absence of ratification or estoppel, be held to be binding upon the company.

The representation, then, made by these agents, that the company would repurchase the stock, was a promise for which the company was not responsible, and which the company had, by its contract, guarded the buyer against, for the buyer was bound to take notice that the agent had no authority to make agreements for the company, and that the only agreement the company was willing to make was that expressed in the writing. Though the agents personally may have been responsible for fraud, we do not find that these representations are a sufficient basis for actionable fraud as against the company.

One other representation remains to be considered. The agents represented that the American Hotel Company and the Bankers Realty Investment Company "were the same company and the same people." Such a representation as this had to do with the subject-matter of the contract. It was a representation going directly to the desirability and value of the stock and was a representation which was reasonably incidental to the sale of stock. Such a representation was within the scope of the authority of the agents to make, and the defendant company could not set up the provision of the contract that it would not be bound by the representations of its agents in bar of an action for fraud, based on those representations, were such representations proved to be false and actionable. But from the record it appears that the parties have laid little stress upon those representations as being the basis for the suit. Little evidence is developed with regard to them. It is no doubt for this reason that the commissioner, in the former opinion, made no mention of those representations except to set out that such representations were alleged in the pleadings. The plaintiffs knew

that these two companies were not identically the same, for plaintiffs admitted that they read the name, American Hotel Company, upon the contract and upon their certificates of stock, and received dividends from the American Hotel Company. Though it is manifest they knew the two companies were not identical, they may have been led to believe that the companies were operated under the same management and that the same officers were in control; the representation being that they were the "same people." So far as the record shows, however, it may have been true that the companies were operated under the same management and by the "same people." No attempt is made to show that so much of the representation was false. What the management or financial condition of the American Hotel Company was, or the value of the stock, is nowhere shown, and the same is true as to the Bankers Realty Investment Company. Whether the fact that the two companies were operated under the same management, and whether or not that would have been a benefit or a detriment to the American Hotel Company, does not appear. In fact, the record is entirely silent when it comes to the matter of proving that this representation was false, or that the plaintiffs were injured in any way by it.

For the reasons given, the motion for rehearing is

OVERRULED.

MAE H. MAXWELL, APPELLEE, V. JACOB A. MAXWELL: HENRY E. MAXWELL, EXECUTOR, APPELLANT.

FILED JULY 20, 1921. No. 21427.

1. **Appearance.** Where, in a motion to quash the service of summons upon him, a defendant pleads matter amounting to a demurrer to the petition, his appearance is general and the court has jurisdiction of his person. *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170, followed.

2. **Wills: EQUITABLE CONVERSION.** A testator devised and bequeathed real estate and personalty in this state to his wife for her life,

directing that, at her death, all the property be sold and the proceeds divided equally among his children. *Held*, that the direction to sell worked an equitable conversion of the real estate into personalty at the time of the testator's death.

3. **Divorce**: ALIMONY: AWARD OF UNDIVIDED REMAINDER. Where an unambiguous will, by the terms of which the real estate thereby devised becomes equitably converted into personalty, has been admitted to probate without objection, and the estate thereby conveyed has been fully ascertained and inventoried by the executor, and all debts have been paid, and administration has been fully completed except final distribution, which is delayed only by the existence of the life estate, an undivided remainder in the estate is not in the custody of the county court so that the district court may not award it to the wife of the remainderman in a suit by her for divorce.

4. ———: ———: ———. Under such circumstances and conditions the court, upon granting a divorce to an innocent wife, has power to award to her the husband's undivided interest in remainder, in appropriate proceedings in which the property is fully identified and the court has jurisdiction of the parties.

5. **Death**: PRESUMPTION. Evidence examined, and *held* that, under the facts and circumstances, the presumption of death from seven years' continued absence did not arise.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Morsman & Maxwell, for appellant.

Abbott & Rohn, contra.

CAIN, C.

On September 21, 1918, the plaintiff Mae H. Maxwell, filed her petition in the district court for Dodge county, Nebraska, against her husband, Jacob A. Maxwell, and Henry E. Maxwell, as executor of the last will of Samuel Maxwell, deceased, and trustee of the estate. The object of her suit was to obtain a divorce and the custody of their two minor children, and to have awarded to her the undivided one-ninth interest of her husband in the estate of his deceased father, Samuel Maxwell, which was alleged to be in the possession and under the control of the defendant Henry E. Maxwell as executor and trustee.

The defendant husband did not appear, and trial was had to the court upon plaintiff's petition and the answer thereto of Henry E. Maxwell. The court found in plaintiff's favor, granting her a divorce and custody of the minor children, and assigned and awarded to her the undivided one-ninth interest of her husband in the estate of his father. The defendant Henry E. Maxwell alone appeals.

The points argued in appellant's brief and relied upon by him for a reversal may be conveniently stated as follows: (a) That the lower court erred in overruling his special appearance and motion to quash the service of summons made upon him in Douglas county. (b) That as the will of Samuel Maxwell gave his widow, Elizabeth A. Maxwell, a life estate in all his property, and directed that upon her death all the property should be sold and converted into money, an equitable conversion thereof took place upon the testator's death, and that it is now all personalty, and that as final distribution of the estate has not been made by the county court of Dodge county, where the administration is pending final distribution, the property sought to be awarded to the plaintiff in this suit is *in custodia legis,* and hence cannot be reached by this or any other process; that, on account of a possible conflict between the judgment rendered in this case and the judgment of the county court of Dodge county to be rendered on final distribution, he may be required to pay the money twice. (d) That there is no legal way by which the interest of the defendant husband in his father's estate can be reached by or awarded to plaintiff. (e) That the defendant Jacob A. Maxwell having been absent and unheard of for more than seven years, the legal presumption of his death obtains and defeats the suit.

Consideration of these questions requires a somewhat extended statement of the petition. On September 21, 1918, the plaintiff filed her positively verified petition against defendants, setting forth the following facts, which are sustained by the evidence, to wit: That she

was married to the defendant Jacob A. Maxwell in Lincoln on November 23, 1898, and thereafter in 1906 they removed to Dodge county, where she has ever since resided; that plaintiff and her husband resided together in Fremont until April 9, 1911; that three children were born to them, one a daughter who is now of age, another daughter 16 years of age, and a son 14 years of age; that these children have resided at Fremont with their mother at all times since April 9, 1911, on which latter date the defendant husband, being then an able-bodied man of the age of 43 years, deserted and abandoned plaintiff and his children, and ever since has been wilfully absent from them without just cause or excuse and has not contributed to their support; that after her husband's desertion plaintiff secured employment as a clerk in a local store, and for the seven years next before the filing of the petition has by her earnings wholly supported and maintained herself and the children, and that the whereabouts of the defendant husband has been unknown to her ever since his departure, notwithstanding that she has made investigation and inquiry to ascertain the same. As bearing upon the interest of her husband in his father's estate, the plaintiff in her petition further alleged that Samuel Maxwell, father of her husband, died testate on February 11, 1901, a resident of Fremont, in Dodge county, and seised of real and personal property; that by his will, after making certain specific bequests, he gave and bequeathed all the residue of his property to his widow, Elizabeth A. Maxwell, for life, and directed that on her death the estate be sold and converted into cash and distributed in equal shares to his nine children, of whom the defendant Jacob A. Maxwell is one; that said will was duly admitted to probate in the county court of Dodge county, Nebraska, in the year 1901, and the defendant Henry E. Maxwell, the executor named therein, was duly appointed and qualified as such executor; that due notice to creditors was given and all claims barred and all debts and charges paid. The petition further avers, and there

is some evidence tending to support the averment, that Henry E. Maxwell, more than ten years before the commencement of this action, fully completed the administration of the estate except final distribution, and that at about that time it was mutually agreed between him and the other heirs that he should continue in possession and control of the assets of the estate, paying the widow an allowance from the income thereof, and on her death convert the property into cash as provided by the will; that, while defendant Henry E. Maxwell continues in his office as executor of the estate, he does so as trustee of the property for the widow and children; that there is now in his hands more than $20,000 in cash, mortgages, and other securities, together with 260 acres of land in Cass county and 22 acres in Dodge county, Nebraska, which are fully described in the petition and of which the testator died seised. The petition further alleges that the value of the one-ninth interest of the defendant Jacob A. Maxwell in the estate is $10,000, and that plaintiff has no property whatever for the support and maintenance of herself and children. There were other allegations upon which to found an injunction against the defendant executor disposing of any of the property. Plaintiff prayed for an absolute divorce, custody of the minor children, and that the court award and decree to her the undivided one-ninth interest and share of Jacob A. Maxwell in the estate of Samuel Maxwell, deceased, for the support and maintenance of herself and minor children and as alimony and as her distributive share of the property of her husband, and that the defendant executor be required to answer as to the property of defendant Jacob A. Maxwell in his possession and be ordered and directed to pay over to plaintiff on the death of the widow, Elizabeth, one-ninth part of said estate, and be perpetually enjoined from delivering or surrendering the same to Jacob A. Maxwell, or any one other than the plaintiff; and that notice be given to defendant Henry E.

Maxwell, and for other relief. The widow, Elizabeth, is still living.

Upon the filing of this petition a temporary restraining order was granted by the court enjoining the defendant Jacob A. Maxwell from collecting, receiving, or assigning any part of his undivided interest, and also ordering that a copy of the order, together with a copy of the petition in the cause, be served upon the defendant Henry E. Maxwell, which was done on February 26, 1919. On February 18, 1919, another order was entered enjoining the appellant from delivering or surrendering to Jacob A. Maxwell or to any one else any part of the undivided one-ninth interest. On March 24, 1919, Henry E. Maxwell, the appellant, filed a motion to quash the service of the summons made upon him by the sheriff of Douglas county, and objecting to the jurisdiction of the court over his person. The grounds of this motion were that the summons was issued and served without authority of law, and is null and void, and that the appellant then was, and for more than 30 years theretofore, had been a resident of Douglas county, and at no time a resident of Dodge county. Then follows the fourth ground of the motion, which is as follows: "That the allegations of the plaintiff's petition herein show on their face that the will of said Samuel Maxwell, deceased, worked an equitable conversion of his real estate into personalty at his death, and that the legal title to the whole of said estate is vested in this impleaded defendant as executor of said will, subject to the life estate of Elizabeth A. Maxwell, until the final settlement of said estate and distribution thereof, pursuant to the terms of said will."

On May 10, 1919, his motion was overruled, and on May 15, 1919, plaintiff filed a motion and affidavit for service by publication on the defendant Jacob A. Maxwell and an order for such service was made on the same day. On June 6, 1919, proof of publication of the notice was filed. It will be borne in mind that the summons was served upon the defendant Henry E. Maxwell in

Douglas county on February 26, 1919, and that application for service by publication upon the defendant Jacob A. Maxwell was not made until May 15, 1919. Appellant contends that the service was invalid and the issuance of the summons unauthorized for the reason that the action under section 7580, Rev. St. 1913, could not be deemed to be commenced or brought until the date of the first publication of the notice, and hence that the action could not be deemed "rightly brought" under section 7627, Rev. St. 1913, at the time the summons was issued. In a word, appellant contends that the summons was prematurely issued and the service thereof should have been quashed. On the other hand, appellee contends that, as plaintiff was a resident of Dodge county, and the action was one for divorce, under section 1567, Rev. St. 1913, the action was rightly brought within the meaning of section 7627 on the filing of her petition, and, under the authority of *Eager v. Eager*, 74 Neb. 827, holding that the district court may send its original process to any part of the state unless restricted by statute, that the court's order of September 21, 1918, directing that service of summons be had in Douglas county upon the defendant Henry E. Maxwell was a valid order in the exercise of the court's original powers as a court of equity. We, however, do not think it necessary to discuss these respective contentions for the reason that we have come to the conclusion that the motion to quash the service invoked the powers of the court on the merits of the controversy and constituted a general appearance, thereby waiving all defects.

We have set out the allegations of the petition at some length as they are for the most part not seriously denied and are established by the evidence. The fourth ground of the motion to quash, which we have heretofore set out, in our judgment, amounted to a general demurrer to the petition. Referring to the allegations of the petition it invoked the legal proposition that the will, by directing the sale of the real estate, worked an equitable conversion of all the real estate into personalty at the time of

the testator's death, and the legal title to which was vested in the defendant executor, subject only to the life estate of the widow, Elizabeth, until the final settlement and distribution of the estate, thereby putting the property beyond the reach of plaintiff's action. The necessary inference from these statements is that the petition failed to state a cause of action against appellant and, as to him, should be dismissed. It is true that no dismissal was asked, but it is likewise true that none is asked by a general demurrer. We are convinced that the moving defendant entered upon the merits of the controversy in assigning his fourth ground, which brought him within the rule of this court as constituting a general appearance. *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170, was a case in many respects very similar, and the remarks of Sullivan, Judge, in that opinion are peculiarly applicable to this case. The rule there laid down is as follows: "If a defendant invoke the judgment of the court in any manner, upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general." This rule is supported by other decisions of this court: *Lillie v. Modern Woodmen of America*, 89 Neb. 1; *Rakow v. Tate*, 93 Neb. 198. Unless the appellant intended to invoke the powers of the court by the fourth ground of his motion and secure a dismissal of the action as to himself, it was meaningless or surplusage. We hold that it was an entry upon the merits of the case, and therefore constituted a voluntary general appearance, and that there was no error of the lower court in overruling the motion. After appellant's motion to quash was overruled, he filed an answer, appeared at the trial, cross-examined plaintiff's witness, and even testified himself.

The will of Samuel Maxwell contained the following: "On the death of my beloved wife all my estate of every name and kind shall be sold and the proceeds thereof divided equally among my children"—and appellant contends that this provision worked an equitable conversion

of the real estate into personalty at the time of the testator's death. In this we think appellant is right. *Chick v. Ives,* 2 Neb. (Unof.) 879; *In re Estate of Willits,* 88 Neb. 805; *Gotchall v. Gotchall,* 98 Neb. 730; *Coyne v. Davis,* 98 Neb. 763. And in this opinion we shall treat the undivided one-ninth interest as personalty.

Appellant next contends that the property is *in custodia legis,* and, hence, "cannot be reached by attachment, garnishment, or other legal process," citing, among others, the cases of *Sturtevant v. Bohn Sash & Door Co.,* 59 Neb. 82; *Veith v. Ress,* 60 Neb. 52, and *Anheuser-Busch Brewing Ass'n v. Hier,* 52 Neb. 424, in support of his contention. In the *Sturtevant* case money was about to be paid to the clerk of the district court to be distributed under its decree, and this court held that it was *in custodia legis,* and, hence, not subject to garnishment process issued by the county court, citing the *Hier* case, which we shall presently notice in support of its conclusion. In the *Veith* case this court held that partnership property in the hands of a receiver was in the custody of the law and could not be reached by garnishment. The reason for the rule is well stated in the opinion in the *Hier* case in the following language: "The rule that personal property *in custodia legis* is not subject to attachment or garnishment was adopted for the protection of the officer, and to avoid collision of authority." It must, we think, be conceded that, if the judgment of the district court in this case will conflict with any lawful judgment of the county court of Dodge county hereafter to be rendered on final distribution, this property is *in custodia legis* and beyond the reach of process in this case. But we do not think such a conflict of judicial authority legally possible. The disposition of the estate is definitely fixed by the terms of the will alone, and does not depend upon any possible order or judgment of the county court. The will is unambiguous, and has been duly admitted to probate without objection, and all parties have acquiesced in its provision. There are no rival claimants and no creditors,

and a complete inventory of the estate was made. Besides, this is a divorce action, and the judgment is merely for the purpose of fixing the status of the parties to it and the wife's interest in the property. Appellant suggests the suppositious contingency of the death of Jacob A. Maxwell before the order of final distribution is made in the county court and before the order is made directing him to pay the one-ninth share in cash to the heirs. We do not think such an order within the range of lawful possibility, since the judgment of the district court, considered either as an enforced assignment of the husband's one-ninth interest to the wife or as an adjudication of her interest in his property, exhausts the fund and there would be nothing for the heirs to take. Every married man in this state holds his property subject to the inchoate interest of his wife therein, which interest comes into existence either upon his death or a divorce on any ground except the wife's adultery. His estate descends or is devised or bequeathed subject to this interest and, if it is the whole of a fund, as in this case, the heirs take no interest therein. If considered as an assignment or an appropriation, the result is that the husband will not die seised of it and the heirs have no interest. This sufficiently distinguishes the instant case from the cases cited. Our conclusion on this point is that this one-ninth interest is not *in custodia legis* within the meaning of the rule. There is, therefore, no possibility that appellant will have to pay this money twice.

Appellant next contends that there are no legal means whatever by which this undivided interest of Jacob A. Maxwell can be reached and appropriated to the support of his wife and children, and suggests that the only way by which this judgment may be sustained is by judicial legislation, but we think his contention is without merit. Section 1584, Rev. St. 1913, is as follows: "Upon every divorce from the bonds of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, from any cause,

if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case."

It will be noted that the foregoing section expressly empowers the court, upon granting a divorce where the wife is innocent of adultery, to award her "personal estate of the husband." We think the undivided one-ninth interest of the husband is personal estate within the meaning of the section quoted, and that, under it, the court had jurisdiction to award it to the plaintiff. The term "personal estate" is one of wide signification and includes everything, not real estate, which has an exchangeable value or goes to make up one's wealth or estate. 32 Cyc. 648; *Low v. Rees Printing Co.*, 41 Neb. 127. And, even if the defendant husband's interest were regarded as real estate, the objection would still be unavailing, since section 1587, Rev. St. 1913, by clear, reasonable inference, authorized the court to award real estate of the husband to an innocent wife upon a divorce being granted, where the decree awards it to her in express terms. *Cizek v. Cizek*, 76 Neb. 797, cited by appellant, relates solely to real estate, and, also, was decided before the enactment of section 1587, and, hence, has no bearing upon this case.

In *Gaster v. Estate of Gaster*, 92 Neb. 6, 11, this court said with reference to section 1587, Rev. St. 1913: "The amended section leaves it to the discretion of the court to award to the innocent party a share or interest in the real estate of the guilty party." In *Rhoades v. Rhoades*, 78 Neb. 495, this court held that an innocent wife could maintain an action for alimony, where she sought merely the appropriation of real estate of her husband, upon service by publication, and further held as follows:

"Service by publication is authorized by section 77 of the Code in an action by a wife for alimony and support of her child against the husband, who deserted his family and became a nonresident of the state, where the only relief sought is the appropriation of the real estate of the husband, situated in the county where the action is brought, to the payment of the amount that should be allowed for such alimony and support. Such an action is substantially one *in rem*, and the court has jurisdiction upon the completion of the service by publication to decree the relief sought.

"In such an action, residence of the wife in the county where the property of the husband is situated is not required."

In re Estate of Strahan, 93 Neb. 828, this court held: "Under the present law the interest of the wife in the personal property of her husband is similar to that of a silent partner."

In *Hays v. Hays*, 75 Neb. 728, this court said: "Where a court has jurisdiction of the parties, its authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its jurisdiction."

It is too firmly established in the jurisprudence of this state to be questioned that in a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.

The case of *Catton v. Catton*, 69 Wash. 130, is much like the instant case in this respect. In the *Catton* case the wife brought an action for divorce in King county, seeking to appropriate certain real estate in Grant county and other real estate and personal property in Pierce county. Defendant transferred his Pierce county property to a third person and some of his property was taken under execution. By supplemental bill plaintiff brought in the transferees and the sheriff who held the execution to restrain them from disposing of the property. The decree granted the wife a divorce, found the transfers fraudulent

and void, and awarded the wife certain of the property. The Washington statute is similar to our own, and the court in sustaining the decree said: "The disposition of the property of the parties is an incident to the divorce. Where the property is brought into the action by description, the court thereafter acquires jurisdiction over it. Otherwise, it would be necessary to bring an action in each county where the parties may have property. This was not the intention of the statute. Section 204, Rem. & Bal. Code, which provides that actions for possession of, or affecting the title to, real estate shall be commenced in the county where the subject of the action is situated, clearly does not apply to divorce actions, because the residence of the plaintiff determines where such action shall be brought. The superior court of King county, therefore, had jurisdiction over the property of the parties in Pierce county."

In *Wesner v. O'Brien*, 56 Kan. 724, the court sustained a judgment rendered on constructive service which appropriated land in that state of a nonresident defendant for his wife's alimony, though the land was not situated in the county where the action was brought and no step was taken to bring the property within the control of the court other than the commencement of the suit and publication of the notice. The court said: "A seizure of land in such a case is little more than a form. The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice which warns the defendant that one of the purposes of the proceeding is the sequestration of the land. It refers interested parties to the petition, in which the land is definitely described, and wherein it is asked that the land be set apart as alimony. A formal seizure is no more essential to the jurisdiction of the court in a proceeding of this kind than in an action to quiet title to land based alone on constructive service."

We think this reasoning conclusive. In the instant case, both the petition and the published notice set forth

the purposes of the action with particularity, definitely described and identified the property sought to be appropriated, referred to the will of Samuel Maxwell and its probate, and that it directed the property devised thereby and described in the petition to be sold upon the death of the widow and the proceeds to be divided equally among the nine children, of whom the defendant husband was one. We think this sufficient to bring the undivided one-ninth interest of the defendant husband within the jurisdiction of the court. Other cases on the subject are: *Twing v. O'Meara,* 59 Ia. 326; *Blackinton v. Blackinton,* 141 Mass. 432; *Longbotham v. Longbotham,* 119 Minn. 139; *Thurston v. Thurston,* 58 Minn. 279; *Sanford v. Sanford,* 5 Day (Conn.) 353.

At the time of the trial in the lower court the defendant husband had been absent and unheard of for about eight years, and from this fact appellant argues that the presumption of death must be indulged, which, of course, would bar the suit. In considering this proposition, it is necessary to refer to the evidence. The evidence shows that, when this husband left his wife and children on April 9, 1911, there were local pressing bills against him for the necessaries of life; that plaintiff had told him that, if he could not make a living for the family, she could, but would not make a living for him also; that she was on the point of writing appellant about the situation; that he had been working for Marshall Brothers, of Arlington, in the nursery business, and told plaintiff that he had $500 coming to him from them, when, in fact, he was indebted to them to the extent of $431, which appellant afterward paid and charged against his distributive share of the estate; that he had been careless in his personal habits; that he left stealthily, leaving his team at Niobrara. After he left plaintiff secured a clerkship in a store and, ever since, has continuously worked for wages, and from her earnings, not only paid up the local bills, but supported herself and children and educated them. Under these circumstances we think that

there are reasons other than death to account for his continued absence and silence. It is quite possible that appellant cannot invoke the presumption of death as against the wife, but, for the purpose of this opinion, we assume that he can. The presumption of death does not obtain in every case of a person being absent and unheard from for a period of seven years. It depends upon the circumstances. In *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71, this court said: "The best authorities, with substantial unanimity, hold that whether seven years' continued absence from one's usual place of residence will raise the presumption of death must depend largely upon the circumstances and conditions of each particular case." We hold that the circumstances and conditions of the instant case are sufficient to rebut any presumption of death that might arise from the husband's continued absence and silence, and that it does not obtain. This seems too clear to require the citation of authorities, but they will be found in L. R. A. 1915B, 728, 740, *Modern Woodmen of America v. Ghromley*, 41 Okla. 532. Also, *Seeds v. Grand Lodge, A. O. U. W.*, 93 Ia. 175.

While there is no one here to challenge the sufficiency of the evidence to sustain the decree of divorce, we have nevertheless examined it and find that it is amply sufficient.

There is no error in the record, and the judgment of the district court is right, and we recommend that it be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

ELEANOR I. FOOTE ET AL., APPELLANTS, V. GEORGE R. CHITTENDEN ET AL., APPELLEES.

FILED JULY 20, 1921. No. 21495.

1. **Pleading:** PROOF. A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause. The allegations and proof must agree.
2. **County Courts:** COURTS OF RECORD. In Nebraska, county courts are courts of record. They have exclusive original jurisdiction of guardianship and probate proceedings, and as to such matters they are courts of general, superior, and not inferior, jurisdiction. Their records import verity, and their proceedings possess, as a rule, the same presumptions of jurisdiction and regularity as are possessed by courts of superior common-law jurisdiction. All matters necessary to give the court jurisdiction, upon which the record is silent, are presumed.
3. **Guardian and Ward:** GUARDIAN'S SALE: NOTICE TO NONRESIDENT MINORS. The failure to give notice to nonresident minors of an application made to a county court of Nebraska for the appointment of a guardian to take charge of and conserve their property located in this state is not such a jurisdictional defect as will render a sale of the property of such minors made by the guardian so appointed, under a license issued by the proper district court, void or subject to collateral attack.

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

John N. Dryden and *N. P. McDonald*, for appellants.

H. M. Sinclair, Fred A. Nye, John A. Miller and *Rinaker, Kidd & Delehant, contra.*

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS and MORNING, District Judges.

CLEMENTS (E. J.), District Judge.

This is an action to determine adverse claims to two city lots situated in Kearney, Nebraska. The plaintiffs claim title through the will of Sarah B. Leffingwell, who died February 17, 1896, seised of said property. The defendants claim title to or interest in said lands from the

same source, under a sale by the guardian of the plaintiffs, who were then nonresident minors, under a license from the district court for Buffalo county, Nebraska. Walter W. Barney, the guardian who made the sale, was appointed by the county court of said county on July 23, 1903, at which time plaintiffs were aged five, ten, and fourteen years, respectively, and resided in the state of Pennsylvania. The plaintiffs assail the validity of the appointment of said guardian by the county court, but stipulate in the record that the proceedings in the district court with reference to said guardian's sale were complete and regular in all respects; that said sale was confirmed and the guardian was ordered to and did execute a deed to the purchaser, Samuel J. Fair; that said purchaser took possession of said premises under said deed on May 10, 1904, and he, his grantees, and those subsequently succeeding to his right and title therein, including the defendants herein, have ever since remained in peaceable and adverse possession thereof; that they have made valuable improvements on said premises and have paid all the taxes and assessments levied against same.

There is nothing in the record which tends to show that the appointment of Mr. Barney as guardian, or the sale of said property so made by him, was unnecessary, or that same was not made in good faith for the purpose of protecting the interests of the minors; nor that the price paid by the purchaser for said lots was not all they were worth. No one questions the good faith or honesty of the guardian in anything he did. It appears that all the proceedings of the courts and acts of the guardian were for the best interests of the plaintiffs, and that the purchaser at the guardian's sale and all subsequent grantors claiming through him are purchasers for full value, without any actual knowledge of any defect in any of said proceedings or in their title to said property. Under these circumstances there appears to be no reason, which appeals to a court of equity, which is a court of conscience, why all of said proceedings should be declared

void and the property in question taken from the defendants by plaintiffs in an action commenced more than fifteen years after said sale, more than eleven years after the eldest, and more than two years after the youngest of the plaintiffs became of age. Plaintiffs come into a court of equity and insist that they are entitled to recover, not because of any wrong or injury which has been done them, but because they contend that a technical rule of law has been violated which gives them the legal right to do so. If their contention be correct, plaintiffs must prevail, for courts of equity, as well as courts of law, are bound by legal principles; but the law will not be construed so as to work injustice if such a result can be avoided without the violation of established legal principles or rules.

In their petition plaintiffs plead only two grounds or reasons for their claim that the appointment of Mr. Barney as guardian is void, which are: (1) That no notice was given to plaintiffs of the application for such appointment; and (2) that the bond in the proceedings for the sale was approved by the clerk, and not by the court. The second of these grounds has been wholly abandoned and only the first remains. No other is presented or argued in plaintiffs' original brief herein; but, in their reply brief, counsel for plaintiffs have attempted to introduce and insist upon two other asserted grounds or reasons, viz., (a) that the application for the appointment of said guardian was not made by any one authorized to do so; and (b) that said application failed to state that plaintiffs were minors, were residents of Buffalo county, or had real estate therein.

The rule is elementary that the allegations and the proof must agree. "A party is not allowed to allege in his petition one cause of action and prove another upon the trial." *Imhoff v. House*, 36 Neb. 28. "A party will not be permitted to plead one cause of action and upon the trial rely upon proof establishing a different cause." *Luce v. Foster*, 42 Neb. 818. Counsel's attempt to pre-

sent to this court for the first time in their reply brief causes of action not pleaded in their petition nor presented to the trial court is a violation of such rule and is not entitled to consideration. We will therefore confine ourselves to the consideration of the cause of action presented by the pleadings.

In the record of the county court of Buffalo county in said guardianship proceedings, introduced in evidence by plaintiffs, is an instrument labelled, "Order for Hearing and Notice," in which order the time for hearing of the application for guardianship of plaintiffs is set, and said order concludes with these words, "and that no notice herein be given, the same being waived."

County courts in Nebraska have exclusive original jurisdiction of guardianship and probate proceedings. They are courts of record, and as to such matters they are courts of general, superior, and not inferior, jurisdiction. *Scott v. Flowers,* 61 Neb. 620; *Genau v. Roderick,* 4 Neb. (Unof.) 436. Their records import verity, and their proceedings possess, as a general rule, the same presumptions of jurisdiction and regularity possessed by courts of superior common-law jurisdiction. Where a county court possesses general jurisdiction of a given class of subject-matter, the possession of jurisdiction assumed to be exercised in a particular case falling within that class is, in a collateral proceeding, presumed. All matters necessary to give the court jurisdiction, upon which the record is silent, are presumed. *Davis v. Hudson,* 29 Minn. 27; *Shroyer v. Richmond,* 16 Ohio St. 455. The reasons for the foregoing rule are clearly stated in *Davis v. Hudson, supra,* which case is cited in plaintiffs' brief on another point. Of course, such presumptions will not be permitted to contradict statements in the record which, as we have seen, import verity.

That part of the record above quoted therefore shows that no notice of the hearing on said application was given for the reason that the same was waived. The record being silent as to who waived notice and how it

was done, we must, under the foregoing rule, presume that all parties who were entitled to notice waived same and that such waiver was in the form and manner required. This presumption applies to the father, mother, and all persons *sui juris* to whom notice should have been given. The right of such a person to waive notice of any proceeding to which he is entitled is unquestioned. The Nebraska statutes provide that no receiver shall be appointed until after notice of the time and place of the application is given to all parties to be affected thereby, and that "every order appointing a receiver without such notice shall be void." Yet this court has repeatedly held that such notice may be waived. *Farmers & Merchants Bank v. German Nat. Bank*, 59 Neb. 229; *Veith v. Ress*, 60 Neb. 52; *Murphy v. Fidelity Mut. Fire Ins. Co.*, 69 Neb. 489; 34 Cyc. 125.

As the plaintiffs were then minors they did not have capacity to make a valid or binding waiver of any of their legal rights, and, if it were necessary to give them notice before the guardian could be legally appointed, then such appointment was invalid. Counsel's contention that such notice to them was required is based upon section 1661, Rev. St. 1913, which provides that the court may appoint a guardian for a nonresident minor "after notice given to all persons interested, in such manner as the court shall order, and after a full hearing and examination." In their brief counsel for plaintiffs say that in *Davis v. Hudson*, 29 Minn. 27, "it was held, under a statute identical with ours, that the court could not exercise its jurisdiction until the provision respecting notice had been complied with;" and that "the manner of notice is committed to the discretion of the judge, but some notice is indispensable." This is the principal authority relied upon to sustain plaintiff's contention, but neither in this case, nor in any other that we have been able to find, involving a like statute, is it said that such notice must be given to the nonresident minors themselves. The record of the guardianship proceedings under consideration in

the *Davis* case did not show that notice had been given to any one, but the court held that, "the records being silent upon the matter of notice of the application for such appointment, such notice is presumed in a collateral proceeding," and the guardian's sale was sustained.

In a later case, *Kurtz v. St. Paul & D. R. Co.*, 48 Minn. 339, the same court passed directly on the identical question under consideration. In that case the plaintiffs were minors residing in Wisconsin with their mother and owned land in St. Louis county, Minnesota. Their next of kin were their mother and a married sister. The mother applied to the probate court of St. Louis county for letters of guardianship. Notice was served on the married sister personally, and the court held that the mother had notice by being herself the petitioner. It was contended that, as no notice was given to the minors themselves, the appointment of the guardian and the sale of the minors' property made by her as such were void. In the opinion it is said:

"Notice of the hearing for such appointment is not a constitutional prerequisite to the jurisdiction to name a guardian. Appointing a guardian deprives no one of his property, and does not change or affect the title of it. Letters of guardianship are merely a commission which places the property of the ward in the care of an officer of the court as custodian, and in its effect is not essentially different from the appointment of a receiver, or temporary administrator, a jurisdiction which can be and frequently is exercised before service of any process. The matter of notice of an application for the appointment of a guardian is, therefore, purely a matter of statutory requirement. * * * The statute clearly commits it to the sound discretion of the judge to decide how and in what manner notice shall be given, and to fix the kind of notice most likely to serve the ends of justice, and protect the interests of the infants. Similar provisions in similar statutes are quite common, and it is agreed, with one accord, that the purpose is to give notice to relatives

or next of kin who are naturally interested in the infants or their estates, so as to give them an opportunity to attend, if they desire, for the purpose of giving the probate court the requisite information as to the nature and value of the estate of the infant, and as to the propriety or impropriety of the appointment, as guardian, of the person named in the petition. *Underhill v. Dennis,* 9 Paige, 202; *White v. Pomeroy,* 7 Barb. (N. Y.) 640; *Ex parte Dawson,* 3 Bradf. Sur. (N. Y.) 130. Notice to the infants is not the important or essential thing, for the very necessity for appointing a guardian for them arises out of the fact that they are incapable of managing their own estate, or of determining for themselves what is for their own interests. If they are of very tender years, and strictly *non sui juris,* notice to them would be an idle ceremony, and utterly useless. Hence we conclude that the notice contemplated by statute does not necessarily require or include notice to the infants themselves, but that it is left to the sound discretion of the probate judge to order such notice to persons interested as natural guardians and next of kin as he shall deem most likely to inform them of the application, and thus, through their attendance, advise him of the extent and condition of the infants' estate, and of the expediency of the appointment prayed for."

We have quoted thus at length from the opinion in said case because the reasoning and conclusion therein appear to be sound and right and meet with our approval.

We therefore hold that the failure to give notice to plaintiffs in the case at bar of the application for the appointment of a guardian to take charge of their property in Nebraska did not render such appointment void and make it subject to collateral attack. As this is the only defect pleaded, which is relied upon, it follows that this conclusion is decisive of the case, and other questions discussed in the briefs will not be considered.

We find no prejudicial error in the record, and the judgment of the trial court is therefore AFFIRMED.

FARMERS STATE BANK, APPELLEE, V. HOME STATE BANK, APPELLANT.

FILED JULY 20, 1921. No. 21719.

1. **Chattel Mortgages**: TRUST FUNDS. Where a bank, with knowledge of prior mortgage indebtedness on personal property, takes a mortgage thereon, it being agreed between the mortgagor, the owner of the property, and the bank that the property is to be sold and the proceeds deposited in such bank, and out of the proceeds the bank shall first pay the prior mortgage indebtedness against the property, *held* that, upon deposit of the proceeds of the property in such bank, the bank becomes trustee of the fund and holds the same in trust for the prior mortgagees; and, in an action in equity by one of the prior mortgagees to subject the trust fund to the payment of a balance due on one of the prior mortgages (the proceeds of the property being sufficient to pay the entire prior mortgage indebtedness against it), the fact that the bank had applied a part of the trust fund in liquidation of the mortgagor's indebtedness to the bank by his direction before or at the time of the application, thereby reducing the trust fund to an amount insufficient to pay the prior mortgages, would not constitute a defense to such an action; *held*, further, that the relation of debtor and creditor did not exist between the mortgagor and the bank, except as to any amount remaining after the payment of the prior mortgages, and that the bank must restore so much of the trust fund as is necessary to pay the balance due the prior mortgagee bringing the suit. The principle stated in *Alter v. Bank of Stockham*, 53 Neb. 223, that "where a mortgagor of chattels converts the same into cash, at their full value, and deposits the money with his agent, who has notice of the mortgage lien, an action will lie at the suit of the mortgagee against such agent, for the proceeds of such property," followed.

2. **Evidence** examined, and *held* to sustain the judgment of the trial court.

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

Dort, Cain & Dort, for appellant.

Lambert & Armstrong, contra.

Heard before MORRISSEY, C.J., FLANSBURG and ROSE,

JJ., DICKSON and TROUP, District Judges.

DICKSON, District Judge.

In October, 1919, W. D. Elmore purchased from W. H. Powers 26 head of steers at the agreed price of $3,570.25, and purchased from J. D. Roliff 20 head, for which he agreed to pay $2,551.25, and gave them his notes secured by mortgages on the cattle. Powers sold his note and mortgage to the appellee, Farmers State Bank of Stella, and Roliff sold his to the Bank of Steinauer. Neither mortgage was placed on record. The cattle were fed by Elmore at Humboldt until the last days of December, and were then shipped by him to Kansas City and sold for $7,150. The appellant bank received of the proceeds $7,100, which it placed to the credit of Elmore. During December Elmore became indebted to the appellant bank in the sum of $1,190.91, and about the 23d of December gave the bank his note and secured it by a chattel mortgage on the cattle purchased from Powers and Roliff, it being agreed that the cattle should be shipped and the proceeds deposited in the appellant bank, and out of the proceeds Elmore's indebtedness to the bank would be paid; the bank, however, agreed that it would first pay the mortgage debt against the cattle. The note given by Elmore to the appellant bank was to take up certain checks given principally for feed, which the bank had carried as cash items and overdrafts, and was taken more as a matter of form than as security, the bank seemingly relying on the assurance of Elmore that he would be able to take care of his indebtedness to the bank out of the proceeds of the cattle when sold, as he had done on other occasions. There was an unusual delay in getting cars, and in the mean time the price of cattle dropped from $2 to $3 a hundred pounds, an unexpected happening, and the proceeds were insufficient to pay the purchase-price mortgages and Elmore's indebtedness to the appellant bank.

The real question involved is whether the appellant

bank, when it took its mortgage on the cattle, had knowledge of the existence of the purchase-price mortgages, or notice of facts sufficient to impute notice to it of them. If it had, the judgment of the lower court is right.

There is little, if any, controversy as to what was said at the time of giving the mortgage to the appellant bank. Elmore, responding to the question, "Did you tell them how much you owed on the cattle?" answered, No, sir." Being asked the further question, "Anything said about your having given a mortgage on the cattle?" he said, "Nothing, only the time I signed that mortgage, I told him the paper on the cattle must be paid first, whichever I said." And again, on rebuttal, referring to the chattel mortgage note, he said: "When I went to give them the note, they drew out the note, before I seen (signed) it, I says to them, I says, now, boys, these cattle have got to be settled for first." Glenn D. Jenkins, one of the officers of the appellant bank, referring to the conversation with Elmore at the time of the giving of the bank's mortgage, said: "Well, there was nothing said except as he went to sign the note, he said to us, he says, now of course there is a mortgage against those and that will have to be paid, but there will be plenty of money." Otto Kotouc, another officer of appellant bank, when asked, "What did Elmore say relative to there being a first mortgage on these cattle at that time (referring to the time of giving of the note)?" answered, "Just as we were drawing up the note, why he said that there was a mortgage against the cattle, and of course that would have to be paid first." J. M. Wright, cashier of the appellee bank, testified that, at the time he went to Humboldt to take up with the appellant bank the matter of the payment of the check given by Elmore in settlement of the Powers note, Mr. Linn, an officer of the appellant bank, said: "He knew there was a mortgage on the cattle, but did not know where it was at." These questions and answers fairly reflect the evidence on the question of the bank's knowledge of the existence of the purchase-price mort-

gages on the cattle.

As showing the agreement between Elmore and the appellant bank concerning the payment of the mortgage indebtedness on the cattle, Glenn D. Jenkins, an officer of the bank, testified on cross-examination as follows: "Q. You understood you were to take what he owed you irrespective of what the first mortgage might be, did you? A. No, sir. Q. You understood, then, that the mortgage was against—incumbrance had to be first paid? A. We understood that there was a mortgage against it; yes, sir. Q. And you understood also that it should be paid out of the proceeds before you would get yours, didn't you? A. Yes, sir; we did."

As to what happened after the cattle were sold and the money received by the appellant bank, there is practically no dispute. Elmore accompanied the shipment to Kansas City, and returned by way of Stella, and advised the appellee bank of the shipment of the cattle and the amount received therefrom, and that the money had been deposited in the appellant bank, and on that day, December 31, gave to the appellee bank his check for $2,602.27, drawn on the appellant bank, in payment of the Powers mortgage. The appellant bank refused payment of this check January 7, and the next day Mr. Wright, cashier of the appellee bank, went to Humboldt and took the matter of the payment of this check up with the appellant bank. At this time Elmore had to his credit in the appellant bank $1,362.50, and this amount Mr. Wright obtained on the check of Elmore, the bank having previously charged to Elmore's account a check of $3,643.95 given by him in payment of the Roliff mortgage, together with other items of indebtedness (notes and checks), leaving the stated balance. Among the items that the appellant bank had charged to the account of Elmore was a note amounting to $538.35. This note had been given prior to the giving of the second mortgage note, and was secured by other personal property still in the possession of Elmore, and the bank arranged with Elmore to carry this note, and

later sent $522 of the $538.35 to apply on the debt of the appellee bank, which reduced its indebtedness to $720.80.

The appellant claims that the appellee knew and permitted the sale of the cattle, thereby waiving its lien. The only evidence tending to show that the appellee bank had any knowledge that the cattle were to be shipped was such an allegation in its original petition. This was sworn to by the cashier of the bank, Mr. Wright. In explanation of this he says that, upon learning of the allegation, he called Judge Lambert's attention to it, and that an amended petition, omitting the allegation, was filed. Wright testified positively, as did Elmore, that the appellee bank had no knowledge the cattle were to be shipped, and both say that the first knowledge the bank had of the shipment and sale of the cattle was when Elmore returned from Kansas City to Stella.

This is an action in equity brought to subject the proceeds of the cattle deposited in the appellant bank to the payment of the balance due to appellee. The appellee had judgment in the court below for the balance due on the Powers note and mortgage, which the appellant seeks to reverse in this court, contending that it had no notice of the appellee's mortgage, and no notice of any lien or of any trust in or upon the proceeds of the cattle deposited in its bank. From the record in this case it is undisputed that the appellant bank knew, when it took its mortgage from Elmore, that the cattle were mortgaged. Its officers say that Elmore told them of "a mortgage" or "one mortgage." It made no inquiry as to who held the mortgage incumbrance or the amount thereof; it made no effort whatever to ascertain the facts relative to the incumbrance; such information as it had would have put an ordinarily prudent man upon inquiry, which, if followed up, would have disclosed the mortgage indebtedness against the cattle. The law charged the bank with all the knowledge that it could have obtained had it made inquiry of Elmore as to the incumbrance on the cattle. Yet, the bank elected to take the mortgage without further investi-

gation or inquiry, which convinces us, as it undoubtedly did the trial court, that the appellant bank had notice of the purchase-price mortgages, or notice of facts sufficient to impute notice to it of the existence of those mortgages. When Elmore said, "Now, boys, these cattle have got to be settled for first," the bank knew he had not paid for the cattle, that he still owed for them, and that they were mortgaged for all or part of the purchase price; hence, no further inquiry by the bank. He was a customer of the bank; it knew his financial standing; knew whether or not he could purchase and pay for 50 head of cattle; knew whether the cattle were paid for or not; knew whether he could buy without giving security on the cattle. The bank knew, or could have known, the facts. If it did not know and failed to make inquiry, it should not now complain of want of knowledge. It accepted the mortgage more as a matter of form than as security. It had advanced, at previous times, money to Elmore before shipment for the same purpose. It relied, not upon its chattel mortgage, but upon Elmore. It had been assured that there would be sufficient money to pay the mortgage indebtedness from the cattle and the amount due the bank, and relied upon his statement then, as it had before. Had there been no slump in the cattle market, the cattle would have brought sufficient money to pay, not only Elmore's indebtedness to appellant bank, but also the purchase-price mortgages, and there would have been no lawsuit.

The bank having knowledge of these purchase-price mortgages, and having received the proceeds of the mortgaged cattle under an agreement with Elmore to first pay the mortgage debt against the cattle, made the bank a trustee of the proceeds for that purpose. While the legal title to the proceeds of the mortgaged cattle was in Elmore, the equitable title thereto, or so much thereof as was necessary to pay its mortgage, was in the appellee, and the appellant bank's application of a part thereof in liquidation of Elmore's indebtedness by his direction be-

fore or at the time of application, leaving an insufficient amount to pay appellee's mortgage, would constitute no defense to an action in equity brought to subject this trust fund to the payment of that mortgage. The proceeds being sufficient to pay both purchase-price mortgages, the bank must restore so much of the trust fund as is necessary to pay the balance due the appellee. The relation of debtor and creditor existed only as to what money remained after the purchase-price mortgages had been paid. The record in this case brings it within the rule announced in *Alter v. Bank of Stockham*, 53 Neb. 223.

The judgment of the lower court is sustained by the evidence and is

AFFIRMED.

PETER HOLMBERG, APPELLEE, V. AUGUSTA HOLMBERG, APPELLANT.

FILED JULY 20, 1921. No. 21555.

1. **Divorce:** ABATEMENT. Where a divorce was granted and one of the parties died before the expiration of six months thereafter, such divorce decree never became effective, and as to such divorce the action abated.
2. ———: ALIMONY: DEATH OF PARTY. In such action, where, as a part of the decree, alimony was allowed and fully paid before the death of the party, the alimony judgment was not affected by the death of the party, and the court has no power to vacate the judgment or dismiss the action.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Lambert, Shotwell & Shotwell, for appellant.

John W. Battin, contra.

Heard before LETTON, DAY and DEAN, JJ., GOOD and RAPER, District Judges.

RAPER, District Judge.

Peter Holmberg, plaintiff, filed in the district court for Douglas county a petition for divorce against his wife, Augusta Holmberg. Summons was duly served on the defendant, and she appeared and filed an answer and cross-petition. The cause was tried, and on October 24, 1919, a decree of divorce was entered in favor of plaintiff, with an award of $450 alimony and $50 attorney's fees for defendant, which sums plaintiff paid on the day the decree was entered, and the defendant received the same.

The plaintiff, Peter Holmberg, died on the 12th day of December, 1919, before the divorce became operative under section 1606, Rev. St. 1913. Afterwards, and within six months from the date of the decree, the defendant filed a petition in the case, asking that the decree of divorce be vacated and action dismissed. A hearing was had on this petition, and the court found against defendant and refused to vacate the divorce decree or dismiss the action. From this order she appealed.

It is the contention of the appellant that, after the entry of a decree of divorce, the status of the proceedings, within six months, is that of a pending action and abates on the death of either party. Under section 1421, Rev. St. 1913, "All actions and suits which may be pending against a deceased person at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted" as a party to such proceeding. The general rule in the United States is that a suit does not abate on the death of either party after a verdict or decision by the court, or of entering of an interlocutory judgment, when the cause of action survives. But where the cause of action does not survive, the action abates as if the death had occurred before the verdict or interlocutory judgment or decision, unless saved by a statute.

An action for divorce does not survive. The purpose of the action being to dissolve the marriage relation, and that relation being dissolved by death, the proceedings

after the death of one of the parties would be useless and of no avail. Where, however, property rights are involved and a judgment for alimony or determining the separate property rights between the parties has been had in the case, the cause generally will survive as to such matters. 1 C. J. 208, sec. 404; 1 R. C. L. 39, sec. 35.

The alimony judgment having been duly entered was valid, and, as it was at once satisfied, it is at an end, and the court is without power, in a proceeding like this, to modify, vacate, dismiss, or expunge it. There is nothing there to abate or revive.

Section 1606, Rev. St. 1913, provides that the decree of divorce shall not become operative for six months after trial and decision, except for purpose of review or appeal, and if no such proceedings have been instituted the district court may at any time within six months vacate or modify its decree. The cause of action for divorce not surviving, it abated at the death of the husband.

The ultimate purpose of the requested vacation of the divorce decree is to establish the defendant's property rights as the widow of the deceased plaintiff in his estate. All the avenues are open for the determination of such rights in the proper courts, where all the parties affected can be heard, and in such tribunals she can establish her status as the widow of the deceased plaintiff. *Chase v. Webster*, 168 Mass. 228; *Matter of Crandall*, 196 N. Y. 127, 17 Ann. Cas. 874; *Estate of Seiler*, 164 Cal. 181, Ann. Cas. 1914B, 1093.

The action of the district court is

AFFIRMED.

FRANK ALBIN ET AL., APPELLEES, V. CONSOLIDATED SCHOOL DISTRICT, APPELLANT.

FILED JULY 20, 1921. No. 21782.

1. **Constitutional Law: EMINENT DOMAIN: NOTICE.** Chapter 244, Laws 1919, is unconstitutional for failure to provide for notice to the property owner of the time and place at which the apprais-

ers would meet for the purpose of making their assessment.

2. **Eminent Domain**: APPEAL: WAIVER. The proceedings being without jurisdiction, the owner did not waive his objection thereto by appealing from the award.

3. **Constitutional Law**: EMINENT DOMAIN: NOTICE. Actual knowledge of the owner of the appointment of the appraisers under an unconstitutional act cannot operate as a substitute for notice required by due process of law.

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

John B. Barnes, Jackson B. Chase and *John Wiltse*, for appellant.

Kelligar, Ferneau & Gagnon, contra.

Heard before MORRISSEY, C.J., DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ., ALLEN and REDICK, District Judges.

REDICK, District Judge.

This is an action in equity brought by appellees to enjoin the school district, appellant, from taking possession of a tract of five acres of land sought to be condemned for a school site under chapter 244, Laws 1919, and is submitted upon an agreed statement of the case, wherefrom it appears that on May 1, 1920, the school board having passed the required resolution declaring the necessity of appropriating the tract in question, filed its petition in due form in the county court of Richardson county, reciting its inability to purchase the land by agreement with the owners, and asking that three freeholders of the district be appointed to assess the damages to such owners by reason of the taking. The county judge thereupon appointed three appraisers and ordered them to report for duty May 7, 1920, at 10 o'clock a. m. Notice of such appointment was served upon the appraisers May 3, 1920, requiring them to appear at the time stated, and to make their report thereafter in writing on or before May 20, 1920. On May 3, 1920, there

was served upon appellees a writ, duly issued under the hand and seal of the county judge, notifying them of the filing of said petition, and that "three appraisers which are appointed by the court will make report of the damages sustained by the said Frank Albin and Ida M. Albin on or before May 20, 1920, and that said matter is set for hearing in the county court room, at Falls City, Nebraska, on May 20, 1920, at 1 o'clock p. m."

The appraisers, having taken the oath as required, made their appraisement, assessing the damages at $300 an acre, or $1,500. No notice of the time and place of meeting for the purpose of assessing the damages was served upon appellees, but it appears that they knew who the appraisers were, and were well acquainted with them, and learned that an appraisement had been made some time before May 20, the day set for the hearing; and on that day appellees each filed objections to the proceedings, alleging that their property was sought to be taken without due process of law, and that said act is unconstitutional. On the same day the school district filed its acceptance of the appraisement and deposited $1,500 in court subject to order of appellees. At the hearing appellees offered evidence that no notice had been served of the time and place of the assessment of damages, which was received on May 25, to which date the hearing had been adjourned. They also offered evidence as to the interest of appraisers, and value of the land taken, to which objection was sustained. The court thereupon overruled all objections of appellees, and in August, 1920, when appellant was about to take possession of the land, this action was brought, resulting in a permanent injunction against the condemnation proceedings, and the school district appeals.

The constitutionality of the act is attacked on the ground that it does not provide any notice to the landowner of the time and place of meeting at which the appraisers will assess the damages, and therefore no opportunity was afforded appellees to be heard upon that

question before filing of the report. The act in question, after providing for the filing of a petition with the county judge, proceeds as follows:

"Section 3. Thereupon notice shall issue, under the seal of the county court, to the persons interested in the property sought to be taken, of the filing of the petition and of the time and place fixed for a hearing thereon. Such notice shall be served by delivering to each of the persons interested, when his residence is known, a certified copy thereof, and the service shall be proved by affidavit. * * * The hearing on the petition may not be had for at least ten days after the completion of service.

"Section 4. At the time the petition is filed, the county judge shall appoint three disinterested freeholders of the school district in which the real estate is situated, who, after being duly sworn to perform the duties of their appointment with fidelity and impartiality, shall assess the damages that may be sustained by reason of the taking of the property and on or before the day set for the hearing file a report in writing with the county judge."

Section 5 then provides that upon payment of the amount of the appraisement the district may take immediate possession. And section 6 provides: "If the assessment shall not be satisfactory to the board, other and different appraisers may, on application of the board, be appointed to assess the damages."

It will be noted that the only notice required to be served upon the property owners is "of the filing of the petition and of the time and place fixed for a hearing thereon," and that the appraisers are to be appointed at the time of the filing of the petition, and are to make their report assessing the damages to the property owners on or before the day set for the hearing. Neither the statute nor the notice fixes any time or place where the appraisers shall meet for the purpose of assessing the damages.

The precise question for determination, therefore, is whether or not the failure of the statute to provide notice

to the owner of the meeting of the appraisers, and thus give him an opportunity to be heard before the filing of the report, renders the act obnoxious to section 3 of the Bill of Rights, providing: "No person shall be deprived of life, liberty, or property, without due process of law." A precise definition of the term "due process of law" has not been attempted by the courts, and wisely so, by reason of the multifariousness of its application; but, although its limitations are not subject to accurate definition, the courts are of one mind upon the proposition that in a general sense it means the right to be heard before some tribunal having the jurisdiction to determine the question in dispute, and has its most complete and vigorous application to proceedings in their nature judicial. The point in issue has been before this court a number of times, and we will proceed to examine some of the cases relied upon to sustain appellee's contention that the act is unconstitutional.

The case of *McGavock v. City of Omaha,* 40 Neb. 64, was an action to recover damages for a change of the grade of the street. The charter of the city of Omaha, under which such change of grade was attempted to be made, required the appointment of appraisers to assess damages, and provided for an appeal from the award which should be the exclusive remedy, but contained no provision for notice to the property owner, with reference to which legislation Harrison, J., remarked:

"Here is conferred the power and authority to one party to appoint or form the tribunal or body, take, hear, or examine the evidence, and assess the amount of recovery, without any notice to other parties concerned, or any provision for them being in any manner represented in the proceedings, and providing for an appeal from an adjudication of their rights about which they can have no knowledge, and making the remedy by appeal exclusive. Can this be done? We are satisfied it is within the inhibition of the provisions of the Constitution, as an attempt to appropriate or damage property 'without due

process of law,' and will not bar parties of the right to an action for the damages sustained, and the fact that the legislature has failed to provide for any notice cannot bar the right to compensation."

The court, however, as noted by Letton, J., in *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb 121, 143, restricted their holding to the proposition that in such case an action for damages would not be barred.

In *Wilber v. Reed*, 84 Neb. 767, the validity of a portion of section 8605, Ann. St. 1907, was under consideration. By that section the city of Beatrice and others of its class were authorized to appropriate private property for the purpose of public parks, after providing for the appointment of appraisers, and notice to the owners of the time of making the assessment for damages, and contained the following:

"At the next regular meeting of the council after such assessment, the council may vacate such assessment, if unjust, and, if so vacated, or in case of a failure to obtain the assessment, for any cause, the council by resolution may appoint other three assessors; and, in that case, such new assessors shall, on the day following their appointment, without further notice, meet at the place fixed by the ordinance for meeting of the assessors, and * * * shall proceed as provided for the first board of appraisers."

The matter proceeded to the point where the appraisers met for the purpose of making their appraisement, when they were restrained by an order of the district court. Subsequently the restraining order was dissolved, and the council proceeded under that part of the section above quoted to appoint three other appraisers, who made the appraisement, and thereafter plaintiff brought the action to enjoin the officers of the city from taking possession of the property upon the ground that quoted portion of said section was unconstitutional in failing to provide notice to the property owner of the time and place of meeting of said appraisers, and such was the holding of

the court; citing *People v. Tallman,* 36 Barb. (N. Y.) 222, *Rathbun v. Miller,* 6 Johns. (N. Y.) *281, and other cases.

These cases are sufficient to show that this court is committed to the proposition that, before the property of a citizen may be taken for public use under the power of eminent domain, the owner is entitled to such notice of the proceedings as will give him an opportunity to be heard upon the questions involved.

For the purpose of determining the legislative interpretation of "due process of law," we have examined the other enactments on the subject of eminent domain as contained in the Revised Statutes of 1913, and find that, in 23 out of 25 such enactments, notice to the property owner of the time and place of the meeting of the appraisers is required, either by specific direction or by reference to other enactments where such notice is required. It is contended, however, by the appellant that the provision for the issuance of notice by the county court satisfies the requirement of due process of law. It has been held that the appraisers in condemnation proceedings, in determining the value of the property taken, or the amount of damages, exercise judicial functions (*In re Appraisement of Omaha Gas Plant,* 102 Neb. 782); in other words, that upon this question the proceeding is in its nature judicial, and therefore, in determining whether or not the notice provided is sufficient, the principle governing such proceeding should govern.

The notice in question advised the property owner that a petition was filed, and appraisers appointed May 1, and that the hearing on said petition would be had May 20. In the meantime the appraisers had taken the oath, determined the question of damages, all without notice to the property owner until the report was filed, not later than the day of hearing. We are unable to perceive how this can be looked upon as due process of law. The property owner, when he comes into court on the day of hearing, finds the only question upon which he has a right to be heard at all already determined, and the only remedy

afforded him is an appeal, to get the benefit of which he must give bond, and probably incur the expense of employing counsel. Furthermore, what is this hearing to which he has been invited? Certainly not upon the question of damages which shall be awarded him, because the act confers no authority upon the county judge or court to alter the appraisement in any way. In fact, the only peril in which the appraisement stands is of being rejected by the school board, a right granted it by section 6 of the act in case the assessment is not satisfactory; while, if satisfactory, section 5 merely requires the board to signify its acceptance thereto in writing, and deposit the amount thereof in court, when a fee-simple title will vest in the district. The only matters upon which the owner can be heard are those referred to in section 8, i. e., where more than ten acres are sought to be taken, or where the property constitutes an orchard, garden, or public park, or, if outside the corporate limits of a city or village, where it lies within 20 rods of a residence with no highway intervening. In the respect now under discussion the act is not unlike one which should provide that, in all actions brought before a justice of the peace, the defendant should have notice of the hearing, but that judgment should be rendered for the plaintiff, from which the defendant might appeal. If the analogy is perfect, we hardly think it would be contended that such a proceeding constituted due process of law.

The case of *Sterritt v. Young*, 14 Wyo. 146, contains a very full and learned discussion of this question, citing a number of cases in support of their conclusion, among others *Stuart v. Palmer*, 74 N. Y. 183, quoting from the opinion of Earl, J.: "I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by, the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the

right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

McGavock v. City of Omaha, 40 Neb. 64, is also cited. The case is on all fours with the one at bar and involved the validity of a statute under the power of eminent domain. See, also, *People v. Tallman,* 36 Barb. (N. Y.) 222, *Anderson v. Tuberville,* 46 Tenn. 150, *Dodd v. Hart,* 8 Del. Ch. 448, and *Burns v. Multnomah R. Co.,* 15 Fed. Rep. 177. The last two cases are cited by appellant, but they hold the reverse of his contention.

For the purpose of sustaining the constitutionality of the statute in question, appellant cites the case of *Branson v. Gee,* 25 Or. 462, a case, strictly speaking, referable to the police power, rather than power of eminent domain. The statute permitted the road supervisors to enter upon private property adjoining the road and take therefrom gravel and materials for the purpose of making repairs, and provided that the owner might file his claim with the county court and have his damages assessed. The action was brought against the road supervisors, and the court held that the remedy of the plaintiff was that provided by the statute, and, the proceedings being instituted by the state, no notice was required before the taking, and that the remedy to the property owner was adequate. In *Hood River Lumbering Co. v. Wasco County,* 35 Or. 498, however, the court held that a statute providing for the taking of private property under the power of eminent domain containing no provision for notice to the owner is void; and Judge Bean distinguishes the case of *Branson v. Gee, supra,* remarking:

"The decisions of this court upon the validity and constitutionality of acts providing for the assessment of property and levy of taxes for general purposes, or for assessments for opening or improving streets in munici-

palities, or the laying of sewers, or the taking of material by road supervisors for the repair of public highways, are not authority in the present case, except in so far as they may illustrate the application of the doctrine of due process of law to a given state of facts. * * * It was held in these cases that the city charters were constitutional and valid, although they made no provision for notice to the property owners; but this holding was expressly put upon the ground that 'the city is a miniature state—the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for, when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council.' Mr. Justice Brewer, in *Paulson v. Portland,* 149 U. S. 38."

The failure to distinguish between the police power, the power of taxation, and the power of eminent domain, has led to some confusion in the cases upon the question of due process of law, as was noted by Post, C.J., in *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549, 565. Such distinctions are thoroughly pointed out and discussed in 20 C. J. 517, sec. 5, consideration of which will explain many of the cases holding that notice to the property owner affected may be implied; for example, *Enterprise Irrigation District v. Tri-State Land Co.,* 92 Neb. 121, which was a case involving the exercise of the police power, and *State v. Several Parcels of Land,* 83 Neb. 13, a tax case.

The case of *Buckwalter v. School District,* 65 Kan. 603, also cited by appellant, was an action in ejectment against the school district, which by mistake had built a schoolhouse upon the land of plaintiff. A statute covering such situations permitted the district to apply to the county judge to appoint freeholders to appraise the value of the land, and thereupon title should vest in the district, but omitting to provide for notice of such application to the owner. It was held that ejectment could not be main-

tained, that compensation need not be made before the taking, but that the owner was not bound by the amount of the assessment, and might either appeal therefrom, or bring an action to recover the value of the land; the court saying (p. 607):

"Notice to the citizen of the taking of his property for a public purpose is of no concern to him, for the right to take exists, independently of notice. It is only when compensation for such taking comes to be considered that the owner of the condemned property becomes interested, and only of proceedings to determine that question is he entitled to notice, for upon that question only has he a right to be heard. The taking precedes the assessment of damages. The title passes upon the taking of the property."

It seems to us that a distinction may be made between cases where the property has been taken and improvements made upon it and the only question remaining is the compensation to be paid the owner, and cases like the one at bar where the objection is made to the proceeding itself by which the land is sought to be condemned. In the former the court would be justified in holding that the requirement of due process of law was satisfied, while in the latter the proceeding should be required to conform to the Constitution.

The last remark is also applicable to the case of *Appleton v. City of Newton*, 178 Mass. 276, where the land had been taken and water pipes laid therein before the bill in equity to remove the cloud upon the title caused by the recording of the condemnation proceedings had been filed; no notice of such proceedings to the owner being provided in the statute. However, that case is authority for the proposition: "It is enough if there is such a notice as makes it reasonably certain that all persons interested who can easily be reached will have information of the proceedings, and that there is such a probability as reasonably can be provided for that those at a distance also will be informed." The cases cited to support that hold-

ing fail to do so. *Huling v. Kaw Valley R. & I. Co.*, 130 U. S. 559, merely holds that notice by publication is sufficient to a nonresident owner, and *Hagar v. Reclamation District No. 108*, 111 U. S. 701, *McMillen v. Anderson*, 95 U. S. 37, and *Davidson v. New Orleans*, 96 U. S. 97, were all cases involving assessment of a tax. Furthermore, it appeared that the proceedings were in December, 1889, and the plaintiff had notice of them as early as January 1, 1890, by personal correspondence with the engineers in charge, and took no action until December, 1897; and the bill might well have been dismissed on the ground of want of equity. In any event we cannot approve of the reasoning in that case, which rests the validity of the statute upon the mere probability that the owner may have notice.

The case of *Lancaster v. Augusta Water District*, 108 Me. 137, also cited, merely holds that the owner is not entitled to notice of the condemnation proceedings, but the statute provided for notice of the assessment of damages.

The case of *State v. Grand Island & W. C. R. Co.*, 31 Neb. 209, is also relied upon by appellant. The railroad had taken possession of the land in question without condemnation proceedings, and the owner called an inquest for the purpose of determining the damages, as permitted by the act, before the county judge, and notice thereof was given to the railroad company, and this action was an original application for mandamus to compel the company to deposit the damages so found with the county court. The statute in question provided for ten days' notice to the property owner of the assessment, but did not provide for any notice to the railroad company in case the owner initiated the proceedings, and the court held, as it appeared from the record that notice was given to the railroad company, it was sufficient. The proceeding in that case was a statutory substitute, however, for an ordinary action for damages, and was a judicial proceeding, and the notice given was all that was re-

quired in such cases to constitute due process of law.

In *St. Joseph v. Geiwitz,* 148 Mo. 210, also cited, the summons issued in the proceedings notified the owner that "on the day therein named commissioners *would be* appointed" to assess the damages. In the instant case the notice given was that the appraisers had been appointed and would file their report on or before May 20. The distinction seems obvious.

Appellant claims notice was waived by appellee's actual knowledge of the proceedings and by taking an appeal from the award. We think no act of appellee could operate to give vitality to an unconstitutional statute, any more than consent may confer upon a court jurisdiction which the law has not conferred. The entire proceedings are void for want of jurisdiction. Of course, if appellee had accepted the award, he could not be heard to object, but in such case the title of appellant would rest upon the estoppel, rather than the statute. *Abney v. Clark,* 87 Ia. 727.

Appellant refers to five other statutes to which it is claimed the same objection as urged here applies. Only three of them are, apparently, defective, and we do not deem it necessary to discuss them, as all other acts we have examined provide for notice, and the fact, if true, that our holding invalid the act under consideration would affect other statutes should not deter us from declaring the law in the instant case.

We are constrained to hold the act unconstitutional, and therefore the judgment of the district court is right and is

AFFIRMED.

ALDRICH, J., dissents.

DEAN, J., dissenting separately.

The present case does not present a controversy between private persons. It is a controversy between private persons and a consolidated rural school district, an arm of the sovereign government that functions under its authority, whose officers are charged with the responsibility

that pertains to the elementary education of the youth of the district. It is conceded that plaintiffs were without actual notice of the appointment of the appraisers until three days thereafter, namely, May 3, 1920.

The point that plaintiffs stress the most is technical. They argue with great force that they were not formally notified of the time when nor the place where the appraisers were to meet. Questions pertaining to the value of the land and to the damage suffered, if any, are treated as of no concern, but firm reliance is placed upon the failure of formal service of notice.

The same principle is involved in *McGavock v. City of Omaha*, 40 Neb. 64. In that case, as here, the question of notice was involved, and we held: "A notice must be given by a city of proceedings to assess the damage to property which will be caused by a proposed change of the grade of a street in said city and of the time and place where the appraisers appointed for the purpose of assessing such damages will meet, in order that the owner of the property so damaged may have an opportunity to be heard in his own behalf. * * * If the notice is not given, the appraisement proceedings will not exclude the party of any remedy, but such party may commence an action at law to recover damages caused by such change of grade to property of which he or she is the owner."

Plaintiffs had an adequate remedy at law. As in the *McGavock* case they were without notice, but their remedy was to "commence an action at law to recover damages," if any, they suffered beyond the amount of the appraised value. If plaintiffs' remedy at law was adequate, further inquiry, under the weight of authority hereinafter noted, should cease with respect to the constitutionality of the act.

Pawnee County v. Storm, 34 Neb. 735, is in point. The opinion is by Maxwell, C.J. That case had to do with the location of a public highway over the land of a nonresident owner. The usual statutory notice was published. The owner, as in the present case, was without

actual notice of the proceeding until after the time for filing claims for damages had expired. The court held that the right of the owner to compensation was not forfeited, and that he might recover the value of the land so taken within a reasonable time after he had actual notice. The remedy there pointed out would doubtless require the owner to file a claim with the county board, though the opinion is silent on that point, and it is presumed that body would do its full duty. In the present case plaintiffs forfeited no property rights. True, they could not be heard before the appraisers after the report was filed with the county judge, but plaintiffs were not remediless, as pointed out in the *McGavock* case and in the *Storm* case.

In 2 Lewis, Eminent Domain (3d ed.) sec. 568, the *Storm* case is cited. The text reads: "In Nebraska it has been held that, while notice by publication will give the tribunal jurisdiction and enable the land to be bound by its judgment, the landowner, who does not receive actual notice of the proceedings in time to make his claim pursuant to the published notice, may present it afterwards and will be entitled to have it allowed."

For other reasons plaintiffs are not in position to question the constitutionality of the act. The question of value is not referred to in the evidence, nor is it pleaded in the petition that the five-acre tract exceeded $1,500 in value or that plaintiffs were damaged in excess of that sum. With respect to value they have pleaded only conclusions. On this point the petition reads: "Plaintiffs further allege that the defendants have deposited with the county judge the condemnation money and are now plowing said land preparatory to putting in fall wheat thereon, and if the defendants are permitted to take possession of said tract of land they will suffer irreparable injury, for which they have no adequate remedy at law."

In 21 R. C. L. 440, sec. 5, it is said: "It is a well-settled rule that legal conclusions are not to be pleaded, for it is the duty of the courts to declare the conclusions,

and of the parties to state the premises. The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted by a demurrer to the complaint containing it." Having failed to plead or to prove damages, plaintiffs cannot be heard to complain of the act on constitutional grounds. *Cram v. Chicago, B. & Q. R. Co.*, 85 Neb. 586, 228 U. S. 70. See note L. R. A. 1917C, 142. It may be noted incidentally that the *Cram* case was affirmed on appeal to the supreme court of the United States. In the *Cram* case it is said: "Until defendant is shown affirmatively to have been injured, he cannot be heard to complain that the act under which the suit is brought is unconstitutional." 85 Neb. 586. Unless this appears he has not been deprived of due process.

In Cooley, Constitutional Limitations (7th ed.) 232, it is said: "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it." In *Clark v. Kansas City*, 176 U. S. 114, Mr. Justice McKenna cites with approval the foregoing language of Judge Cooley, and adds: "We concur in this view, and it would be difficult to add anything to its expression." *State v. Currens*, 111 Wis. 431: "Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions. * * * We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others." In *Wellington, Petitioner*, 16 Pick. (Mass.) 87, the court, speaking by Shaw, C.J., say: "Where an act of the legislature is alleged to be void, on the ground that it exceeds the limits of legislative power, and thus injuriously affects private rights, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected."

If plaintiffs were damaged in excess of $1,500 by the appropriation of their land, they should have so alleged

in plain and unmistakable language. Or if the tract, by reason of location or because of contiguity to other lands of plaintiffs, or for any other good and sufficient reason, caused them to be damaged in a sum exceeding that allowed by the appraisers, they should have pleaded the facts.

With respect to the judicial annulment of a legislative act, I adhere to the views expressed in the dissenting opinion in the nonpolitical judiciary case entitled *State v. Junkin*, 85 Neb. 1, 11, wherein the following authorities are cited: Cooley, Constitutional Limitations (7th ed.) 227; Professor Wigmore, 23 Am. Law Review, 719; *City of Topeka v. Gillett*, 32 Kan. 431; *Ogden v. Saunders*, 12 Wheat. (U. S.) *213; *Hoover v. Wood*, 9 Ind. 296.

The delicate duty of declaring that a legislative act is void is an assumption of judicial authority that should not be exercised except upon the clearest grounds. An attack against an act of the legislature on alleged constitutional grounds should be the last resort of the litigant. To hold an act invalid should be the last resort of a court. When a litigant presumes to raise his hand against the validity of a legislative act he should first plead facts showing clearly and affirmatively that his rights will be injuriously affected by an enforcement of the act. In the present case neither the equities nor the law are with the plaintiffs. In brief, it appears that a law has been declared unconstitutional at the suit of "a party whose rights it does not affect" and who "merely assumes to champion the wrongs of others." A slender judicial thread is it not upon which to hazard the validity of a legislative act?

JOSEPHINE NITZ ET AL., APPELLEES, V. WILLIAM WIDMAN, APPELLANT.

FILED JULY 20, 1921. No. 21581.

1. **Wills: DEVISE: EVIDENCE.** Evidence examined, and *held* that the testator was, at the time of his death, the owner of the land devised.

2. **———: ———: CONSTRUCTION.** A devise to testator's daughter for life, and after her death in equal shares to her children, should be construed as referring to her children living at the time of the testator's death, but subject to open and let in any after-born child or children coming into being before the time appointed for distribution, unless a different intention is plainly manifested by the will.

3. **Partition: LIFE TENANT.** The owner of a life estate in a portion of a larger tract of land may maintain partition proceedings against a cotenant holding a fee-simple title.

4. **———: INFANT DEVISEES.** Minors may, by their next friend, join as plaintiffs in a partition proceeding, when, under the provisions of a will, and the conditions of the property devised, it is probably necessary in order to protect their interests from total loss.

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

B. E. Hendricks, for appellant.

J. H. Barry, contra.

Heard before LETTON, ALDRICH, DAY and DEAN, JJ., SHEPHERD and STEWART, District Judges.

STEWART, District Judge.

In this opinion Josephine Nitz and her five children will be referred to as plaintiffs, and William Widman as defendant.

From a decree of the district court for Saunders county, declaring plaintiffs the owners of a share in certain land in said county, occupied and claimed adversely by the defendant, and from an order for partition, the defendant appeals.

March 1, 1893, Joseph Widman and William Widman, father and son, purchased and took a deed to about 629 acres of land in Saunders county, for the expressed consideration of $23,730, and gave a $10,000 mortgage on the land and on 160 acres of land belonging to Joseph Widman. February 12, 1917, Joseph Widman died, leaving a will, which has been duly probated, devising, among other things, a life estate in a portion of said lands to Josephine Nitz, and then over to her children. On the date of testator's death Josephine Nitz was the mother of five living, unmarried, minor children. Josephine Nitz instituted this suit in partition on her own behalf, and as the next friend of said children. All shares of other devisees have been conveyed to the defendant.

By his cross-petition the defendant claims that about the year 1893 he had an agreement and a written contract for the purchase of his father's half interest in said lands, whereby it was provided that defendant was to have a deed after payment of incumbrances then existing, and the sum of $500 annually for ten years. Defendant alleges that said written contract was lost or destroyed, that he has fully performed its conditions, and asks to have his title quieted to the whole tract.

On this branch of the case, to entitle defendant to prevail, he must show by clear and satisfactory evidence that an agreement between him and his father was made, and that its conditions were fully performed by him. *Kofka v. Rosicky,* 41 Neb. 328; *Peterson v. Bauer,* 83 Neb. 405; *O'Connor v. Waters,* 88 Neb. 224; *Moline v. Carlson,* 92 Neb. 419.

Several witnesses testified, in substance, to having heard the testator say that defendant was to pay the incumbrances on the land and $500 annually for ten years, when he would get a deed; that defendant had fulfilled his contract and could have his deed if he would come and ask for it. Harry Widman, a brother of defendant, testified to being present when his mother stated

in testator's presence that attorney Gilkeson had drawn the contract, and that defendant should have his deed; that the testator got mad and stuck the contract in the stove. For five years before the land was bought, the defendant, with one or the other of his brothers, farmed between 400 and 500 acres of land, starting with a team and wagon, the gift of his father. At the date of purchase, defendant testified he had in the bank between $6,000 and $7,000. He admits, on cross-examination, that 1894 and 1895 were poor crop years, and that prices on farm products in 1896 were low. He has had the use of the whole tract since the spring of 1893. He produces receipts showing taxes paid by him for 18 years, and 4 checks for $500 each and one for $250 from defendant to the testator, dated in 1907, 1908, 1910, 1913, and 1914, which were received in evidence. It appears that such payments had been continued for about 18 years. It is not shown who actually paid the notes or procured the release of the $10,000 mortgage, on maturity of final instalment, March 1, 1896. Defendant has made lasting improvements, found by the trial court to be worth $18,000. Testator made a will about 1901, and three others since that time, in which he devised the undivided half of the land in question.

The record affords no light on defendant's failure to get a deed from his father. They lived at no great distance apart, and there is no suggestion of any estrangement between them, and no satisfactory explanation is given of the conduct of the testator in disposing by will of the lands claimed by the defendant. The provisions of the will gave the defendant about 120 acres of land, and half of the residue of the estate, which, as shown by the order of distribution, was about $2,200.

The will in question contained the following:

"Third. I desire that my daughter, Josephine Nitz, and my son, Harry Widman, shall each have 40 acres out of the land which I own jointly with my son William, same to be of the average value of the entire tract, and I

therefore give and devise to said daughter and son forty acres each of said land.

"Fourth. The balance of my property, whether the same be real, personal or mixed, I give, devise and bequeath to my sons John and William, in equal shares."

"Sixth. Should my son William die before I do, then the part devised to him herein shall be divided in equal shares among my other children. The share and interest devised to my daughter Josephine Nitz by this instrument shall descend to her during her lifetime only, and after her death in equal shares to her children.

"Seventh. I am not forgetting the children of my deceased daughter, Martha, but as they have had considerable from my estate heretofore, I do not wish to make any further provision for them herein. This is also the reason no greater amounts are given to my son Harry, and my daughters Josephine and Emma."

Defendant contends that the minor plaintiffs are not entitled to unite with the life tenant in prosecuting the partition suit, because it is uncertain how many, if any, of them may survive the life tenant, who, also, may have given birth, at the time of her death, to other children who survive her.

The recital of the will, "and after her death in equal shares to her children," contemplates the possibility of the birth of other children. The estate in remainder vested in the living children of Josephine Nitz at the date of the testator's death, but subject to open and let in any after-born children of said Josephine Nitz in being before the time appointed by the will for distribution. *Webber v. Jones*, 94 Me. 429; *McLain v. Howald*, 120 Mich. 274; *Forest Oil Co. v. Crawford*, 77 Fed. 106; 28 R. C. L. 265, sec. 242.

The defendant further contends that the petition of the life tenant and the remaindermen by their next friend conferred no power upon the court to confirm the shares of the several parties, or to order partition. Under the will Josephine Nitz had a right to immediate possession

of her portion of said land, and to maintain an action for its partition. She is a tenant in common with the defendant. The general rule now is that every cotenant may demand partition as a matter of right, however inconvenient or injurious it may be to make it, or whether the title of the parties be legal or equitable, if there is a present right of possession. 20 R. C. L. 743, sec. 27; Freeman, Cotenancy and Partition (2d ed.) sec. 455; *Carneal v. Lynch*, 91 Va. 114.

Although the minor plaintiffs in this case had no present right of possession, they were proper parties, for the purpose of preserving and protecting their estate from the danger of total loss by reason of defendant's right to contribution of plaintiff's proportion of the value of extensive improvements upon the premises. Section 7588, Rev. St. 1913, provides: "The action of an infant must be brought by his guardian or next friend. When the action is brought by his next friend, the court has power to dismiss it, if it is not for the benefit of the infant; or to substitute the guardian of the infant, or any person, as the next friend." Since the plaintiff Josephine Nitz had the right to maintain this proceeding, without the consent of said minors, the defendant cannot be heard to complaint that they are in court. By permitting the case to proceed on their behalf by their next friend, the court practically said it was for the minors' benefit. Under the peculiar provisions of the will, and the attending conditions surrounding the property involved, we cannot say that the court was without power to order partition, as prayed, of the plaintiffs' combined estates. In this case we are not unmindful of the provisions of section 1652, Rev. St. 1913.

The trial court doubtless anticipated that from a tract of upwards of 300 acres a partition could be made in kind, awarding plaintiffs their share in such proportion as to free it from charge for existing improvements, and also avert the costly expense attending sale, together with the necessity of protecting the estate in remainder

by a bond for a long period of years.

An examination of authorities cited in defendant's brief discloses that they are either in harmony with the law as recognized in this opinion or that they are not applicable to this case. In the main they are to the effect that one of several tenants in common cannot, as against his cotenants, make a transfer by metes and bounds of a portion of the common land.

By the will in this case, each devise was spread throughout the whole tract. It varied the quantity and character of estates created, but gave no particular or specific part of the land to any devisee.

The judgment and order of the district court was right, and is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1921.

P. R. CARPENTER v. STATE OF NEBRASKA.

FILED OCTOBER 14, 1921. No. 21931.

1. **Indictment:** PRACTICE OF MEDICINE: NEGATIVING EXCEPTIONS IN STATUTE. The exceptions set forth in section 2724, Rev. St. 1913, as amended in 1919 (Laws 1919, ch. 190, title VI, art II, sec. 8), form no part of the description of the offense, and it is unnecessary that they be negatived in an indictment charging a violation of the medical practice act.
2. **Physicians and Surgeons:** ACT REGULATING PRACTICE OF MEDICINE: VALIDITY. The statute regulating the practice of medicine is not void as discriminatory because it fails to provide that persons desiring to practice "Napropathy" may treat diseases without examination.
3. ———: STATE BOARD OF HEALTH: DUTIES. Unless so provided by the legislature, it is not incumbent upon the state board of health to furnish means for examining the qualifications of all persons desiring to treat patients by drugless or other methods of healing for fee or reward, and to fail to do so is not a denial of any constitutional right.
4. ———: ———: NEW METHODS OF HEALING. Neither the legislature nor the state board of health can be expected to anticipate the inception of new methods of healing.

ERROR to the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Clarence S. Darrow and *William M. Ely*, for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

Heard before MORRISSEY, C.J., LETTON, ROSE, DEAN,

ALDRICH, DAY and FLANSBURG, JJ.

LETTON, J.

Plaintiff in error (hereinafter termed defendant) was convicted upon four counts of an information charging him with the illegal practice of medicine, for a stated fee. The evidence shows that defendant, who did not possess the qualifications as to professional education required by the statute for the practice of medicine, or the treatment of diseases, had treated the persons named in the information for physical ailments, for a fee, by a manipulation of the spine or its ligaments.

Defendant relied for a reversal of the judgment upon a number of assignments of error, which may be grouped as follows: (1) No count of the information charges an offense; (2) the court erred in excluding evidence offered in his behalf; (3) the court erred in giving and refusing certain instructions; (4) the statute is in violation of the Constitution of the state and of the United States.

Section 2724, Rev. St. 1913, as amended in 1919 (Laws 1919, ch. 190, title VI, art. II, sec. 8), is as follows: "Any person shall be regarded as practicing medicine, within the meaning of this article, who shall operate on, profess to heal or prescribe for, or otherwise treat any physical or mental ailment of another. Nothing in this article shall be construed to prohibit gratuitous services in case of emergency, and this article shall not apply to commissioned surgeons in the United States army and navy, nor to nurses in their legitimate occupations, nor to the administration of ordinary household remedies."

It is argued that the latter sentence is not negatived in the indictment; that, if the indictment may be true and still the accused may not be guilty of the offense described in the statute, it is insufficient; that the section quoted has an arbitrary definition of practice of medicine, and that the exceptions made in the second sentence form as much a part of the definition as any other part of the section.

The same complaint was made to the information in the

case of *Sofield v. State*, 61 Neb. 600. The court said: "The information is assailed on the ground that it failed to contain any negative averment relative to the exceptions contained in section 17, ch. 55, Compiled Statutes. Such a negative averment was wholly unnecessary. *O'Connor v. State*, 46 Neb. 157."

In *Holt v. State*, 62 Neb. 134, which was a prosecution for keeping intoxicating liquor for sale without a license, under a section of the statute which provides: "That this [section] shall not apply to physicians or druggists holding permits for the sale of liquors for medicinal, mechanical, chemical, or sacramental purposes, or persons having liquors for home consumption"—it was argued that the information was fatally defective because it did not specifically allege that the defendant was not one of the persons designated in the proviso. But the court said: "The information sufficiently negatives the exceptions of the statute. It alleges that the accused had no liquor license or druggist's permit, and that the defendant kept the intoxicating liquors for sale and did sell the same. * * * The information negatives all exceptions of the statute which are a necessary description of the crime attempted to be charged. Moreover, the general rule is that only such exceptions and provisions of a statute as are part of the description of the offense need be negatived in the information." This principle applies and the information is sufficient.

It is assigned as error that the court refused to permit defendant to testify as to the condition of several of his patients before and after the treatments administered by him, and that in such treatments no drugs, medicines or surgical operations were used. It is said that the fact that defendant belongs to a class that has been unjustly discriminated against, and that his constitutional right to life, liberty and the pursuit of happiness has been, or is sought to be, violated by the statute, can only be established by evidence showing the real nature of the acts performed. While a portion of the offered testimony was

excluded, defendant was allowed to testify that "napropathy" is a drugless method of treatment of diseases or disorders of the human body discovered or founded about 15 years ago, and that he did not treat cases of obstetrics or of broken bones. He stated the theory of treatment as follows: "We believe that the innate property of ligamentous tissue to shrink up from injury results very frequently in damage to the nerves which go out through the spinal column to the different parts of the body, and thus the impairment to nerves due to this contracting property of the ligamentous tissue results in shutting off the nerves in there, or possibly an irritation of the nerves, so that the organs or parts thus supplied do not act in a normally functioning way." He defined at length the term "ligamentous tissue," and further testified that he treated the ligaments by using manual force upon the bones to which the ligaments were attached, using the prominences of the bones as a lever to stretch the shrunken ligaments, which are for the most part attached to the vertebræ. The witness was also permitted to testify in detail as to the actual condition of several of his patients before treatment and their general appearance and physical condition after the treatment. The undisputed testimony, therefore, is that their later condition was better than the first, and no prejudice or error occurred by the exclusion of merely cumulative evidence on this point.

Dr. Oakley Smith was called in behalf of the defendant and testified that he had charge of a school teaching "napropathy" in Chicago, which was the only school of the kind in the United States; that the system was founded by him about 15 years ago; and that he had formerly been a chiropractor. When asked to state the difference between chiropractic and osteopathy, on the one hand, and napropathy, on the other, the witness testified: "I will do the best I can. As far as I can see, they are opposite in this regard: The chiropractor works on the basis of bones out of place, works on the basis of

putting them back in place, makes up his treatment as he goes along; in other words, without chart or bookkeeping. The napropath says we should do all work with a chart, work on the basis it's a ligatight, not bone out of place; a ligatight is a shrunken ligament, and on the basis we should stretch those shrunken ligaments. That is all. Q. And you might state the osteopath theory. A. Without any accusations against the chiropractor, the chiropractor is the same as the osteopath, as far as I can see in theory and action. That is all."

The court sustained an objection to the question as to how long the system of treating disease by manipulating the spinal column has been used. Defendant offered to show by the witness "that the practice of manipulating the spine has been in use in the world as far back as the history of medicine can be traced, that it has been specially in use in Bohemia, where he has studied and observed, and that it is used in families and has been for more than one hundred years, and that it is in frequent use in the United States in families, especially in families of those who have recently come from Europe, as a household remedy," which permission was refused as not tending to prove or disprove any issue in the case. This is assigned as error. The evident object of the tendered evidence was to bring the practice of the treatment within the exception of the statute which permits "the administration of ordinary household remedies." Even if received, the testimony would not, in our opinion, have brought the case within the exception. Use in Bohemia or in the families of immigrants from Europe of rubbing or manipulation of the spine would not establish that the practice of "napropathy" as described by the witness is an "ordinary household remedy" in this country. The ruling on this point was not erroneous.

Defendant requested instructions, in substance, to the effect that the law permits any person to treat diseases or physical ailments of others through the administration of household remedies, and that by such administra-

tion is meant the use of any agency "such as massage or the exercise of the muscles or nerves by external physical manipulation, when such use of either or any of such agencies is frequently applied by members of a family or household in which one may be suffering some physical or mental ailment, or by neighbors, or by any other person called in for advice for such ailments," etc. The refusal of the court to so instruct the jury is assigned as error. We think these instructions were properly refused. It has been pointed out that neither the evidence offered and excluded, nor that received, would establish that the defendant administered ordinary household remedies, within the meaning of the statute.

It is also assigned that it was error for the court to refuse to instruct the jury that it was the duty of the state board of health to provide means whereby persons desiring to practice drugless healing by the system of "napropathy" could take an examination as to their fitness to engage in such a system of healing. It is said that to refuse or neglect to afford such an examination is a denial of defendant's constitutional rights and a discrimination against him in favor of practitioners of other schools of medicine. In recent years a number of schools of thought concerning the treatment of diseases have sprung up, mostly concerned with what is known as drugless healing, such as christian science, osteopathy and chiropractic.

The constitutionality of an act forbidding the practice of medicine except by persons licensed by the state board of health was first passed upon in this state in the case of *Gee Wo v. State,* 36 Neb. 241. The statute was again upheld in *State v. Buswell,* 40 Neb. 158. The quoted section defining the practice of medicine was especially considered and was held to be valid.

In *Little v. State,* 60 Neb. 749, which was a prosecution for the practice of osteopathy before the enactment of the statute providing for the issuance of licenses to that class of practitioners, the constitutionality of the

act was again attacked on the ground of being prohibitive in its nature.

The law was again sustained in *Harvey v. State,* 96 Neb. 786, where it was said by Sedgwick, J.: "Some of the questions presented appeal strongly to one's sense of justice, and would be difficult of solution if they were not foreclosed by the statute and the early decisions of this court. * * * This court cannot amend the statutes, nor disregard the early decisions upholding and construing those statutes. The legislature has had ample opportunity to modify the laws, if they are considered harsh, unjust or impolitic, and, not having done so, they must be enforced as the will of the public expressed through its lawmaking powers."

After the law in this state had been so construed, believing that the regular schools of medicine did not possess a monopoly of the skill and knowledge available or necessary to alleviate human suffering, the votaries of these new methods applied to the fountain head, and convinced the lawmaking powers of the state that their respective systems were of value and effect in the treatment of disease. The legislature thereupon supplemented the statute by providing that the practice of osteopathy and chiropractic could lawfully be carried on under certain prescribed regulations. This was the proper and orderly method of proceeding.

There are but few relations in life in which there is a greater feeling of dependence, trust and confidence than in the relation between a patient and his physician. The very use of the title "Doctor" to the average mind implies peculiar skill and knowledge, and invites faith and confidence, and it is entirely proper to protect the public from ignorant or incompetent men or women professing to be competent physicians. Such laws, no doubt, in some cases, and perhaps in this case, prevent a man of greater ability, or better education, than some of those having legal qualifications, from practicing, and seem unjust in isolated cases; but it is impossible to legislate to

meet every individual case, and some latitude must be allowed in order to attain the necessary and proper object to be attained—the protection of the public from quacks. There may be but a slight difference between the treatment given by osteopathic, chiropractic, or other healers by manipulation, but the state has recognized a distinction between them, and has declared the practice of such arts by specially educated practitioners legal and valid. The requirements for the right to practice either of these schools of drugless healing are not exacting, rigorous or unreasonable, but they are sufficient to exclude the ignorant. Neither does the knowledge or study required, at least in osteopathy, seem to be inconsistent or incompatible with the study of napropathy as described by its founder or discoverer. We know of no law which would prevent the exercise of the system of napropathy by one who has been licensed to practice osteopathy.

The legislature cannot be expected to anticipate the founding of new systems of thought or methods of healing, and neither can the state board of health be required to anticipate every new idea in the drugless treatment of diseases. The cases cited on behalf of the defendant mainly are distinguishable, either as not involving the point considered here, or as construing statutes different in their terms. A large number of cases bearing on the questions involved may be found in the annotation to *People v. Cole,* L. R. A. 1917C, 822 (219 N. Y. 98), and in notes in former volumes of the series to which this note is supplementary.

We fail to see that any constitutional right of the defendant has been infringed. The judgment of the district court is

AFFIRMED.

STATE, EX REL. FRANK TANNER ET AL., APPELLANTS, V. S. K. WARRICK ET AL., APPELLEES.

FILED OCTOBER 14, 1921. NO. 22021.

1. **Schools and School Districts:** HIGH SCHOOL DISTRICTS: ANNEXATION OF TERRITORY: APPROVAL. In a proceeding to annex territory to an existing high school district under the proviso in section 6, ch. 243, Laws 1919, the approval of such annexation by the board of education of the district to which it is sought to annex such territory is, after the declaration of annexation by the county superintendent of schools, the only approval or consent necessary to be given and no action is required to be taken by the authorities of other school districts affected.
2. ———: ———: ———: NOTICE. In such proceedings notice to the school boards of the other districts affected is not required.
3. ———: ———: BOUNDARIES: NOTICE. The terms of the statute which provide for a hearing on the initial question of fixing the boundaries of consolidated districts by the redistricting committee furnish sufficient notice to all parties interested of the proposed boundaries of the district.
4. ———: ———: ANNEXATION OF TERRITORY: PETITION: WITHDRAWAL OF NAMES. Petitioners for the annexation of territory to an existing high school district, under section 6 of the act above mentioned, may withdraw their names from the petition by written request at any time before action has been taken by the county superintendent.
5. ———: ———: ———: ———: ———. After such declaration has been made and communicated to the parties mainly interested, it is too late to withdraw their names, even though the declaration was not reduced to writing immediately.
6. **Evidence:** PAROL EVIDENCE: ACTS OF PUBLIC OFFICIALS. Where the statute does not require a record to be made of official acts of a public officer, parol proof is competent and admissible to show that action was taken and the nature of such action.
7. **Schools and School Districts:** HIGH SCHOOL DISTRICTS: ANNEXATION OF TERRITORY: PETITION: WITHDRAWAL OF NAMES. The fact that withdrawals from such a petition were made before approval by the board of education of the "existing high school district" to which it is sought to annex territory is not material, since the determination of the number and eligibility of the signers of such a petition is committed to the county superinten-

dent, and his or her action upon the petition is final.

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

Morrow & Morrow, for appellants.

Mothersead & York, contra.

Heard before MORRISSEY, C.J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

LETTON, J.

This is an action in the nature of *quo warranto* brought by the appellants, who are residents and taxpayers respectively in school districts numbered 3, 10, and 39 of Scotts Bluff county. They pray for an order ousting the defendants from exercising any jurisdiction as a board of education over the territory embraced in the respective districts named. From an adverse judgment, relators appeal.

The real purpose and object of the suit is to challenge the validity of the organization of "The Consolidated School District of Scotts Bluff."

Chapter 243, Laws 1919, so far as material here, provides, in substance, that all the territory in any county of the state shall be districted into districts for high school and consolidated school purposes; that within 20 days after the act becomes a law the county board in each county shall appoint two school electors of the county, who, with the county superintendent, shall constitute a committee to make such surveys and investigations as will determine an equitable adjustment of the boundaries of districts for high and consolidated schools within the county; that within 10 days after the adjournment of a state conference of such committees provided for by the act, each county committee shall meet in the office of the county superintendent and proceed to plat and establish the schoolhouse site and boundary line of the proposed districts within the county. Within 10 days after the report is completed and maps of the new district pre-

pared, the county superintendent shall designate a time for a hearing at the county seat, where any school elector may file objections to the plan as recommended. After the hearing the committee are given power to make such changes in the report and maps as they deem advisable, and within 30 days after the completion of the survey they are required to transmit the final report and order to the county board, who shall record the same in the minutes of their proceedings.

After the filing of the report with the county board 25 per cent. of the school electors may within 40 days file a written protest with the state superintendent, who, after a hearing is had, provided for in the act, shall then approve the boundaries established by the county committee, or order a rearrangement of such boundaries as in his judgment may seem best. In section 6 is found the following proviso: "Provided, that if the proposed new district contains an organized consolidated or high school district, when a petition of not less than 51 per cent. of the school electors in said new district residing outside of the existing organized consolidated or high school districts shall be filed with the county superintendent, then he shall declare such territory to be so annexed, conditioned upon the approval of the board of education of said existing districts. Blank petitions for this purpose shall be furnished by the state superintendent: Provided, further, any parts or fragments of old districts which may be left outside of the boundaries of the new districts, in the adjustment and operation of this act, shall be provided for by the districting committee, which may add temporarily such parts or fragments to other districts." It is under this proviso that the consolidated district whose organization is challenged was created.

The gist of the petition is the allegation that no action was taken by the county superintendent until after the remonstrance and withdrawal of names had been filed, and the further allegation that the withdrawals were effective to reduce the number of lawful signers to less

than the jurisdictional number. The latter allegation is sustained by the evidence. The defense is that, prior to the time of filing the remonstrance and attempted withdrawals, the county superintendent had acted and declared the territory annexed to the school district of Scotts Bluff, conditioned upon the approval of the board of education of said district, and that the withdrawals came too late and were ineffectual.

The errors assigned are, in substance, that the court erred in holding that approval of the school boards of the territories sought to be annexed to the school district of the city of Scotts Bluff was not necessary before consolidation could be effected, and in holding that the petition could be legally acted upon without first giving notice to all districts affected of the presentation of the petition. The other assignments virtually are that the court erred in finding that the county superintendent verbally declared the annexation of the outlying territory of the Scotts Bluff district on the 29th day of June, 1920, and in holding that such verbal declaration was sufficient to prevent the withdrawal of names from the petition. It is also assigned that the court erred in holding that the petitioners could not remove their names from the petition after the same had been acted upon by the county superintendent and before the board of education of the city of Scotts Bluff approved the same.

The statute does not require approval by the school boards of the territory sought to be annexed to a high school districts, nor does it require notice of the presentation of such a petition to the county superintendent to be given to all districts affected. The statutory provisions with regard to the time the initial action to be taken by the committee on redistricting, and the recording of their proceedings in the minutes of the county board, whose proceedings are required by law to be published, were evidently designed to furnish sufficient notice of the action of the committee to all persons residing within the territory affected. The approval by the board of any district

except that of the consolidated or high school district to which it is desired to annex outside of the territory is not essential. The words, "the approval of the board of education of said existing districts," clearly refer to "the existing organized consolidated or high school districts" mentioned in the proviso.

The main question in the case is whether the evidence shows that the county superintendent had acted upon the petitions and declared the territory to be annexed before the withdrawals were filed. The evidence for relators shows that on June 5 some of those objecting to the consolidation made an inspection of the records in the office of the county superintendent but found no written record of any action having been taken on the petition. The county superintendent at that time was out of the city. On July 7, and on the morning of July 8, certain protests and remonstrances against the annexation of the territory in districts 3, 6, 10, and 39, and withdrawals of the names of 36 persons who had signed the original petition, were filed in the office of the county superintendent. The protests were signed by 86 others not signers to the petition.

On the 8th day of July a record of the approval of the board of education of the school district of the city of Scotts Bluff was filed in the office of the county superintendent. On August 5 the county superintendent in writing reported to the county clerk and the president of the board of education of Scotts Bluff that she had declared all the territory described in the petition to be annexed, and the consolidated school district created; the notification being in part as follows: "I hereby certify that on June 26th, 1920, petitions were filed in my office from 51 per cent. of the electors of the territory proposed by the redistricting committee for annexation to the school district of Scotts Bluff praying that said territory be annexed to the school district of Scotts Bluff.

"And I further certify that at the same time A. C. Davis and S. P. Lacy requested that the west half of

section 1 and the northwest quarter of section 12, township 23 north, range 55 west, be also permitted to come into the Scotts Bluff consolidated district.

"And I further certify that on June 29 I declared my verbal approval of the boundaries as made by the county redistricting committee, and petitioned for annexation to the Scotts Bluff school district, to include, however, said parts of sections 1 and 12 if they might be accepted by the Scotts Bluff school board and petitioned in by the interested parties by July 7."

Before the petition for annexation was filed with the county superintendent, S. P. Lacy and A. C. Davis had been removed from school district No. 10 and annexed to consolidated district No. 67. They preferred to be included in the Scotts Bluff district. The county superintendent prepared petitions for them to circulate to effect this purpose. These petitions were returned to the county superintendent on June 28. Lacy and Davis testified that the county superintendent then said she had made a mistake, and it would be necessary to post notices in the districts affected by their petitions, and told them to post the notices and return the petitions before July 6, and she would act on their petitions and the petition for the annexation of the other territory to the Scotts Bluff district at the same time, on her return from Denver. The county superintendent testified that she took final action on the petition on June 29. She further testified that after she approved the petition she informed certain members of the Scotts Bluff board of education of the approval, and also called by telephone certain electors in the annexed territory, and also the county clerk, or his deputy, and a member of the redistricting committee, and notified them of the action taken, and that this was done before she went to Denver, which was on June 30. She denies that Lacy and Davis returned petitions at a time when they had failed to put up the proper notice, but says they took the notices out on Saturday the 26th. She testifies she told Davis and Lacy that they must get the

assent of the Scotts Bluff board before they went any further. Two members of the board of education of Scotts Bluff testified that in the latter part of June the county superintendent told them she had approved the boundaries as laid out by the redistricting committee.

The superintendent of schools of the city of Scotts Bluff testified that, on June 29, "I went to her office and learned that she was going to Denver, and I wanted to know if her action was final—the action she had taken on the 26th. I wanted to know so that we might go ahead. She told me that her action was final in the matter, and that we were authorized to go ahead." He further testified that between June 29 and July 8 he received the written acceptance that she had declared; it came into his possession several days before the board of education acted upon it, and the board on the strength of this declaration has expended about $10,000 in furnishing extra school accommodations. The president of the Scotts Bluff school board testified that the county superintendent called him from Denver on July 7, and stated she had learned that a remonstrance had been filed against the redistricting, and assured him that the petition had been approved and the matter was settled.

On rebuttal there was testimony to the effect that after the superintendent returned from Denver the relators called at her office to ascertain what had been done with the remonstrance. Some of them testified that they asked her why she did not give them a hearing on the remonstrance, and she told them she had already acted on the other petition; that she had acted verbally, and told the different members of the Scotts Bluff school board that she would accept it, but was holding the petition on account of the Davis and Lacy petitions. When asked why the blanks were not filed (apparently referring to some printed blank forms of approval in evidence), she said she was holding them on account of the Lacy and Davis petition, so she could act on all of them together. It was also shown that some of the relators had protested against

the consolidation at the hearing before the redistricting committee, and that the petition had not been presented to them for signature; but it is also shown that some of them knew of it being circulated, while others only heard of it a short time before the remonstrance was filed.

The most important question in the case is whether the failure of the county superintendent to place upon record at the time it was made her approval of the petition left the matter still open so that petitioners might withdraw in the interval between her oral declaration and the making of the record. We have found no case exactly in point, the decisions cited by relators are to the effect that, unless a complaint in writing was filed before a board of equalization, it had no jurisdiction to raise or lower assessments in the particular circumstances of each case; but this we think does not aid us in this case. A judgment of a court is valid and effective when it is declared and announced by the judge, although it may not be reduced to writing until afterwards. Mandamus will lie to compel the entry of a judgment already rendered, but which has not been made a matter of record; and parol evidence is not admissible in other cases to show that a judgment has been rendered. Where there is no statute requiring proceedings to be made a matter of record, such as in the case of a nonjudicial board or office, and of merely ministerial acts in an inferior court, the strict rule as to court records does not apply, and they may be proved by parol. *Van Kleek v. Eggleston,* 7 Mich. 511; *Dehority v. Wright,* 101 Ind. 382; *Jolley v. Foltz,* 34 Cal. 321; *Richardson v. Hitchcock,* 28 Vt. 757; *Farnsworth Co. v. Rand,* 65 Me. 19; 22 C. J. 1011, sec. 1294.

But, even if we apply the law relating to courts of record, it would seem that, where the officer to whose judgment is committed the approval or rejection of a petition to form a consolidated school district has considered the question involved and has announced to a number of the parties mainly interested her decision upon the matter, the mere fact that a record of her action was not

made immediately, but was reduced to writing afterwards, does not prevent the act and declaration from becoming effective and binding. There is no evidence to show that any other declaration was ever made than that announced by the county superintendent to several members of the board of education of the city of Scotts Bluff on June 29, and afterwards embodied in two statements, one directed to the president of the board of education, and the other to the county clerk. These statements recite and declare the facts as found by the district court to exist.

It was held in *Biart v. Myers*, 3 Neb. (Unof.) 196, that, while a superintendent of public instruction acts judicially in forming a new school district from territory embraced within the boundaries of other districts, it does not follow that his findings and orders in the premises must be entered with all the formality of a judgment of a court of law; if the record shows a substantial compliance with the statute it is sufficient. There is no time or place fixed by the statute for the declaration of approval by the county superintendent; it is enough that the approval be made, and it should, of course, be shown in writing within a reasonable time after the declaration is made; but the essential thing is the approval, which is a mental act, and the declaration, either oral or written, which is physical. The mental determination would be insufficient if unaccompanied by any act evidencing that it had been made; but, when made and declared, it becomes effective, notwithstanding the fact that the written evidence was not recorded until later. While the statute in terms does not require the recording of the act, the proper conduct of official affairs requires that such a record be made.

The argument is made that, since the last withdrawal from the petition was filed on the morning of July 8, and the board of education of the school district of Scotts Bluff did not meet to approve the boundaries, as defined in the petition, until the afternoon of that day, final

action had not been taken, and therefore the right of withdrawal still existed. But this loses sight of the fact that the board of education has nothing whatever to do with the determination of the validity of the petition, or the number of qualified signers upon the same. The function of examination of the petition, and decision as to whether it should be allowed and approved, rests entirely with the county superintendent. The board of education has no power to act until after the approval of the petition has been certified to it by the county superintendent, and, hence, the action of the county superintendent with respect to the approval of the petition is the determining and final act so far as the petitioners are concerned. When a petition approved by the county superintendent has been presented to the board of education, the only act necessary to be done to effectuate a consolidation is the approval by the board. If this approval is withheld, the whole proceedings under this proviso are of no avail.

In *State v. Cox,* 105 Neb. 75, it is said, speaking of the act under consideration: "The bill does not purport to be an amendment of the former sections, but enacts entire new legislation upon the same subject-matter, and repeals the former sections covering that matter." This is a sufficient answer to the contention that the requirements of the former general statute governing the division of school districts must be complied with in proceedings under the new act.

It is conceded that petitioners might withdraw at any time before action was taken by the county superintendent. The evidence sustains the district court finding that no withdrawals had taken place before action by the county superintendent.

We find no error in the judgment. It is therefore

AFFIRMED.

ROSE, J., dissents.

STATE, EX REL. POLK COUNTY, RELATOR, V. GEORGE W. MARSH, AUDITOR OF PUBLIC ACCOUNTS, RESPONDENT.

FILED OCTOBER 14, 1921. No. 22377.

1. **Elections:** COURTHOUSE BONDS: VOTES OF WOMEN. Since the nineteenth amendment to the Constitution of the United States became effective, the votes of women cast at an election for the submission of a proposition to issue bonds of a county for the purpose of erecting a courthouse are of equal validity with, and are as much entitled to be counted as, those of male voters.
2. **Counties:** COURTHOUSE BONDS: STATUTORY PROVISIONS. The special provision contained in section 954, Rev. St. 1913, as amended, for the submission to the voters of a proposition to issue bonds of a county for the erection of a courthouse controls such an election, and not the general provision contained in sections 956 to 960, inclusive.

Original proceeding in mandamus to compel respondent, as auditor, to register certain bonds of Polk county, issued for the erection of a courthouse. *Writ allowed.*

Stout, Rose, Wells & Martin and *M. A. Mills, Jr.*, for relator.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before LETTON, DAY and DEAN, JJ., CORCORAN and GOSS, District Judges.

LETTON, J.

This is an original action in mandamus upon the relation of Polk county against the auditor of public accounts to compel him to register $125,000 of bonds of that county voted for the purpose of erecting a courthouse at a special election. The board of canvassers certified the returns of the election as follows:

"For said bonds and tax:

Women's vote, six-hundred sixty..... 660
Men's vote, nine-hundred forty-one..... 941

Total votes for.....1,601
"Against said bonds and tax:
Women's vote, four-hundred eighty-seven.... 487
Men's vote, nine-hundred sixty-two..... 962

Total votes against.....1,449"

The county board declared the proposition adopted. A transcript of all the proceedings was made, certified by the county clerk, and filed with the auditor of public accounts, who refuses to register the bonds. The auditor denies that the issuance of the bonds had been ordered by a majority of the legal voters of the county voting thereon, and alleges that the women voting at the election were not legally entitled to vote on the proposition, and that in fact a majority of the legal voters of the county voted against the bonds and taxes. He also pleads that two-thirds of the votes cast is necessary under the statute and were not cast in favor of the proposition.

It is argued in the brief that the notice of the special election was insufficient, in that the polling places were not lawfully designated. The answer admits the allegations of the petition that due and proper notice was given of the time and place of the election, and that it was held at the places designated. A notice that an election would be held "at the regular polling places in the city" was held sufficient, in the absence of pleading and proof that there were no regular polling places in the city, or that the electors were in some way deprived of their opportunity to vote. This principle applies. *Hurd v. Fairbury,* 87 Neb. 745; *State v. Marsh, ante,* p. 547.

Were women eligible to vote at the election? The election was held on September 21, 1920. The nineteenth amendment to the Constitution of the United States had been proclaimed and became effective August 26, 1920. Fed. St. Ann. Supp. 1920 (2d ed.) p. 821. This provides:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." Under the decisions of the United States supreme court construing the fifteenth amendment to the Constitution of the United States, it is held that all discriminations in the elective franchise based upon "race, color, or previous condition of servitude" are absolutely without force or effect; that distinctions may be made between classes of citizens upon other grounds, but that as to the grounds inhibited such restrictions are absolutely void. These decisions are strictly in point and apply to the question presented here. *Neal v. Delaware*, 103 U. S. 370, 389; *Guinn v. United States*, 238 U. S. 347; *Myers v. Anderson*, 238 U. S. 368.

It appears that at the special election at which the proposition to issue the bonds was submitted, women were allowed to vote, but that their votes were separately counted and returned. The difference or distinction made or sought to be made by the election or canvassing board was "on account of sex." Their rights as to the deposit of ballots at the election were not "denied or abridged," but if, as contended, their votes should not be counted, this would be an effectual denial of their right to vote. A vote which is uncounted amounts to nothing. A refusal to count such vote or to recognize it as having full force and effect would be a clear violation of the nineteenth amendment. The votes cast by the women at the election are as much entitled to be counted as those cast by the men, and there is a clear majority for the affirmative.

It is also objected that two-thirds of the votes cast were not in favor of the proposition, as required by section 959, Rev. St. 1913. Section 956 is a general law governing "the mode of submitting questions to the people for any purpose authorized by law." Sections 956 to 960, inclusive, show that the raising of money is one of the questions which may thus be submitted to the people of a county. For its adoption such a proposition requires that two-thirds of the voters voting at the election vote

affirmatively. Section 954, though a part of the same act, contains a special provision authorizing the county board to provide a suitable courthouse, and for that purpose to borrow money and to issue the bonds of the county to pay the same. "But no appropriation exceeding $1,500 shall be made for the erection of any county building except as hereinafter provided, without first submitting the proposition to a vote of the people of the county at a general election or a special election ordered by said board for that purpose, and the same is ordered by a majority of the legal voters voting thereon." The special provision controls. There is a restriction in the same section that "In no case shall the levy of taxes made by the county board for all purposes, including the taxes levied herein provided for the erection of a courthouse or jail, exceed in any one year the sum of fifteen mills on the dollar of the assessed valuation of said county." Section 954, as amended by chapter 67, Laws 1919.

Attached to the transcript is a certificate of the county clerk of Polk county that the rate of taxes levied for county purposes in 1920, including 1.46 mills for a courthouse building fund, amounted in all to 12.61 mills. It is apparent, therefore, that the levy of taxes to be made in the future may well be within the 15-mill limitation of the statute without interfering with ordinary running expenses.

We find no sufficient reason assigned for the refusal to register the bonds. A peremptory mandamus is allowed as prayed.

WRIT ALLOWED.

MICHAEL A. KNUFFKE, APPELLANT, V. EDWARD W. BARTHOLOMEW, APPELLEE.

FILED OCTOBER 14, 1921. No. 22171.

1. **Trial:** PROOF. All issuable facts which the evidence properly ad-

mitted on behalf of one party to an action tends to establish may be considered proved, where the other party offers no proof.

2. **Master and Servant:** RELATION. On the issue as to whether a workman is an employee as distinguished from independent contractor, his relation to his employer should be determined from all of the facts, rather than from any particular feature of the employment or service.

3. ———: WORKMEN'S COMPENSATION: PERCENTAGE OF LOSS: PROOF. Under the workmen's compensation law the percentage of a permanent partial loss of normal efficiency is an ultimate fact and may be determined by the trial court from all of the evidence showing the nature and permanency of the injuries and the conditions before and after, without direct evidence of such percentage.

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

Gurley, Fitch, West & Hickman, for appellant.

McIntosh & Martin, contra.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation law. While defendant was engaged in plastering a panel on the outside of the Reinmuth Implement Building in Sidney, he fell from a scaffold July 9, 1920. To procure an award for resulting injuries he filed with the compensation commissioner a claim against plaintiff, the contractor by whom the building was being constructed. That officer found that defendant, when injured, was an employee of plaintiff and was entitled to $15 a week for a period not yet determinable. From this award plaintiff appealed to the district court and there pleaded that defendant, when injured, was an independent contractor, as distinguished from an employee, and therefore not entitled to compensation for his injuries. Plaintiff pleaded further that defendant's disability was not total or permanent and prayed for a dismissal of the proceeding.

The trial court found that defendant was an employee of plaintiff and was entitled to $15 a week for a total disability from the date of the accident, July 9, 1920, until the date of the decree, May 17, 1921, and thereafter to $12 a week for a permanent partial loss for 183 weeks, both periods being 225 weeks. Plaintiff has appealed.

It is first argued that defendant was an independent contractor and not an employee. The question is one of fact. Plaintiff offered no evidence and the issues were determined alone on the proofs adduced by defendant. It follows that all the issuable facts which the evidence tends to establish may be considered proved.

On the issue as to whether a workman is an employee as distinguished from an independent contractor, his relation to his employer should be determined from all the facts, rather than from any particular feature of the employment or service. *Barrett v. Selden-Breck Construction Co.*, 103 Neb. 850.

There is evidence tending to prove the following facts: Defendant entered into an oral contract with plaintiff to plaster the interior of the building for 17 cents a yard and the contract was fully performed. During the negotiations the plastering of an exterior panel for a sign was mentioned, but defendant said it was doubtful if he could do it, owing to another engagement. Later defendant orally promised, for $1.25 an hour, to plaster the panel, plaintiff to construct the scaffold and to furnish a helper. Plaintiff agreed to these terms and constructed the scaffold. Defendant commenced work on the panel and was attended by his former helper, who used defendant's mortar box. Plaintiff told how he wanted the panel plastered, but was not present when the work was done. His foreman was there, however, and defendant would have been under him, had changes or information been wanted. On account of a defect in the scaffold, defendant, while using it in plastering the panel, fell head foremost to the pavement below. In the settlement for work and materials he received 17 cents a yard for the

interior plastering and paid his helper 65 cents an hour. He received $1.25 an hour for his work on the exterior panel and collected 65 cents an hour for his helper. There was no attempt to contradict the evidence from which these facts are inferred. There is no proof that plaintiff surrendered his right to direct or discharge defendant. It was the understanding that the latter should do the plastering himself and there is nothing to indicate that he made any profit out of the services of his helper. In an economic sense the compensation of $1.25 an hour may be considered wages.

Evidence of the nature outlined does not seem to be insufficient to sustain the trial court's finding that defendant, when injured, was an employee within the meaning of the workmen's compensation act. This assignment of error is therefore overruled.

Insufficiency of the evidence to sustain the award is also urged. The principal complaint under this head is the absence of testimony showing definitely the percentage of the permanent partial loss. That there was a total disability for a time is shown beyond question, and the evidence sustains the finding below that it continued to the time of the decree. The proof of a permanent partial loss is equally clear, but the extent or percentage thereof is not so definite and certain. The determination of the issue requires the finding of an ultimate fact—a question for the trial court. The injured person and his physician may testify to the injury and to resulting conditions, but the deduction as to the percentage of loss is for the trial court. The conclusion may be reached from all the evidential facts and circumstances, without direct testimony as to the proportion of loss. Harper, Workmen's Compensation (2d ed.) sec. 161; *International Coal & Mining Co. v. Nicholas*, 293 Ill. 524, 10 A. L. R. 1010. In the exercise of judicial discretion a reasonable estimate based on such evidence meets the requirements of the law. Otherwise the mission of the statute in this respect would fail.

Defendant's brain was injured and he was unconscious for nearly a month. There was a compound fracture of the upper bone of his right arm and the action thereof was limited. Atrophy weakened the power muscles of his shoulder. The condition of the arm as the result of the injury was shown. Motion, speed and strength were impaired. He was fit for his trade before the accident and unfit for it afterward. The trial judge saw the arm in motion after atrophy had done its work. He heard the testimony of a physician that the injuries were permanent. He seems to have found in effect that the permanent partial loss was 80 per cent. of normal efficiency and the evidence seems to justify the conclusion.

The judgment below is somewhat ambiguous, but it is construed to require the payment of $15 a week for 42 weeks and thereafter $12 a week for 183 weeks, 225 weeks in all, and, as thus construed, is

AFFIRMED.

WILLIAM R. DAILEY ET AL., APPELLEES, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED OCTOBER 14, 1921. No. 21667.

1. **Negligence**: INJURIES TO ELEVATOR PASSENGER: LIABILITY. When the owner of a building employs an unskilled and inexperienced person to operate a passenger elevator therein and personal injuries are inflicted upon another without his fault by reason of the operator's inexperience and lack of skill, the owner will be held liable in damages for such injury.

2. **Appeal**: CONFLICTING EVIDENCE. Where the testimony conflicts with respect to material matter, the verdict will not be disturbed, when there is sufficient evidence to support it, unless the verdict is clearly wrong.

3. **Damages**. There is no fixed or exact rule known or recognized in our system of jurisprudence in which the same measure of damages for personal injury may be applied to all cases alike. Much must be left to the good sense and reason of the jury.

4. ———: ELEMENTS. In an action to recover for personal in-

juries, the physical pain, the mental anguish and the humiliation that is suffered by plaintiff, and the permanency of the injury, and the decreased purchasing power of money, are all proper elements of damage to be considered by the jury in deliberating upon their verdict.

5. **Carriers:** OPERATION OF ELEVATOR: CARE REQUIRED. The owner of a passenger elevator that is installed in his building for the use of tenants and the public is bound to use the same degree of care with respect to those using the elevator that is imposed upon common carriers.

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

Gaines, Ziegler, Van Orsdel & Gaines, De E. Bradshaw and *Brome & Ramsey,* for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before LETTON, DEAN, ALDRICH and DAY, JJ., GOOD, District Judge.

DEAN, J.

William R. Dailey sued to recover damages for personal injuries sustained by reason of defendant's alleged negligent operation of a passenger elevator in its 17-story office building situated at Farnam and Fifteenth streets in Omaha, known as the Woodmen building. He recovered a verdict for $52,000. On defendant's motion a remittitur of $1,069 was filed, that sum representing certain alleged medical and hospital expenses which plaintiff was unable clearly to establish. Judgment was thereupon rendered in plaintiff's favor for $50,931, and defendant appealed.

On the part of plaintiff the evidence tends to show that July 19, 1919, while he was in the prosecution of his business as a salesman and solicitor for an Omaha stationery company, he went to the Woodmen building at 10:30 in the forenoon to call upon his employer's customers, and while he was stepping into one of six passenger elevators operated by defendant, and before gaining an entrance, the conductor started the car at a high rate

of speed, thereby causing him to lose his balance and fall. In an effort to save himself from injury he grasped the ascending floor of the elevator and was carried rapidly upward, coming in violent contact with the upper part of the iron shaft enclosure. From that point he was swept from the car and fell into the elevator shaft, a depth of 20 or 25 feet, striking iron beams and the cement floor at the bottom of the pit and thereby sustaining the injuries of which he complains.

On this feature of the case plaintiff's testimony in substance is that when he approached the car he paused a moment to allow a lady to enter, and that he immediately followed. He testified: "I proceeded to enter it; got my right foot in, and was in the act of bringing the left foot in, when the elevator started up with a sudden jolt, and threw me down, just simply threw me right down, then slipped out of the elevator, the elevator doors still being open, feet slipped out, the elevator moved upward, and both of my feet slipped off, curled in under the elevator, and dropped into the pit." Plaintiff further testified that the door of the car was open when he started to enter and the elevator was standing still. He said there was no car starter in the corridor that day when the accident happened, though he had seen one there when in the building on former occasions.

There is evidence tending to prove that defendant employed an unskilled, inefficient and inexperienced young lady, a novice, to operate the elevator car, and that the accident was caused by her negligence in starting the car before she closed the door and while plaintiff was in the act of stepping inside, and that she failed to stop the car immediately upon plaintiff's failure to gain an entrance. On this point she was called by plaintiff as a witness and testified that the day of the accident was the first time she operated the car alone; that the operators were supposed to close the doors of the cars before starting; that she started the car on the trip in question at a high rate of speed without closing the door; that she estimated the

door was three feet ajar when Dailey tried to enter; that almost immediately she saw him sliding off the car; that the car was hard to operate and older operators had warned her to be careful with it.

With respect to plaintiff's injuries the physician who first attended him immediately after the accident testified: "I found distortion of the left foot, due to a fracture at the junction of the lower and middle third of the left tibia and fibula; an incised wound about one and a half inches in length. Q. Go ahead. A. And one inch in breadth at the middle third of the inner aspect of the right tibia; an abrasion of the skin over the lower and inner portion of the right patella; * * * a slight amount of rigidity over lower left abdomen; an incised wound just below the posterior and anterior superior spine; no fracture of the spine, in my opinion; skin abrasion on the right jaw; skin abrasion on the right nipple; skin abrasion on both hands and the left forearm just below the elbow on the anterior aspect; abrasion of the skin of the back, extending from the middle of right scapula down the entire length of the back to the gluteal muscles; scalp wound about the size of half a dollar, just below the occiput. Q. Just state to the jury what the appearance of the left leg was at the time you examined Mr. Dailey. A. The left leg was distorted, turned outward, due to a fracture of both bones at about the junction of the lower and middle third of those bones. Q. That is, the left foot was turned outward beginning at a point about two-thirds of the distance below the knee? A. Yes, sir. Q. What did that disclose in the way of bone injury? A. A fracture. Q. What sort of a fracture did you discover this to be? A. Comminuted fracture. * * * Q. What did the rigidity of the left side of the abdomen indicate to you, if anything? A. Indicated severe trauma, in my opinion; at that time it was significant of hemorrhage. Q. Internal hemorrhage? A. Yes, sir. Q. Did the patient, Mr. Dailey, seem to be suffering from shock at that time? A. Yes, sir." The doctor further

testified that there was fracture of the fifth lumbar vertebra and "a separation of the symphysis pubes, which are the two bones that come down in front, making this arch in the lower part of the abdomen here; that is the separation. Q. That is the pelvic arch? A. Yes, sir; pelvic arch. Q. Describe what further you found. A. I found an obliteration, or practical obliteration, of the obturator foramen; which is a ring over all the arches of these bones; the separation in the left side of this arch causes a pushing up of this bone, obliterating that foramen. Q. This part of the pelvis? A. Yes, sir. * * * Q. Did you finally operate on Mr. Dailey? A. Yes, sir. Q. When did the operation take place? A. September 1, 1919. * * * Q. What was the nature of that operation? A. Bone graft of the tibia. Q. That is the bone of the lower leg? A. Yes, sir. Q. What was the purpose of that operation? Why was that operation necessary? A. To secure union of the fracture. * * * From the fracture—this bone was broken in several pieces and the two shafts of the bone overriding, causing a shortening; those pieces were removed, and a piece of bone taken from the upper portion of the shaft of the bone. * * * The leg was iodized, that is, sterilized with iodine, and removed immediately with alcohol; an incision is made over the anterior aspect of the tibia here through the skin and fascia, that is, the covering underneath the skin; the bone is made bare, and with a twin saw that is run by electricity a piece of the bone is taken out from above this fracture covering a distance of about four and a half or five inches, and the saws continue to cross this fracture." The witness testified that plaintiff's leg was placed in a plaster cast and he remained in the hospital three and a half months; that his leg was shortened not quite an inch, and that it was permanent. "The junction of the symphysis, in order to regain the normal, will necessitate another operation. As to the amount of permanency of disability there will be, that will have to be determined a little later. As to how much bone ab-

sorption will take place there in a man of Mr. Dailey's age, as to the amount of immobility around the ankle joint and the knee joint, will have to be worked out, but, in my opinion, around the knee joint and the ankle joint will be 30 per cent. totally impaired." The doctor further testified that another operation upon the bones surrounding the ankle would in time become necessary.

Two surgeons were called in consultation. They testified that they assisted in the examination of plaintiff, using an X-ray as an aid. With respect to the injuries, their evidence substantially corroborates that of the physician whose evidence is detailed herein. One physician testified that plaintiff was ill about a month from an attack of pneumonia that he contracted because of low physical resistance that resulted from his injuries. This doctor said that he suffered great pain while under his care; that he lost weight and became emaciated; that he was delirious at intervals and could not speak above a whisper. The hospital nurse who had him in charge from July 19 until September 30 testified that when plaintiff was brought into the hospital he had symptoms of shock, and syncope, and had bruises all over his body; that his back was "black and blue all over;" that his hands were cut up; that he was unable to move himself at all without great pain; that he could not sleep at night and was delirious at times and very weak; that when it was necessary to move him she did it with assistance; that he was placed on "a fracture bed" with his left leg placed between sandbags keeping it in one position so that it could not be moved; that he suffered pain in the pelvic region; that the pelvic bone on the right side was very much bruised; that they administered opiates to quiet him and to make him sleep; that they injected about three quarts of salt solution into his chest to sustain him and for a number of days they could not get his pulse; that in a case of this character in which there is weakness, the salt solution "is about the last resort that we have." She further testified that plaintiff "was bruised

from the top of his head and below the pelvic region;" and that he had "a bruise on the right leg;" that he was unable to talk above a whisper and became very much emaciated; that part of the bone was taken from his left leg and grafted into the place where the break occurred; that owing to weakness they had to have a "cradle" over the bed to keep the pressure of the bed clothes from his body.

Plaintiff's wife testified that they had been married 15 years, and that he was in the employ of one firm during all of that time; that he had not known a day's illness during their married life; that she was summoned to his side about an hour and a half after the injury; that he recognized her, but could not speak; that he was not removed from the hospital for about two and one-half months; that when he arrived at his home he was placed in bed, where he lay propped up with pillows more than a week; that he was unable to move himself; that his suffering was severe in the back and pelvic region; that subsequently she obtained assistance of a neighbor and they moved him from the bed to a chair, where he could sit at a table for about a half hour, when he would become faint and dizzy and was compelled to return to his bed; that it was more than a month after he returned home before he could sit up all day; that his condition was such that he was unable to be clothed until January 1, and about that time the cast was taken off, and in the meantime he was taken to the hospital to have X-ray pictures taken; that when the cast was removed his leg was swollen from the top of the cast to his body; that when the cast was taken off she procured crutches for him and a splint was put on his leg for protection; that if his injured foot touched the floor he almost fainted and he was compelled to return to his bed; that at night he was unable to change his position in bed and she had to turn him over every half hour, and that at the time of the trial she testified that she had to change his position two or three times in the night; and that up to the time of the

trial he had never been able to turn on the fractured side and that she had never seen him put any weight on that side; that when he tried to do so or to put his left foot to the floor he became faint and it became necessary to put him back in his bed; that he complained greatly of soreness and suffered great pain.

Defendant denies that it was negligent. It introduced testimony tending to prove that plaintiff negligently attempted to enter the elevator after it began to ascend, and that to gain an entrance he seized the doors, which prevented them from closing, and tried to jump in while the car was in motion; that he missed his footing and in falling seized the floor of the car with his hands and from thence he dropped into the bottom of the elevator shaft; that the speed of defendant's elevators in question is controlled by a device located in the building, and that the operator has only indirect control of the speed by signaling to the man in charge of the controlling device, and that the doors of the elevator close automatically when the car begins to rise. There is also testimony going to show that the operator of the elevator made certain material statements in a deposition soon after the accident that were less favorable to plaintiff than those she made at the trial and that were in part contradictory of those statements. She frankly stated that her recollection of the facts was better at the trial than it was soon after the accident. Her testimony though, as one of plaintiff's witnesses, was a matter of credibility for the jurors. It may be said that, with respect to the scene of the accident and the occurrences immediately attending that catastrophe, the evidence of the witnesses who were called by the respective parties is in direct conflict. But that too was a question of credibility and the jury evidently accepted the version of plaintiff and rejected that of defendant, so that, under the rule, where there is sufficient evidence to support the verdict it will not be disturbed by us unless it is clearly wrong.

Plaintiff testified generally that the pain he suffered

was intense and almost continuous; that his nights were sleepless and full of anguish; that his physical condition became so impaired and his vitality was so low that his life was despaired of; that, in the expectancy of impending death, a minister of the gospel was called to his bedside to administer the last rites while he was yet in the hospital; that he has never been able at any time since the accident to rest with any degree of comfort in one position for any length of time; that it was only shortly before the trial that he was able to lie down even on one side, and that in no position, either night or day, could he remain more than a half or three-quarters of an hour without experiencing intense pain; that he could not move his injured foot without help, and at the time of the trial was able to move about only by the aid of crutches, and even at that time could not press his left foot to the floor.

The defendant contends that, even if it was guilty of negligence, the verdict is greatly excessive. It points out that plaintiff, who was 45 years of age when the accident occurred, had an expectancy of about 24½ years, and that at the time he was earning $23 a week. Plaintiff, however, testified that he had "a commission arrangement on outside business." From the facts so pleaded by defendant it argues that in no event should the judgment be in excess of $13,000 or $14,000. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, is a like case wherein we refused to fix "with exact nicety just how much compensation should be paid." We adhere to the rule there announced.

There is no fixed or exact rule known or recognized in our system of jurisprudence in which the same measure of damages for personal injury may be applied to all cases alike. As has often been said, much is left to the good sense and reason of the man in the jury box. *Fishleigh v. Detroit United Ry.*, 205 Mich. 145; *Southern R. Co. v. Bennett*, 233 U. S. 80. The law gives to the jury the right to determine the amount of recovery in cases of personal injury. That is, of course, one of its func-

tions, and, if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed. It will be noted, however, that the present case was tried and the verdict rendered in a period, that has not yet passed, when the purchasing power of money for necessaries generally was about half that which prevailed only a few years prior thereto, and the jury no doubt took this circumstance into consideration. But from the record before us and in view of verdicts that have been sustained in this and in other states, in cases involving injuries substantially like those in the present case, we conclude that the verdict is excessive in the sum of $10,000.

Union P. R. Co. v. Connolly, 77 Neb. 254, was decided by this court in 1906. We there held that a verdict of $27,500, recovered as damages for an injury resulting in the amputation of both legs about five inches below the knee, was not excessive. True, Connolly was only 31 and his expectancy was 33½ years. But in his case, appalling and horrible even to contemplate, the pain and suffering could hardly have been greater than plaintiff's, whose injuries are in large part internal. Besides, it is obvious that Connolly's capacity to engage in useful and profitable employment would be even much greater than the plaintiff can hope to enjoy. The mental anguish and physical pain that plaintiff herein has suffered and that he continued to suffer, and the permanency of the injury, the humiliation, and the medical assistance and personal attention that his physical condition will require, and the decreased purchasing power of money, are all proper elements of damage for the jury to consider. Cases are cited in the *Connolly* case showing that, even in the first decade of the present century and prior thereto, when from a financial viewpoint the times were normal, substantially like verdicts, in the light of the facts therein depicted, were held not to be excessive.

The evidence seems clearly to support the allegation of plaintiff with respect to the negligence of defendant. In

the elevator lobby, where three elevators are installed on each side, it was shown that defendant ordinarily employed a starter. At the time of the accident it appears that the starter was not in the lobby. The elevator that inflicted the damage was under the control of a young lady, as hereinbefore noted, who was unskilled, and who began her work as conductor that morning without having had previous experience. She testified that she signaled for power at the highest speed when she should have signaled for the lowest. She substantially corroborated the evidence of plaintiff's testimony with respect to the manner in which the injuries were inflicted. The evidence on this feature of the case, taken in its entirety, discloses negligence on defendant's part. In *Quimby v. Bee Building Co.*, 87 Neb. 193, we held that the owner of a passenger elevator, installed in his building for the use of tenants and the public, is subject to the same degree of care with respect to those using the elevator that is imposed upon common carriers. In *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, the court say: "The owner and manager of an elevator for passengers is to be treated as a public carrier of passengers, and is subject to the same responsibilities as a railway passenger carrier. Therefore the law holds him to the utmost diligence and care of very cautious persons, and responsible for the slightest neglect." In *Tousey v. Roberts*, 114 N. Y. 312, it is said: "An elevator in a building, for the carriage of persons, is not supposed to be a place of danger, to be approached with great caution; on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination." In *Blackwell v. O'Gorman Co.*, 49 Atl. 28 (22 R. I. 638), it is said: "Starting an elevator while the door remains open, and while a passenger is entering the car, is negligence." To substantially the same effect is *Mitchell v. Marker*, 62 Fed. 139.

The judgment in the present case is one of the largest

in amount that has ever been awarded for personal injuries in this jurisdiction, and it may be added that the record presents the most serious personal injuries that have at any time been presented to this court. In view of this fact a comparison of verdicts that have been heretofore rendered in personal injury cases is of little assistance. The rule is well settled that in this class of cases it properly comes within the province of the jury to take into account the purchasing power of money with respect to the commodities that are in use by the public generally and that may reasonably be said to constitute the necessaries of life. *Lincoln Gas & Electric Light Co. v. City of Lincoln*, 250 U. S. 256; *Seaboard Air-Line Ry. v. Miller*, 5 Ga. App. 402; *Louisville & N. R. Co. v. Williams*, 183 Ala. 138; *Noyes v. Des Moines Club*, 186 Ia. 378; *Hays v. United R. Co.*, 183 Mo. App. 608; *Hurst v. Chicago, B. & Q. R. Co.*, 280 Mo. 566.

Defendant finally argues that, the jury having made an excessive award as compensation for medical and hospital expenses, proves that it was not guided by the evidence. A remittitur of the excess in the sum of $1,039 was filed by the plaintiff. In *Kriss v. Union P. R. Co.*, 100 Neb. 801, we held that in such case where a remittitur is filed the error is cured. Defendant also makes complaint with respect to the giving of certain instructions. Upon examination we conclude that they do not present reversible error. The court did not err in overruling defendant's motion for a new trial.

The Megeath Stationery Company, plaintiff's employer, was made a party plaintiff, and is interested in the suit from the fact that it has paid to plaintiff compensation under the provisions of the workmen's compensation law. The company asks that it may be subrogated to the rights of plaintiff to the amount of such compensation as it may have paid him in accordance with the provisions of the act in question. From the record it appears that the prayer of the company should be and it hereby is granted. It is therefore ordered that the Megeath Stationery Com-

pany be subrogated to plaintiff Dailey's rights in the judgment in the amount of the compensation that it has paid him under the act. For the purpose of arriving at the amount of money so paid, the parties, or any of them, may, if so advised, submit further testimony to the district court.

The judgment is that, if plaintiff Dailey files a remittitur in the sum of $10,000 within twenty days, the judgment will be affirmed for $40,931. Upon his failure to do so, a reversal will be granted and a new trial ordered.

AFFIRMED ON CONDITION.

FRED H. DENKER V. STATE OF NEBRASKA.

FILED OCTOBER 14, 1921. No. 21899.

1. **Criminal Law**: ACCUSED AS WITNESS: CROSS-EXAMINATION. "If the defendant testifies in his own behalf, the county attorney may, on cross-examination, ask him whether he has been convicted of a felony, and, if the witness equivocates in his answer, the prosecutor may ask such additional questions as may be reasonably necessary to bring out the fact of that conviction." *Johns v. State*, 88 Neb. 145.
2. ———: VERDICT: REVIEW. "A judgment of conviction in a criminal case will not be set aside because of conflicting evidence, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict." *Wheeler v. State*, 79 Neb. 491.
3. **Evidence** examined, and found sufficient to sustain the verdict.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Richard S. Horton, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C.J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

ALDRICH, J.

The defendant, Fred H. Denker, was convicted of the crime of forgery in Douglas county in January, 1921, and sentenced to confinement in the penitentiary from one to twenty years. Defendant prosecutes error.

The main contentions of the plaintiff in error are: First, that the county attorney improperly examined him as to his former conviction of forgery; and, second, that the evidence was insufficient to sustain the verdict of the jury and the sentence of the court.

We note first that defendant appeared as a witness for himself. That being true, he is subjected to the same rules of cross-examination as any other witness to test or attack his credibility. The examination was irregular and may be criticized, but was brought on by equivocation of defendant. It is manifest that defendant knew what the prosecuting attorney was seeking. This question was asked: "Mr. Denker, have you ever been convicted of a felony? A. No, sir. Q. Never been convicted of a felony? A. No, sir." This was a plain equivocation. Section 7906, Rev. St. 1913, provides: "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." The county attorney by further cross-examination brought out the admission of defendant that he had pleaded guilty of a felony and was sentenced to the penitentiary. What the county attorney did in the instant case he has authority for in the case of *Johns v. State,* 88 Neb. 145. This phase of the case, with this brief discussion, may be dismissed.

The next question raised is that the evidence is insufficient to support a verdict of guilty. The evidence proves the fact that the defendant had established certain business relations with the Nebraska Clothing Company. In October, 1919, he cashed a check. After passing this valid check it is claimed he cashed the forged check in question. Counsel for plaintiff in error has much to say in criticism of Miss Waxman concerning her general conduct and the reliability of her testimony. We are of the

opinion that she was willing to tell the truth and all the facts. The forged check was presented to Miss Waxman, then the head cashier of the Nebraska Clothing Company, and she cashed it. She testified that as a rule she did not see the party having a check to be cashed, but that the defendant came to her desk himself and asked if she would cash the check. It was unusual for her to see the party, as the custom was to send the check up through the carrier. Thus it appears that she was advantageously situated to be able to later identify Denker as the man who cashed the forged check. The fact that Miss Waxman in her cross-examination hesitated in recognizing the defendant does not reflect upon her testimony, for she positively identified the defendant at the trial as the man who cashed the check. There is no material difference between the testimony as she gave it on the last trial and the former trial. The jury were satisfied with her statement of fact.

Upon the question of whether the handwriting on exhibits 1 and 2, and the writing on exhibit 4, is the handwriting of defendant, we have the testimony of Mr. Wallace O. Shayne and Mr. Roy E. Karls. The record shows that Mr. Shayne was a man of much experience and had been in the employ of the government and other banks as a handwriting expert. The defendant in opposition called Mr. Roy E. Karls, who has been a bank cashier. The testimony of these two witnesses was placed in juxtaposition and the jury believed Mr. Shayne. It is not the province of this court to find fault with the verdict of the jury. "A judgment of conviction in a criminal case will not be set aside because of conflicting evidence, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict." *Wheeler v. State,* 79 Neb. 491. This proposition has long been settled in this state, and may be said to be a rule of law. That being the case, we will not disturb the verdict of

the jury rendered under these circumstances, and we think justice will be subserved by confirming this verdict.

AFFIRMED.

FRANK ULASKI, APPELLEE, V. MORRIS & COMPANY, APPELLANT.

FILED OCTOBER 14, 1921. No. 22191.

1. **Master and Servant:** WORKMEN'S COMPENSATION: APPEAL: CONFLICTING EVIDENCE. "Where the district court in a workmen's compensation case finds, on substantially conflicting evidence, that the employee was injured in a particular manner, such finding of fact will not be reversed on appeal unless clearly wrong." *Swift & Co. v. Prince, ante*, p. 358.
2. ———: ———: LOSS OF USE OF FINGER. Where the injured employee suffered 25 per cent. partial permanent loss of the normal use of the second or middle finger of his right hand, the extent of the injury not being ascertainable until 10 weeks after the accident, then he is entitled, under section 3662, Rev. St. 1913, as amended by section 7, ch. 85, Laws 1917, to compensation for the period of 7½ weeks at $15 a week, commencing, not with the day of the accident, but with the day when the extent of the injury is ascertainable, and, in addition, is entitled to $15 a week for the 10 weeks.
3. **Witnesses:** FEES OF EXPERT. "One testifying as an expert on a subject requiring special knowledge and skill, in the absence of a special contract, is entitled only to the statutory fee." *Main v. Sherman County*, 74 Neb. 155.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed as modified.*

James C. Kinsler, for appellant.

Bigelow, Peterson & La Violette, contra.

Kennedy, Holland, De Lacy & McLaughlin, amici curiae.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG and ROSE, JJ.

ALDRICH, J.

On September 11, 1920, Frank Ulaski, an employee of defendant, was injured while in the course of his employment. He was what is called a "beef lugger." On that day he says that a beef fell from an overhead rail, and in catching it a bone sliver was forced into the first joint of the middle finger of the right hand. The defendant's physician administered some iodine and bandaged the finger and he had daily dressings at the doctor's office. In the meantime an infection developed and it became necessary to open the wound. Finally, he was sent home, where he stayed during the succeeding week and two days. He was treated daily by the company physician and his finger was repeatedly lanced. He returned on September 29, under direction of the company's physician, and was assigned a lighter task in which he did not have to use the injured finger.

On October 1, he was called to the office and given a check for $5 to cover his compensation for two days, the 27th and 28th of September, the first week being exempted by law. He signed a release; and then returned to work and was required to do work that necessitated the use of his finger. He told the foreman he could not do that work because of his sore finger. An altercation ensued and he was permanently discharged. This discharge occurred about two hours after he had signed the release, and, notwithstanding his discharge, he was treated by the company physician for several days afterwards. Later, while his finger was still swollen and open, the company physician refused him further treatment. It was on October 7 that he was refused further compensation, and then he went to the compensation commissioner, who informed the company's claim agent and told him that Ulaski was at that time entitled to a week's compensation. Ulaski then went to the company's office and was paid the sum of $15, and was required to sign two releases. His finger was at that time still sore and swollen. He returned to the defendant company on

November 16, seeking work. The defendant company had not at that time begun to lay off men, although they refused him employment. It is claimed that plaintiff was not yet in condition to work and was not able to use the knife. Even at this time his finger was in such a condition that he was unable to work and was forced to quit after shoveling coal a few hours. January following he applied for compensation and was awarded a hearing and was allowed additional compensation. Upon a hearing in the district court being had, the trial court, among other things, held that "the plaintiff have and recover from the defendant company, in addition to the sum already paid, compensation at the rate of $15 per week for a period of 17½ weeks, all of which is now due and payable forthwith; that the defendant company be and it is hereby ordered to pay to plaintiff the sum of $75 for attorneys' fee in this court, and to pay to the plaintiff for expert witness fees charged as costs the sum of $50, and to pay into court the costs of this suit; that, unless said payments are made forthwith, the defendant shall also pay 50 per cent. of the said compensation for 17½ weeks as the statutory waiting time." From the judgment so rendered the defendant appealed.

In *Swift & Co. v. Prince, ante,* p. 358, the court said: "The trial court saw the witnesses and heard their testimony, and its findings, upon conflicting evidence, should not be disturbed. It is the rule in cases of this kind that findings of fact, supported by sufficient evidence, or findings of fact on substantially conflicting evidence, will not be reversed unless clearly wrong." The rule announced in the *Prince* case is applicable to the facts before us and we adhere thereto. The finding of fact is amply supported by the record. The court was justified in allowing Ulaski 10 weeks for total disability in addition to the week and two days formerly allowed by the court under the finding of fact.

The record shows conclusively that plaintiff was allowed 10 weeks' compensation for time lost dating from

October 7, 1920. After he had rested and had had time to make improvement it was further found that he had lost 25 per cent. of the normal use of his injured finger. His loss altogether, then, was 10 weeks for total disability and 7½ weeks for permanent partial loss of the finger, making a total loss of time of 17½ weeks at $15 a week, as provided by statute. The defendant refused to pay the award as made by the compensation commissioner. Then the case was tried in the district court and the decision of the compensation commissioner affirmed.

As appears of record there was total disability of 10 weeks, and according to the spirit and intent of the statute the plaintiff was entitled to a recovery of $15 a week pending that time, and to a permanent partial disability for a period of 7½ weeks. This in the aggregate constitutes the total loss of the plaintiff for the entire time of the injury, and we concur in the finding of the court in this regard as it is amply sustained by the record. This case is not unlike the principle found in *Addison v. Wood Co.*, 207 Mich. 319. The principles of the statute as applied to this case are fully discussed and the application of the law which we follow is made. We adhere to the principle of law therein involved. It is in point in the instant case. We believe the court was right in allowing a total disability for a period of 10 weeks and was correct in allowing permanent partial disability at the rate of $15 a week. The requirements of the statute have been amply complied with and the court has met the situation as shown in plaintiff's case.

We are not unmindful of the fact that in the discussion and conclusion of the instant case there are cases holding a different principle and conclusion from what we have arrived at, but at the same time we believe that our conclusion has the support of law and does ample justice to the parties under these facts.

On the question of attorney's fees, section 3666, Rev. St. 1913, as amended by chapter 85, Laws 1917, and chapter 91, Laws 1919, provides as follows: "Whenever

the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award; the appellate court shall in like manner allow the plaintiff a reasonable sum as attorney's fees for the appellate proceedings." The $75 so allowed by the trial court is correct and just and we affirm it. It follows that defendant must pay the costs of this suit.

There is, however, no provision in the law for the payment of expert witness fees. The expert witnesses are therefore allowed the usual and lawful witness fee, and no more. *Main v. Sherman County*, 74 Neb. 155.

The judgment of the district court is affirmed, except as modified herein. It is ordered that the court disallow the expert witness fee in the amount of $50, and that the expert witness recover only the usual and lawful witness fee; and that defendant receive credit for one and one-third weeks' compensation which defendant has already paid on plaintiff's claim. It is further ordered that defendant pay an attorney fee for plaintiff, as costs in this court, in the sum of $100.

AFFIRMED AS MODIFIED.

F. B. BAYLOR, TRUSTEE, APPELLANT, V. HENRY J. HALL ET AL., APPELLEES; FOLSOM BAKERY ET AL., APPELLANTS.

FILED OCTOBER 14, 1921. No. 21433.

1. **Contracts: CONSTRUCTION.** In construing a contract, a court will give due force to the grammatical arrangement of the words and clauses, unless by so doing it appears to be at variance with the intention of the parties as indicated by the contract as a whole.
2. **———: ———.** It is a general rule of construction, unless the intention of the parties appears otherwise, that a relative word

or clause will be construed as referring to its nearest antecedent.

3. ———: ———. The contract set out in the opinion construed, and *held*, that the clause, "to be used in the liquidation of the indebtedness of the said Lindell Hotel, existing on and prior to August 1, 1916," refers to the nearest antecedent, namely, that the accounts assigned to the Lindell Service Company should be so used, and does not include the 48 shares of stock assigned to Hall.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Reversed, with directions.*

Fawcett & Mockett, Claude S. Wilson and *C. L. Clark,* for appellants.

C. C. Flansburg, T. J. Doyle, H. N. Mattley and *P. R. Halligan, contra.*

Heard before MORRISSEY, C.J., LETTON, DEAN and DAY, JJ.

DAY, J.

This is an action in equity, somewhat in the nature of an accounting, brought by F. B. Baylor, trustee for certain creditors of Robert W. Johnston, against Henry J. Hall, Lindell Service Company, a corporation, and Robert W. Johnston. The action, in so far as it affected the defendant Johnston, was based upon certain accounts due and owing by Johnston to the creditors represented by the trustee. The action, in so far as it sought to charge defendants Hall and the Lindell Service Company with liability for the debts of Johnston, was based upon certain contracts, reference to which will hereafter be made. After the action was commenced other creditors of Johnston were permitted to intervene, charging substantially the same facts as alleged by the plaintiff, and joining the plaintiff in the relief prayed. The trial court found the issues in favor of the plaintiff and the interveners, as against the defendant Johnston, and rendered a judgment against him for the amount found to be due the

plaintiff and the respective interveners. The trial court further found the issues in favor of the defendants Hall and the Lindell Service Company, and, as to these defendants, the petitions of the plaintiff and the interveners were dismissed. From the judgment in favor of Hall and the Lindell Service Company, the plaintiff and the interveners have appealed.

A brief reference to the circumstances leading up to the making of the contracts will serve to a better understanding of the precise point in controversy. It appears that for some years prior to August 1, 1916, Robert W. Johnston had conducted the Lindell Hotel in the city of Lincoln, Nebraska, and had become indebted in considerable sums to various creditors. At that time he held the title to the hotel property in his own name, but it was incumbered by a mortgage for approximately the purchase price. He was in arrears with the interest payment, and the mortgagees were considering taking steps to repossess themselves of the property. Negotiations were entered into between Hall and Johnston which resulted in a contract between the parties dated August 1, 1916, by the terms of which they agreed to organize a corporation to be known as the Lindell Service Company, to succeed Johnston in the proprietorship of the Lindell Hotel. Arrangements were perfected by which Johnston was to deed the hotel property back to the original owners, and they in turn were to lease the premises to the Lindell Service Company for a period of ten years, no rent to be paid for the first year. Under the agreement Hall was to pay into the treasury of the corporation $5,100, and was to receive therefor 51 shares of the capital stock. Johnston was to transfer to the corporation the provisions on hand, purchased for the operation of the hotel, and also to turn over to the corporation a café owned by him at Capital Beach, a pleasure resort near Lincoln, for which he was to receive 49 shares of the stock in the corporation. Johnston further agreed to assign one share of his stock to an employee designated by Hall.

Pursuant to the agreement the corporation was organized and entered upon the operation of the hotel. The contract of August 1, 1916, recognized that Johnston was owing certain accounts incurred in the operation of the hotel, and in that behalf provided as follows: "It is further agreed that inasmuch as there are now certain bills owed to divers parties for provisions, laundry and other matters pertaining to the management and operation of the said hotel, to the present date, which are believed to be in excess of $11,500, the exact amount thereof is not known, that said bills will be paid from time to time, after current expenses are paid, from the revenues derived from the operation of said hotel, as rapidly as the revenues so derived will permit the payment of said bills. The money expended in the payment of said bills will be charged to the said Robert W. Johnston, and deducted from his share of the profits resulting from the operation of said hotel." Acting under this contract the Lindell Service Company paid out from time to time on Johnston's debts, up to April 11, 1917, the sum of $15,584.73. Through an error of the book-keeper the corporation had advanced on account of these debts several thousand dollars more than the net earnings of the corporation. An audit of the books then disclosed that Johnston's debts on August 1, 1916, amounted to approximately $33,000. Other complications arose in the affairs of the corporation, and Johnston, who had managed the hotel, took employment elsewhere. At this stage of the business affairs of the corporation, Hall and Johnston entered into another contract of date April 11, 1917. The provisions of this contract which bear upon the present controversy are paragraphs one, five, and six, and are as follows:

"1. That said Robert W. Johnston will assign to the first party (Henry J. Hall) forty-eight (48) shares of the capital stock in the Lindell Service Company, a corporation of Lincoln, Nebraska; will assign to said Lindell Service Company all unpaid bills and accounts receivable, now due the Lindell Hotel under the former management

of Robert W. Johnston, to be used in the liquidation of the indebtedness of the said Lindell Hotel, existing on and prior to August 1, 1916."

"5. First party (Hall) further agrees that the Lindell Service Company, at a meeting of its stockholders, will authorize the making of a contract by said Lindell Service Company, a corporation, to assume and pay that certain indebtedness of Robert W. Johnston, described in a certain written agreement between Henry J. Hall and Robert W. Johnston, to incorporate the Lindell Service Company, dated August 1, 1916, pursuant to the terms of said written contract, as more fully set forth in said contract.

"6. First party further agrees that neither he, the said Henry J. Hall, nor the Lindell Service Company, will make any claims against the said Robert W. Johnston on account of advances made by said Lindell Service Company, in payment of the indebtedness of said Robert W. Johnston, incurred and existing prior to August 1, 1916."

Johnston complied with the terms of the contract. Hall took no steps to have the provisions of paragraph five of the contract carried out, but continued to operate the hotel until June 1, 1917, at which time he sold all the corporate property including the lease, realizing therefor, net, $7,480. With this sum he paid his note of $5,100, given for borrowed money to pay for his shares of stock, and used the balance in paying indebtedness of the Lindell Service Company. None of the accounts assigned to the Lindell Service Company under the provisions of paragraph one were collected.

The plaintiff, as well as the interveners, state that the whole question presented by the record turns upon the interpretation to be given to paragraph one of the contract of April 11, 1917. It is their contention that the contract requires that the 48 shares of stock assigned to Hall should be used by him in liquidation of Johnston's debts contracted prior to August 1, 1916; and it is argued that, inasmuch as Hall has converted the assets of the

corporation into money, therefore 48/100 of the net proceeds derived from the sale of the corporate property should be applied in the payment of Johnston's old debts. We are unable to agree with counsel in this interpretation of the contract. As we view it, the first paragraph of the contract does not mean that the 48 shares should be applied in payment of the debts. The phrase in the contract, "to be used in the liquidation of the indebtedness of the said Lindell Hotel, existing on and prior to August 1, 1916," refers only to the first antecedent, namely, that the assigned accounts should be so used. Ordinarily in construing a contract a court will give due force to the grammatical arrangement of the clauses, unless by so doing it appears to be at variance with the intent of the parties as indicated by the contract as a whole. The cardinal rule is to carry out, if possible, the intention of the parties. If a clause contained in a written contract would by grammatical construction have one application, and from the whole tenor of the instrument it is manifest that the parties to it intended it to have a more extended application, it will be construed according to the intended intention of the parties. Thus it is the general rule that, unless the intention appears otherwise, a relative word or clause will be construed as referring to its nearest antecedent. But where the context of the writing shows that the relative word or clause is not intended to apply to its nearest antecedent it will be construed in such a way as to carry out the intention of the parties. 6 R. C. L. 845, sec. 234.

Applying these general principles to the contract in question, it seems clear to us that the clause, "to be used in the liquidation of the indebtedness of the said Lindell Hotel, existing on and prior to August 1, 1916," refers only to its nearest antecedent, namely, that the accounts assigned should be so used. By paragraph five of the contract, Hall agrees that he will have the stockholders of the Lindell Service Company authorize the corporation to make a contract to assume and pay Johnston's indebted-

ness arising out of the former management of the Lindell Hotel, the same to be paid in accordance with the terms of the contract of August 1, 1916. By that contract the debts of Johnston were to be paid off from time to time after current expenses were paid from the revenues derived from the operation of the hotel, as fast as the revenues would permit, and that the money so paid out on bills was to be charged to Johnston's account. By the contract of April 11, 1917, Hall and the Lindell Service Company agreed to waive any claim against Johnston by reason of the advances so made. While we are of the view that the contract does not require that Hall should use the 48 shares of stock in the payment of Johnston's old debts, it is quite apparent, we think, that Hall has breached the contract. He made no effort to have the stockholders authorize the Lindell Service Company to assume and pay Johnston's old debts out of the revenues derived from the conduct of the business after deducting current expenses. This he could easily have done, because he owned 99 shares of the stock, and controlled the other share. On the contrary, within six weeks after acquiring the stock, he sold all of the corporate property, and thus effectively put it out of his power to fulfil the contract. From the record before us we are unable to determine whether there were any profits after deducting current expenses arising from the conduct of the business between April 11 and June 1, 1917, at which time Hall disposed of the corporate property. Neither is there testimony from which we could draw a conclusion as to what, if any, damages would reasonably follow from Hall's breach of the contract. It was evidently the intention of the parties that the Lindell Service Company should continue operating the hotel, and it was not contemplated that the corporate property would be sold. In this state of the record, we hold that there is not enough before us upon which we can base a judgment for more than nominal damages, arising from the breach of the contract. We think, however, in view of

the breach of the contract by Hall, he should be charged with nominal damages at least, as the law presumes some damage to follow from a breach of a contract.

The judgment of the lower court is reversed, and the cause is remanded to enter judgment in favor of the plaintiff and interveners for nominal damages, and for costs.

REVERSED.

FLANSBURG, J., not sitting.

JOE CANIGLIA, APPELLEE, V. CIRINO VACANTI, APPELLANT.

FILED OCTOBER 14, 1921. No. 21561.

1. **Appeal:** VERDICT: REVIEW. A verdict of a jury, based upon sufficient evidence to support it, and which cannot be said by the court to be clearly wrong, will not be set aside merely because it appears to be against the weight or preponderance of the evidence, as the weight of the testimony is for the jury, and not for the appellate court.
2. ———: ———: ———. Verdict *held* to be supported by sufficient evidence, and not a verdict which a reviewing court could say was clearly wrong.

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

Piatti & Wear and *John F. Moriarty,* for appellant.

Switzler & Switzler and *Claudio Delitala, contra.*

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J.

On rehearing. Former opinion (not reported) by Commissioner Cain.

This was an action at law by the plaintiff to recover money deposited with the defendant. The plaintiff recovered the full amount claimed. Defendant appeals.

The only question presented is the sufficiency of the

evidence to sustain the verdict. The testimony discloses that the plaintiff arranged with the defendant to deposit moneys with the defendant, and it was agreed that the plaintiff could draw upon the deposit without previous notice and at any time that he pleased. Plaintiff claimed to be entitled to interest at 4 per cent., but whether or not there was an agreement for interest is one of the controverted issues between the parties. The record of deposits was kept in an ordinary bank pass-book, and as each amount was given by plaintiff to the defendant for deposit a record of it was entered by the defendant in this book. The book was retained by the plaintiff. Defendant claims payment of $1,000, made on December 29, 1918. The only issues of fact presented are the question of credit of $1,000 for the cash payment claimed by defendant, and the question of whether or not it was agreed that the deposits should bear interest. The jury found in favor of the plaintiff on the issue of the $1,000 payment, and also found that the plaintiff was not entitled to interest on deposits.

Plaintiff's testimony is a flat denial that the $1,000 payment was ever made. It is admitted by all parties that no receipt was taken by the defendant to evidence such payment. The defendant points out that in another instance, where defendant had made a payment to plaintiff of $380 out of the deposit fund, no receipt was taken, but in that instance the payment was made through the transfer of a bank check, and it was explained, and plaintiff says it was mentioned at the time, that no receipt was therefore necessary. The defendant, defendant's son, defendant's wife and her two sisters all testified, in direct contradiction to the plaintiff's testimony, to the effect that the $1,000 payment had been made. The testimony of these several witnesses, however, as to the particulars of the transaction was not in entire accord. Thus there is a direct issue of fact, the solution of which depends entirely upon the credibility of these witnesses. This issue was passed upon by the jury. It is impossible

for the court to determine which witnesses told the truth. That was a matter within the peculiar province of the jury, and it cannot be said by this court that the decision of the jury is clearly wrong. *Plath v. Brunken,* 102 Neb. 467.

The defendant lays particular stress upon the fact that the interpreter, used by the plaintiff, and also later used by the defendant without objection then to his qualifications, could not speak the English language well, and that confusion resulted. However, we have carefully read the record, and, though there seems to have been some difficulty at times in getting some questions or answers understood, it appears that in each instance the matter was entirely cleared up and that the final answers were intelligent and responsive to the questions made. There is nothing to impeach the interpreter, nor to show that, in any particular instance, he did not, in the end, accurately and truthfully interpret each of the matters presented to him.

We attach little significance to the fact that the jury refused to allow the plaintiff interest on the money. It does not follow, where the jury refused to allow a claim in one instance, based on plaintiff's testimony, that the jury must be held to have disbelieved plaintiff's testimony given to substantiate the other claim.

The former decision in this case, entered upon the opinion by the supreme court commission, is set aside, and the judgment of the lower court is

AFFIRMED.

MARTIN L. BAILEY, APPELLEE, V. JAMES W. CHILTON, APPELLANT: GUY A. SILVIS ET AL., APPELLEES.

FILED OCTOBER 14, 1921. No. 21594.

1. **Pleading:** EQUITY. In an action to cancel deeds and recover title to real property, which is alleged to have been wrongfully and fraudulently procured from the owner, a prayer for alternative

relief, asking that damages may be awarded in case the property cannot be reconveyed, is proper, since equity, having once obtained jurisdiction of the controversy, will retain the case to assess damages in favor of the injured party, or to decree such other relief as may be just in the premises.

2. **Fraud:** SUIT TO CANCEL DEED: PARTIES. In such an action, it is proper to join, as one defendant, the person who fraudulently deprived the owner of his property, as well as the person to whom the property has been conveyed by him and who, it is alleged, took the property with notice of the fraud.

3. **Venue:** ISSUANCE OF SUMMONS TO ANOTHER COUNTY. Where an action is brought and service had upon one defendant in the county where the petition is filed, the action cannot be said to be rightfully brought in the county so as to authorize issuance of summons to a second defendant in another county, where it develops that the plaintiff is unable to present an issuable controversy as to the first defendant, and has no reasonable basis for a cause of action against him, and where no issue of fact is presented to establish that such defendant has any substantial interest in the suit adverse to the plaintiff.

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

C. L. Baskins, for appellant.

Hoagland & Carr, George N. Gibbs and *Evans & Evans, contra.*

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J.

This was an action based upon fraud brought against the defendants Chilton and Silvis to cancel certain deeds made by the plaintiff, and to recover title to the real estate thereby conveyed, and, in the event that such real estate could not be recovered, plaintiff sought an award of damages for the wrongful deprivation of his property. The lower court held that the property had been conveyed by defendant Chilton, plaintiff's immediate grantee, to defendant Silvis, an innocent purchaser, entered judgment for the plaintiff for damages against the defendant

Chilton, and the action as to Silvis was dismissed. Defendant Chilton appeals.

The sole question is one of the jurisdiction of the court over the person of the defendant Chilton, who was served by a summons sent to him in a county other than the county in which the action was instituted.

Plaintiff in his petition, for cause of action, stated that the defendant Chilton had, by fraudulent representations, procured a deed from plaintiff to Chilton, covering the real estate in controversy, and that defendant Chilton, having procured title to such real estate, had conveyed the same by deed to the defendant Silvis, and that the defendant Silvis took with knowledge of the fraud perpetrated upon the plaintiff and was not an innocent purchaser for value. The plaintiff prayed that his deed to the defendant Chilton and the deed from Chilton to defendant Silvis be canceled, and that the title to the real estate be quieted in him; but, in the event that the court should find that Silvis was an innocent purchaser and had acquired a good title as against the plaintiff, that the plaintiff be allowed to recover a money judgment against Chilton for damages.

The suit was instituted in Lincoln county, and service was had upon defendant Silvis in that county and upon defendant Chilton by service of summons upon him in Arthur county.

Defendant Chilton contends that he was improperly made defendant in the action, since the plaintiff's cause of action, if any, against him and against defendant Silvis could not be joined in the same proceeding. It is his contention that plaintiff's cause of action against him was one for damages and the cause of action against Silvis was one in equity to cancel deeds and quiet title. The gist, however, of the plaintiff's action is to recover property, or its value, of which plaintiff has been wrongfully deprived, and his claims against the two defendants, as set out in his petition, grow out of the same transaction, or series of transactions, between the par-

ties, all tending to one end. It would seem that the relief asked for was properly sought in one proceeding. 20 Cyc. 430. By the allegations of the plaintiff's petition, both defendants, Chilton and Silvis, acted together in fraud of the plaintiff's rights and to the end of depriving him of his property, and, where an action is brought for the purpose of canceling deeds fraudulently procured, and it is found that the property for some reason cannot be reconveyed to the party wronged, a court of equity, having attained jurisdiction, will hold the case for the purpose of giving complete relief, and may award damages in lieu of the return of the property. 9 C. J. 1263, sec. 211. As said in *Johnson v. Carter*, 143 Ia. 95, 100: "It is a well-settled proposition that, equity having once obtained jurisdiction of a controversy, if it be found that some act of the party charged has made the application of the specific remedy sought impossible or impracticable, the court will retain jurisdiction to assess damages in favor of the injured party, or to decree such other relief as may be just in the premises. * * * It would be a strange perversion of the spirit which pervades all rules of equity if, when a party, who has been defrauded of his title to land, brings the person who defrauded him into a court of equity, upon a demand for rescission of the conveyance, he can divest the court of jurisdiction by showing that he has conveyed the title to an innocent purchaser, and thus compel the injured party to resort to another forum for the recovery of damages." See, also, *Rakow v. Tate*, 93 Neb. 198.

Under the allegations of the plaintiff's petition, then, it was proper to join the defendants in the one action and to seek the relief prayed.

It is, however, further contended by the defendant Chilton that at the time of the institution of the proceeding it was fully known to the plaintiff that the defendant Silvis had not participated in the fraud, and that Silvis was, in fact, an innocent purchaser from Chilton; that it was, therefore, fully known to plaintiff that he had no

cause of action against the defendant Silvis, and that the allegations of the plaintiff's petition, so far as they relate to any cause of action against Silvis, were made without any foundation whatsoever in fact, and only for the purpose of a joinder of Silvis in the action, so as to procure service upon Silvis in the county, and by that means furnish a basis for the issuance of process against Chilton, as a codefendant, outside of the county where the action was brought.

The statute provides that, where the action is rightfully brought in any county, a summons may be issued to any other county against one or more of the defendants at the plaintiff's request. Rev. St. 1913, sec. 7627.

An action to quiet title must be brought in the county where the property is situated, and in such an action Chilton would have been a proper party defendant to the proceeding, though he had parted with his interest in the property by his deed to Silvis. 32 Cyc. 1347, 1348.

Before, however, the action for fraud or to quiet title can be said to have been rightfully brought against Silvis, it must appear that the plaintiff had some substantial basis for the action. We have made a careful examination of the entire record in this case, and find no attempt in the testimony at any place to show that Silvis was a party to the fraud with Chilton, nor to deny the fact that he was an innocent purchaser of the property. In fact, it does appear that the plaintiff, by his actions, has at no time controverted the rights of Silvis. He promptly moved out of the property at the request of Silvis, and has, until this suit, recognized his title. Upon an examination of all the evidence in the case, it appears clear to us that, as to the defendant Silvis, the action is purely nominal.

Had the plaintiff shown any reasonable ground to believe that Silvis was not an innocent purchaser, and had he introduced sufficient evidence to show that his action against Silvis was based upon probable cause, the case would have been different, for his action might have been

rightfully brought and the court have acquired jurisdiction for the trial of the issuable controversy as against Silvis, though it should prove, upon trial, that the plaintiff's evidence was insufficient to allow him to prevail. But in this case the plaintiff, by his testimony, presented no issue in support of a cause of action against Silvis. The testimony in the case bears upon the one issue of alleged fraud perpetrated by defendant Chilton and upon the question of the amount of damages. That Silvis was not a party to the fraud, but was an innocent purchaser of the property for value, is shown beyond any dispute, as to fact or inference, in the record.

Where an action is brought and service had upon one defendant in the county where the petition is filed, the action cannot be said to be rightfully brought in the county so as to authorize issuance of summons to a second defendant in another county, where it develops that the plaintiff is unable to present an issuable controversy as to the first defendant, and has no reasonable basis for a cause of action against him, and where no issue of fact is presented to establish that such defendant has any substantial interest in the suit adverse to the plaintiff. *Cobbey v. Wright*, 29 Neb. 274; *Dunn v. Haines*, 17 Neb. 560; *Allen v. Miller*, 11 Ohio St. 374; *Miller v. Meeker*, 54 Neb. 452; *Ayres v. West*, 86 Neb. 297.

For the reasons given, it is our opinion that the district court acquired no jurisdiction over the person of the defendant Chilton, and his objections to the court's jurisdiction should have been sustained. The judgment entered against defendant Chilton is

REVERSED.

DAVID BERLINER, APPELLEE, V. DIRECTOR GENERAL OF RAILROADS, APPELLEE: UNION STOCK YARDS COMPANY, APPELLANT.

FILED OCTOBER 14, 1921. No. 21619.

1. **Carriers:** SHIPMENT OF LIVE STOCK: DELAY. Where live stock is tendered to a carrier for shipment and the shipment is received and accepted and transportation begun, and where the carrier, through its default, fails to make connections with another carrier, and returns the cattle to its pens at the originating point of shipment, to hold them until the next day, for the purpose of delivery to the other carrier, then, the fact that it notifies the shipper of its failure to ship and informs him that the stock will be forwarded the following day, if agreeable, does not alone amount to a complete breach and a termination by the parties of the original shipping agreement and constitute a redelivery of the stock to the shipper, so as to give rise to a new agreement for shipment to be made on the following day, but constitutes only a delay in transportation under the original shipping agreement.
2. ———: ———: ———: MEASURE OF DAMAGES. The measure of damages in such a case is the difference between the value of the live stock at the time and place they ought to have been delivered and their value at the time of their actual delivery, or at the first available market after they were actually delivered.
3. **Appeal:** ADMISSION OF EXPERT TESTIMONY: PREJUDICIAL ERROR. In an action to recover for damages sustained during delay in transportation of live stock, where the testimony of plaintiff and defendant, on the question of the amount of damages, is in sharp conflict and evenly balanced, the improper admission of the testimony of one offered as an expert, purporting to show that the damages were in the amount contended for by plaintiff, *held* prejudicial error.
4. **Evidence:** EXPERT TESTIMONY. It is error to allow a witness, offered as an expert, to give his conclusions on the values of live stock, bearing upon the measure of damages, where the hypothetical question put to him does not contain sufficient facts, based upon some evidence introduced, to fairly reflect an issue tendered by the case, and to furnish a sufficient premise upon which to base an intelligent conclusion.

APPEAL from the district court for Douglas county;

CHARLES LESLIE, JUDGE. *Affirmed in part, and reversed in part.*

Brown, Baxter & Van Dusen, for appellant.

Byron Clark, Jesse L. Root, J. W. Weingarten and *Walter W. Hoye, contra.*

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J.

This was an action brought by the plaintiff against the Union Stock Yards Company, of South Omaha, and the Chicago, Burlington & Quincy Railroad Company, to recover for damages caused by an alleged unreasonable delay in transportation of live stock. Verdict and judgment was in favor of the plaintiff and against the Union Stock Yards Company, but against the plaintiff and in favor of the railroad company. The action as to the railroad company has been dismissed. The defendant Union Stock Yards Company appeals.

The defendant urges two grounds for reversal: (1) That the court erroneously instructed the jury as to the measure of damages; and (2) improperly admitted certain testimony.

The jury were instructed that the measure of damages would be the difference between the value of the cattle at St. Joseph at the time they should, without any unreasonable delay, have been delivered, and their value upon the first available market after delivery. Defendant concedes that such measure of damages is the correct one in cases of a delay in transportation, but contends that this is not a case of delay in transportation, but one of a complete failure to perform a contract, or undertaking of carriage, and, in fact, a refusal to carry, and that the measure of damages should have been the difference between the market value of the stock at South Omaha at the time of breach and the market value at St. Joseph at the time the stock should have arrived.

The testimony relative to that question shows that the plaintiff, a dealer in live stock, on October 10, 1918, was holding, in the yards of the defendant company at South Omaha, two car-loads of beef cattle. Plaintiff had been unable to make a desirable sale of the cattle in Omaha, and decided to ship to St. Joseph, Missouri. In order to conceal his identity as owner and shipper of the stock, he acted through the live stock commission firm of Donohue & Randall, of South Omaha, and used the name of Hylen, book-keeper of that firm, as shipper and consignor. The stock was tendered to the defendant stock yards company for shipment to St. Joseph, on October 10, 1918. The defendant accepted the shipment in ample time, under its rules, to have allowed delivery to the railroad for the train scheduled to leave at 8:40 that evening. Defendant, however, through some fault or neglect, did not get the cattle loaded and the cars switched upon the proper tracks until between 9 and 10 o'clock, and after this train had departed. The cattle were left in the cars until 3:10 a. m., when they were unloaded by the defendant and returned to the pens of the stock yards company.

On the following morning the agent of the defendant Union Stock Yards Company telephoned to Hylen, whom he properly believed to be the owner and shipper of the stock, that defendant had failed to load the stock in time for shipment on the train of the previous evening, and informed Hylen that defendant "would see that the stock were fed and watered, and that they would go out that night." To this Hylen said, "That was all right." The uncontradicted testimony is that Hylen gave no instructions as to shipment, disposal, care or custody of the stock, nor did he agree to assume to take charge of it The defendant did not, on the other hand, disclaim any obligation to continue to care for the stock, or to continue in the complete performance of its agreement, already partially undertaken. The telephone conversation outlined above seems to have been all that was said upon

the subject.

During that day the cattle were placed in the yards belonging to the defendant company, customarily used by the commission firm above mentioned, but it does not appear that the commission firm, nor that Hylen, was given any notice as to the exact disposal of the stock. The exclusive control of the defendant company over the stock during that day was in no way interfered with nor interrupted.

We do not think these facts bear out the contention of the defendant that the obligation, arising out of the agreement to ship, made on October 10, had been terminated by the telephone conversation on the 11th, and that a redelivery of the stock had been tendered and accepted by the shipper, and that the shipment of the stock on October 11 became a new shipment. On the other hand, it appears that the stock had been, on October 10, tendered for shipment; that it had been accepted for shipment by defendant, and that transportation had begun; that, through the failure of the defendant, a delay of one day had been caused, and that the defendant had notified the shipper of that delay.

Though the plaintiff may be said to have had an opportunity to retake the stock and sell it upon the Omaha market, he was not bound to do so. He had the right to expect and demand a complete performance of his agreement, which had been undertaken by the defendant, and to require an entire transportation. The conversation between the parties would indicate that they construed their relation as a continuing one, and that the occasion was considered by them as a mere delay in transportation, and not as a complete breach of the agreement to transport and a redelivery to the shipper of the live stock agreed to be transported. The shipment, furthermore, went out on the original billing made on the previous day. Under the facts stated, it seems clear to us to be a case of delay in transportation merely. The defendant knew that the stock was being shipped to St. Joseph, to be tendered on

the market there, and the plaintiff, by reason of the unreasonable delay caused by the defendant, was entitled to those damages which naturally followed, and as would fairly and reasonably be supposed to have been in contemplation of the parties when the shipping contract was made.

The court's instruction, therefore, that the plaintiff was entitled to recover the difference between what the cattle would have sold for on the market at St. Joseph, had there been no unreasonable delay, and what such cattle would have sold for on the first available market after they actually did arrive, was the proper measure of damages.

Even where a shipping contract has been entered upon between the parties and where there has been a failure to accept and receive the shipment according to the agreement, there are decisions holding that the plaintiff is entitled to recover according to the measure of damages just stated. *Chicago, B. & Q. R. Co. v. Todd,* 74 Neb. 712; *Levy v. Nevada-California-Oregon R. Co.,* 81 Or. 673, L. R. A., 1917B, 564.

The defendant further contends that certain testimony, offered as that of an expert, of one Pruss, a dealer and shipper of live stock, and given in response to a hypothetical question, should have been excluded.

The question propounded to the witness was as follows: "Assuming, Mr. Pruss, that 47 head of cattle, weighing—western cattle of a class of good to choice—weighing in Omaha on October 8th about 53,590 pounds, were shipped on the 11th, the evening of the 11th day of October, 1918, to South St. Joseph, arriving there on October 12, 1918, being held in the stock yards pens Saturday, Sunday, and were placed on the market Monday morning following, and assuming further that the market for that class of cattle in South St. Joseph on October the 11th, 1918, was $13.50 to $14.75, could you state what the difference in value of such cattle would be on Monday as against Friday?"

The witness was allowed to answer this question and to give his conclusions on value over the objection of the defendant. The question put to the witness called for his opinion as to the depreciation in value of the stock, but was quite incomplete as a hypothetical question, by reason of its failure to inform the witness of the weight of the cattle at the time of delivery to defendant on October 10, the condition of the cattle then as compared to the condition after arrival at St. Joseph, the amount of shrinkage or excess shrinkage which they had sustained, their appearance after their arrival, the condition and circumstances surrounding the shipment, the care and attention they had received, the time consumed in transit and in pens, and the prevailing market prices on October 14, the time of the first available market after arrival at St. Joseph, as compared to the market price at the time the cattle should have arrived on October 11. In other words, the question calls for the comparison in value of the cattle on the St. Joseph market on October 11 and on October 14, without in any way explaining to the witness or giving sufficient data from which the witness could ascertain the difference in weight or condition of the cattle on those two respective dates, and without informing the witness what the market price of cattle was at St. Joseph on one of the dates in question. Of these facts the record does not show that the witness had any knowledge.

The answer of the witness, therefore, to the question appears to have been purely guess and conjecture on his part. His answers to the questions tendered should have been excluded. The testimony of this witness was to the effect that there would have been a depreciation in value of the cattle from October 11 to October 14 of somewhere between $800 and $1,100.

The only other testimony in behalf of the plaintiff, upon the condition and value of the stock, was the testimony of plaintiff himself. His testimony was somewhat uncertain and indefinite, but, in its final analysis, was to the

effect that there had been a shrinkage in weight to the extent of 40 pounds a head between the time, on October 11, when the stock was delivered to the defendant, and the time, on October 14, when the first available market was obtainable after delivery at St. Joseph, and that the normal shrinkage between Omaha and St. Joseph would not have been more than 20 pounds. His testimony, therefore, showed that there had been a loss of 20 pounds a head, due alone to excess shrinkage. He further testified that the hides of the cattle were muddy and that the cattle appeared stale, and that the value of the stock was from $800 to $1,200 less on Monday, October 14, in their then condition, than their value would have been on Friday, October 11, in the condition in which they should have arrived.

In behalf of the defendant, a commission agent at St. Joseph, the one to whom the plaintiff had shipped his stock, who saw the cattle while they were there in the pens at St. Joseph, testified to the effect that the stale appearance of the cattle would have depreciated their value from 25 to 50 cents a hundred pounds only, making a total depreciation on that account of somewhere from $184 to $268, and he further testified that the normal average shrinkage in weight of such cattle, shipped from Omaha to St. Joseph, was in the neighborhood of 40 pounds a head. His testimony, therefore, in direct contradiction to that of the plaintiff, was to the effect that there had been no excess shrinkage in the weight of the cattle, due to delay in transit, and that their depreciation in value, owing to their stale appearance, would be no more than $268.

It is the contention of the plaintiff that, though the testimony of Pruss may have been improperly admitted, it could not have been prejudicial, since the testimony given by the plaintiff stands uncontradicted in the record. In view of the testimony of the plaintiff's commission agent, who testified in behalf of the defendant, as we have above outlined, we are unable to agree with plaintiff that

plaintiff's testimony stands uncontradicted, nor can we come to the conclusion that the wrongful admission of the incompetent testimony, given by the witness Pruss, should, under the ruling in *Pullman Palace Car Co. v. Woods*, 76 Neb. 694, be held to be harmless error.

The vital question in this case, and practically the only question left for the jury to determine as the case finally resolved itself, was the question of the amount of damages—the extent of the depreciation in value, due to excess shrinkage and the cattle becoming stale. With the sharp conflict between the testimony of the plaintiff and that of the commission merchant at St. Joseph, we cannot say that the defendant was not prejudiced by the incompetent testimony of Pruss, purporting to show that the depreciation in value of the stock was from $800 to $1,100. 4 C. J. 997, sec. 2980. The plaintiff's testimony, being that of an interested witness, would no doubt have been given less weight by the jury had it not been corroborated and supported by the testimony of the witness Pruss, testifying as an expert, and who, by his testimony, showed that he had no interest or concern in the outcome of the case.

The judgment of the lower court dismissing the action against the Director General of Railroads is affirmed, but the judgment against the Union Stock Yards Company is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART, AND REVERSED IN PART.

JOSEPH C. WHEELER V. STATE OF NEBRASKA.

FILED OCTOBER 14, 1921. No. 21828.

Rape: CORROBORATIVE EVIDENCE. In a prosecution, charging attempt to commit rape, where defendant admitted being with prosecutrix, but contended that what he did was with her consent, *held*, that her complaint to her mother, made immediately after the alleged assault, the condition of her clothing, the bruised, scratched and bleeding condition of her body, and the shattered condition

of her nervous system, furnished sufficient corroboration of her story that the assault made upon her was against her will and felonious.

ERROR to the district court for Pawnee county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Byron Clark, Jesse L. Root, Matthew Gering and *J. C. Dort,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J.

Criminal prosecution on a charge of attempt to commit rape. Accused was convicted and brings the case here for review.

The contention is that the story of the prosecutrix is not corroborated.

The testimony of the prosecutrix is that she had met the defendant, who, during the absence of his wife from home, was boarding at the hotel where she was a waitress; that, after an acquaintance of a few days, defendant, about 8 o'clock in the evening, offered to drive her home in his automobile, which offer she accepted. As they approached the house where prosecutrix was living with her mother, defendant drove toward the country, and after they had been in the car about five minutes he exhibited his amorous inclinations by throwing his leg over hers, and continued his advances during the drive, grabbing her nose, biting and pinching her legs, and telling her that she "had to come across;" she in the meantime endeavoring to free herself from his embraces. After driving some distance, the car stopped and the door was opened, either by the defendant or by the prosecutrix falling against it, and both parties got out of the car. Defendant then endeavored to throw her down, kicked her ankles and threw her legs out from under her. During

the encounter her head struck the car door and she lost consciousness. When she recovered the defendant was on top of her and had a portion of her clothing off and her dress up around her waist. Prosecutrix believed that he had sexual intercourse with her while she was unconscious, but was unable to testify positively to the fact. She then endeavored to run away, but defendant shoved her in the car and took her back to town, stopping close to her mothers house.

The mother of prosecutrix testified that she saw the car draw up near her house about 10 o'clock in the evening, and saw her daughter run across the lawn; that the prosecutrix asked her to "open the door quick," that "old Wheeler had about killed her," and that when she did open the door she saw prosecutrix with her hair down and her clothes in her hand.

The prosecutrix was in an hysterical condition, described by the various witnesses as follows: Her hair was down on her shoulders; her face was bruised and scratched; most of her underclothing off; her dress torn; her stockings down to her feet. There was a swollen place on her head; one eye was nearly closed and her lip was mashed; her hands and wrist were scratched, and she appeared scratched all over from her waist up; her back was bruised and skinned in many places, and she was in an extremely nervous and hysterical condition.

Dr. E. L. McCrea, a physician of 20 years' practice, who was immediately called to render medical attention, described her condition as follows: "This girl was scratched all over the chest and back in every way, blood oozing out of those scratches. She had a cut across the nose about where her glasses would come. She had a cut over an eye; she had a lump on the side of her head, on the right side. She had a large black spot at the angle of the jaw, the left side. She had a large blue spot on the shoulder. All along down the spine there was a blue spot, as far as her short corset came, that I noticed. And that is all that I exposed, more than on the right

limb, about six inches from the knee on the inside, was a spot about two by three inches denuded of the skin." The doctor also testified that the woman was nervous and crying; shook all over and was in a state of excitement, and that her pulse was running very high. Three or four days later, this doctor again examined the prosecutrix, and found the upper portion of her body bruised, and upon an examination of her vagina found a tear of about a quarter of an inch at the lower part. Upon cross-examination the doctor testified that her breasts were scratched and bleeding, and that the injury to her sexual organ could have been caused by the male organ of a man in the act of intercourse, and that he had observed that effect from intercourse on many different occasions.

The afore-mentioned description of the woman's condition is substantiated by the testimony of her aunt, and by the testimony of John McClung, the sheriff, who was called in immediately after the assault and saw the parties about 2 o'clock in the morning.

The defendant took the stand in his own behalf; admitted he took the prosecutrix out riding the evening of May 13, 1920; insisted that she made all the advances to him; that she embraced him against his protest and also endeavored to kiss him; that the car stopped of its own accord because of some accident to the machinery; that she asked him whether they would get out or stay in, and that she agreed to everything that was done that night and made no protest whatever. Defendant, however, declined to say whether or not he had sexual intercourse with the prosecutrix, on the ground that to answer the question would tend to incriminate him.

The immediate complaint made by the prosecutrix to her mother; the condition of her clothing; the bruised, scratched and bleeding condition of her body; and the completely shattered condition of her nervous system, all shown to exist at the time defendant left her on the road near her home, directly following the alleged assault, are clearly sufficient to furnish corroboration of her story

that a felonious assault had been made upon her, and, to our minds, quite conclusively refute the contention of defendant's counsel that prosecutrix had voluntarily engaged in sexual intercourse with the defendant. *Hammond v. State*, 39 Neb. 252; *Kotouc v. State*, 104 Neb 580; *Robbins v. State, ante*, p. 423.

We find no reversible error in the record, and the case is

AFFIRMED.

HENRY DAPPEN ET AL., APPELLANTS, V. DAN H. WEBER ET AL., APPELLEES.

FILED OCTOBER 14, 1921. No. 21785.

1. **Schools and School Districts: DE FACTO HIGH SCHOOL DISTRICT.** Where a petition is filed with the county superintendent of schools under the proviso of section 6, ch. 243, Laws 1919, containing the names of persons whom he holds to be not less than 51 per cent. of the school electors residing outside of an existing organized high school district and adjoining said high school district, asking that said territory be consolidated with said high school district, and he issues his order thereon declaring such territory to be annexed to and consolidated with said high school district and numbers the new or consolidated district, and he and the superintendent of public instruction recognize said consolidated district to be a legal entity, *held*, that said consolidated district is a *de facto* school district.
2. ———: ———: QUO WARRANTO. Where a *de facto* school district is shown to exist, its legality cannot be attacked by injunction or by other collateral proceeding, but must be tested by *quo warranto*.
3. ———: OFFICERS: QUO WARRANTO. Where it appears that certain persons are acting as the board of education of a school district under color of right, and they are recognized as such by the county superintendent of schools and the superintendent of public instruction, *held*, that the right to their offices cannot be questioned by injunction, but must be tested by *quo warranto*.

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

Dort & Cain, for appellants.

John Wiltse, contra.

Heard before MORRISSEY, C.J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ., ALLEN and REDICK, District Judges.

ALLEN, District Judge.

May 14, 1920, Henry Dappen, M. C. Riley, Joseph Kean, Alfred Ramsey, Mike J. Tiehen, Charlie Schutte, Ambrose Tiehen, Joseph Lanning, George Funk, John Lyons, and George Utermohlen, plaintiffs, for themselves and on behalf of "one hundred thirty other qualified resident school electors and duly assessed taxpayers," filed their petition in equity in the district court for Richardson county against Dan H. Weber, county superintendent of schools, and Joseph G. Heim, M. U. Riley, Gertrude Heim, L. L. Kinsey, H. W. Heim, and Daisy Smith, as the board of education of high school district No. 95 and acting as the board of education of consolidated district No. 15, to obtain a decree adjudging void the order of said Weber as county superintendent of schools of March 24, 1920, attaching the major part of districts Nos. 34, 35, 42, 43, 44, and 98 to and consolidating the same with Dawson high school district No. 95, and out of said adjoining territory and said Dawson high school district No. 95 creating consolidated district No. 15.

The substance and purpose of the petition are well stated in the following excerpt from the brief of counsel for appellants: "Upon May 14, 1920, Henry Dappen, and ten other school electors and taxpayers, filed a petition in behalf of themselves and one hundred thirty other school electors and taxpayers in the district court of said county, attaching thereto the record of the proceedings before the county superintendent, and alleging that the petition filed with the county superintendent was insufficient and that the order of annexation is void; alleging that the act under which the annexation was pretended to be made was void and unconstitutional; that the statutes pertaining to annexation had not been complied with, and pray-

ing that the annexation be declared void, the territory be restored as it previously existed, and that the defendants be restrained as county superintendent and members of the school board from exercising any jurisdiction or powers under or because of said order of annexation." "The answer admits that no written notice was given of the organization of school district No. 15, and no election was held for the purpose of organizing said school district and for the annexation; that, by virtue of the order of the county superintendent, the annexed territory was annexed to school district No. 95 and was thereby made a part of consolidated school district No. 15; that petitioners' protest had no valid force or effect and the county superintendent had no authority to grant the request."

Counsel for the defendants admits that "This action is brought to test the legality of such annexation or consolidation and to set aside the order of the district court holding such consolidation lawful."

Consolidated district No. 15 was organized under that part of section 6, ch. 243, Laws 1919, which reads as follows: "The new district when organized shall be governed by all laws enacted for the government of schools; provided, that if the proposed new district contains an organized consolidated or high school district, when a petition of not less than fifty-one (51%) per cent. of the school electors in said new district residing outside of the existing organized consolidated or high school districts shall be filed with the county superintendent, then he shall declare such territory to be so annexed, conditioned upon the approval of the board of education of said existing districts."

As we have just seen, the avowed purpose of this action is to obtain a decree setting aside and holding void consolidated district No. 15, and to prevent the board of education of Dawson high school district No. 95 from exercising authority over the adjoining territory as a board of said consolidated district. It is not claimed that the defendants, Joseph G. Heim, M. U. Riley, Gertrude Heim,

L. L. Kinsey, H. W. Heim, and Daisy Smith, are not the legally qualified board of education of Dawson high school district No. 95, but it is urged that the organization of the consolidated district was defective (1) because, while the petition presented to the county superintendent for its establishment purported to contain over 51 per cent. of the names of the school electors in the adjoining territory, as a matter of fact it contained less than that number; and (2) because the order of the county superintendent was not approved by the board of education of the district from which the adjoining territory was taken. But the record shows that the county superintendent and the superintendent of public instruction recognized consolidated district No. 15 as a legal entity and the board of education of Dawson high school district No. 95 as its officers.

This being an appeal from the judgment of the district court in a suit in equity dismissing plaintiffs' action without day, it is to be tried *de novo* on the record there made, and we are required to "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Rev. St. 1913, sec. 8198. It is our duty, under such circumstances, to affirm the judgment of the district court if, for any sufficient reason appearing in the record, it was correctly entered.

Consolidated district No. 15 was at least a *de facto* public quasi corporation or governmental subdivision of the state for educational purposes, and the defendants, Joseph G. Heim, M. U. Riley, Gertrude Heim, L. L. Kinsey, H. W. Heim, and Daisy Smith, were, respectively, *de facto* officers thereof acting in good faith and under color of authority. 22 R. C. L. 681, sec. 17; 24 R. C. L. 564, sec. 7.

In *Osborn v. Village of Oakland,* 49 Neb. 340, it is said: "It is patent that the object and purpose of this proceed-

ing is to test the corporate existence of Oakland as a city of the second class, and the question presented is whether injunction is the appropriate action. It is a general rule, supported by the decisions of this and other states, that equity will not grant a party relief by injunction, where he has a plain and adequate remedy at law. It is likewise a well-established doctrine in this country that *quo warranto* is the proper remedy to inquire whether a municipal corporation was legally created, as well as to oust persons exercising the privileges and powers of corporate officers when the municipal corporation has no legal existence. *State v. Uridil,* 37 Neb. 371; *State v. Dimond,* 44 Neb. 154; *State v. Mote,* 48 Neb. 683; High, Extraordinary Legal Remedies (3d ed.) sec. 684. An information in the nature of a *quo warranto,* and not a bill for injunction, is the appropriate remedy."

In 24 R. C. L. 565, sec. 8, it is said: "The acts of a *de facto* school district, one operating under color of right, are valid. If a school district has been formed under color of law, its legality can only be determined by a suit brought for that purpose in the name of the state, or by some one under the authority of the state, who has a special interest affected by the existence of such corporation, and the fact that the complainant is a taxpayer is not sufficient. It is generally stated that the legality of the formation of a school district can be determined only in a direct proceeding and cannot be questioned collaterally."

The following authorities are in point: *State v. Stein,* 13 Neb. 529; *State v. Mayor and City Council,* 28 Neb. 103; *Hotchkiss v. Keck,* 84 Neb. 545; *State v. Northup,* 79 Neb. 822; *State v. Whitney,* 41 Neb. 613; *State v. Several Parcels of Land,* 80 Neb. 11; *School District v. Wolf,* 78 Kan. 805, 20 L. R. A. n. s. 358; *State v. Olson,* 107 Minn. 136, 21 L. R. A. n. s. 685, and notes; *In re Sawyer,* 124 U. S. 200; *State v. Van Beek,* 87 Ia. 569; *Ward v. Sweeney,* 106 Wis. 44; *Demarest v. Wickham,* 63 N. Y. 320; *Newman v. United States,* 238 U. S. 537; *Reynolds*

v. Moore, 9 Wend. (N. Y.) 35; *Ex parte Keeling,* 54 Tex. Cr. Rep. 118; *Attorney General v. Utica Ins. Co.,* 2 Johns. Ch. (N. Y.) *371; *Hovelman v. Kansas City H. R. Co.,* 79 Mo. 632; McQuillin, Municipal Ordinances, sec. 349, and note; 1 Abbott, Municipal Corporations, sec. 32, and note; Cooley, Constitutional Limitations (7th ed.) 363, 364; 10 R. C. L. 343, sec. 93; 14 R. C. L. 374, sec. 76.

This rule is applicable to school districts, as, like municipal corporations, they obtain their franchises from the state and are created for public purposes and to carry out strictly public policies. This view of the case renders it unnecessary to discuss other points presented in the briefs.

The judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed February 16, 1922. *Former judgment of affirmance adhered to.*

1. **Schools and School Districts:** ANNEXATION OF TERRITORY: PETITION: SIGNATURES. Signatures to the petition for annexation in the instant case may be legally attached by an authorized agent of the petitioner.

2. ———: ———: ———: WITHDRAWAL OF NAMES. "Petitioners for the annexation of territory to an existing high school district, under section 6 of the act above mentioned, may withdraw their names from the petition by written request at any time before action has been taken by the county superintendent." *State v. Warrick, ante,* p. 750.

3. ———: ———: SUFFICIENCY OF PETITION. Petition, under section 6, ch. 243, Laws 1919, for the annexation of certain described territory to an existing school district thereby to form a new consolidated or high school district, examined, and *held* to be sufficient.

Heard before LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

ALDRICH, J.

The former opinion in this case was based upon the rule that the plaintiffs had pursued the wrong procedure,

and that the action should have been in *quo warranto.* The plaintiffs have moved for a rehearing, on the ground that that objection was not raised in the trial court, nor presented in the briefs, and that the court should not have so determined the case *sua sponte,* without allowing a hearing to the parties in litigation on the question. A rehearing was therefore granted. Since the objection to the question as to whether or not the injunction was the proper remedy was not raised in the trial court, nor in the briefs on appeal here, we believe the case should be determined on the merits and on the questions raised on the trial and upon the original briefs. *Taylor v. Independent School District,* 181 Ia. 544.

The legislative session of 1919, for the purpose of facilitating and disseminating opportunities for general education for the benefit of pupils living in country districts, passed a law beneficial for these purposes, and provided for redistricting the various counties into consolidated high school districts. The principal attack of appellants is centered upon section 6, ch. 243, Laws 1919, which section is in words and figures as follows:

"If the election results are favorable to the establishment of said new school district, the county superintendent within ten (10) days thereafter, shall call a meeting of the electors as provided by law for the organization of new districts; at said meeting the qualified electors shall proceed to elect a school board as provided by law. The new district when organized shall be governed by all laws enacted for the government of schools; provided that if the proposed new district contains an organized consolidated or high school district, when a petition of not less than fifty-one (51%) per cent. of the school electors in said new district residing outside of the existing organized consolidated or high school districts shall be filed with the county superintendent, then he shall declare such territory to be so annexed, conditioned upon the approval of the board of education of said existing districts. Blank petitions for this purpose shall be furnished by

the state superintendents. Provided, further, any parts or fragments of old districts which may be left outside of the boundaries of the new districts, in the adjustment and operation of this act, shall be provided for by the districting committee, which may add temporarily such parts or fragments to other districts."

A careful analysis of this section is the real basis of the organization and redistricting of the territory involved, and to do this it is necessary to follow the provisions of chapter 243, Laws 1919, and, if they have been complied with, then the district in question is entitled to a consolidated high school.

On March 23, 1920, a petition was filed with the county superintendent of public schools asking that certain territory mentioned and described in the petition be annexed to and consolidated with the Dawson High School District No. 95, thus forming a consolidated high school district No. 15, in this respect conforming to the demands of the statute.

On March 23, 1920, the school board of Dawson High School District No. 95 approved the petition of annexation, as appears of record herein. Then followed, on the 24th of March, a proclamation of the county superintendent declaring that the territory to be so annexed had been formally declared. In this respect section 6, *supra*, had been complied with. No election was required for the reason that the procedure by petition met all requirements of an election.

Section 6703, Rev. St. 1913, is not inconsistent with chapter 243, Laws 1919, because the two statutes were enacted for entirely different purposes.

The petitions in question were addressed to the county superintendent as provided by law. They indicated the purpose of the petitioners and described the territory which the petitioners sought to have consolidated with Dawson High School District. These records were in the office of the county superintendent before he acted. The Dawson high school board consented and the county

superintendent proclaimed the territory annexed, and that was all that was necessary.

The question which presents itself for consideration is whether the number of electors signing the petitions was sufficient in accordance with the requirements of the statute under consideration. In some instances it is clearly shown that certain signers were not entitled to be considered as electors under the statute.

The electors who signed the petition asking the school district to make the consolidation or annexation have no right to withdraw their names from the petition after it is presented and finally acted upon by the county superintendent. *Sim v. Rosholt*, 16 N. Dak. 77, 11 L. R. A. n. s. 372. As further elucidating the proposition in issue, see *Hudson v. Bayonne*, 54 N. J. Law, 293.

It is admitted by the parties that there were 167 electors in the district proposed to be annexed. It is the contention of the defendants that 153 only of those electors were qualified to sign the petition, since only that number had children of school age, or had property assessed in their names upon the assessment roll of the county. There were 102 signatures upon the petition, 11 of whom, it is conceded by both sides, were not qualified to sign, because of the fact that they had no school children, nor property assessed in their names. Two others had property, but their property was not assessed in their names. There were 7 of the signatures to the petition which were proved to be not genuine. One of the persons who signed the petition was not a resident of the district proposed to be annexed. Two petitioners, it is shown, withdrew their names before the petition was presented to the school superintendent. This made a total of 23 names which, it may be conceded without passing upon their validity, should be withdrawn from the petition. Still there are 79 signatures left, which would be, even according to defendants' contention, 51 per cent. of the qualified electors in the proposed district.

The defendants claim that there were 11 persons who

signed under a misapprehension of the facts. Some thought an election was to be called; some thought they would have to pay tuition if they did not sign; and some were under other false impressions. However, it does not appear that any false representations of fact were made by the circulators of the petition, nor that there was any fraud perpetrated. There is no reason why these 11 signatures should not be counted.

There are four signatures, the names of Elizabeth White, Mrs. G. B. Steits, Mrs. Etta Nichols, and Cordelia Mullens, which were also not genuine signatures of the parties; that is, signatures they purported to be, but which were written on the petition by their husbands. It is claimed by the defendants that these signatures should not be counted. It appears that in the case of Mrs. White and Mrs. Steits their husbands signed in their presence after talking the matter over with them. In the case of Etta Nichols the matter was talked over by herself and husband, and she requested her husband to sign her name. In the case of Cordelia Mullens both husband and wife were sick in bed at the time the petition was brought to the house. They had talked together as to what position they would take in the matter, and, before signing, her husband spoke to her about signing the petition. He then went into the next room and there signed both her name and his own. She did not afterwards object to her signature having been placed upon the petition. We think the circumstances are sufficient to show that the signatures were duly authorized. What a party may do, when done, he may assent to so as to bind himself. We find this proposition in 2 C. J. 472; *Wilson v. Hayes,* 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196; *Cram v. Sickel,* 51 Neb. 828.

All of this discussion up to date leads to the fair and impartial conclusion that the petition in question logically meets the requirements of the statute made and provided for cases like this. We are therefore led to the conclusion that this is a legal and valid statute performing a

great good to the school children of this state and has for its object and purpose the wise and beneficent result to give to school children of the country districts the advantages and opportunities of a high school education.

Many of the propositions discussed by counsel have been discussed and thoroughly gone into and the correct opinion arrived at in the case of *State v. Warrick, ante,* p. 750.

It is unnecessary for us to pursue the subject further. We hope we have made ourselves clear in discussing the provisions of the statute, and that the people of this district in question may have the benefit of a high school as provided for. We could not have done otherwise than affirm this case, for the provisions and requirements as found in chapter 243, Laws 1919, preclude us from having any other view.

It is our duty, plainly as a matter of law, to affirm this case.

AFFIRMED.

WALTER CHRISTIANCY V. STATE OF NEBRASKA.

FILED OCTOBER 14, 1921. No. 21830.

1. **Criminal Law**: INFORMATION: ELECTION. Where an information, having reference to a single transaction, contained two counts, one for statutory rape and the other for an assault with intent to commit rape upon the same woman, and the defendant's motion to require the state to elect was denied, *held* that the ruling was without prejudice.

2. ———: CHALLENGE TO VENIREMAN. Where the defendant's challenge of a venireman for cause was denied, but the record shows that he was subsequently excused, *held* the defendant was not prejudiced thereby.

3. ———: ———. Where the court sustained the state's challenge to a venireman because of his business relations with counsel for defendant, and a competent juror, who was not challenged, took his place and was retained, *held* that the ruling was not prejudicial.

4. ———: JURY. The defendant was not entitled to a specific juror; if the members of the panel possessed the requisite qualifications and constituted an "impartial jury," that was all he could ask.

5. ———: CROSS-EXAMINATION OF ACCUSED. Where on cross-examination the county attorney asked the defendant a question not within the range of the direct examination, but the court promptly sustained an objection thereto and informed the county attorney that the question was improper and should not have been asked, and at the defendant's request and on his own motion so instructed the jury, *held* that there was no error.

6. ———: ———. Where, during the introduction of evidence, the county attorney, for the ostensible purpose of thereby giving evidence of his age, requested the defendant to stand up in the presence of the jury, but it subsequently appeared that there was no dispute that the defendant at the time of the commission of the offense was more than 22 years of age, and nothing to show that he complied with the request, *held* to be without prejudice.

7. ———: INSTRUCTION AS TO CHASTITY. An instruction in these words approved: "As to the question of the previous chastity of Gladys Dyer, it is not necessary that her testimony that she was not previously unchaste be corroborated. It is sufficient as to this point if you are satisfied by the evidence, beyond a reasonable doubt, that she was not unchaste previous to the time of the alleged act of sexual intercourse complained of in the information."

8. ———: ———. The court instructed the jury that it was necessary for the state to prove, beyond a reasonable doubt, that the prosecuting witness was previously chaste, *held* to be the equivalent of "not previously unchaste."

9. ———: ———. The phrases "previously chaste" and "not previously unchaste" are synonymous; "previously chaste" is an affirmation that the prosecuting witness was "not previously unchaste."

10. ———: INSTRUCTION AS TO VERACITY. The following instruction approved: "If you believe that any witness has knowingly sworn falsely to any material fact in this case, you may, if you see fit to do so, disregard all of the testimony of such witness."

11. **Rape:** INSTRUCTION. The defendant's request that the jury be instructed, in substance, that a "female under 18 years of age and over 15 years of age, who had improper or unlawful sexual intercourse with a man, is not within the act," *held* properly refused.

12. ———: ———. The following instruction approved: "The ob-

ject of the statute under which the information is drawn is to protect the virtuous maidens and the undefiled virgins of the state; and a female under 18 years of age and over 15 years of age, who has had unlawful sexual intercourse with a male, is not within the act."

13. **Evidence** examined, and *held* sufficient to support verdict.

14. **Rape:** EXCESSIVE SENTENCE. Judgment and sentence reduced to three years' imprisonment in the penitentiary.

ERROR to the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Affirmed: Sentence reduced.*

Charles H. Sloan, Frank W. Sloan and *Thomas J. Keenan,* for plaintiff in error.

Clarence A. Davis, Attorney General, John Barsby, Robert B. Waring and *C. L. Dort, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., ALLEN and REDICK, District Judges.

ALLEN, District Judge.

The plaintiff in error was convicted by a jury in the district court for Fillmore county of the crime of statutory rape, and from a judgment of guilty thereon and the sentence to seven years' imprisonment in the penitentiary, he has brought the case to this court for review. For convenience, the parties will remain classified as they were in the district court.

The information contains two counts, in the first of which it is charged that on September 18, 1920, the defendant, in Fillmore county, committed a statutory rape on the person of Gladys Dyer, and in the second count that at the same time and place he committed an assault upon her with intent to commit rape.

The defendant moved the court for an order requiring the state to elect on which count of the information it would proceed, (1) because "said counts contain different and repugnant charges," and (2) because "said charges contained in said counts are based upon fundamentally different statutes, which statutes severally denounce

fundamentally different acts." This motion was denied, and the defendant assigns the ruling of the court as error. The second count was superfluous, as the defendant could have been convicted of an assault with intent to commit rape under the first count. *Hubert v. State,* 74 Neb. 220; *Baxter v. State,* 80 Neb. 840. However, the county attorney dismissed the second count before the case was submitted and there was no error in the ruling.

It is contended that the court erred in overruling the defendant's challenge to a proposed juror, Charles Norton. Mr. Norton on his *voir dire* examination said that he had read quite an extended account of the transaction in the Nebraska Signal, which gave the nature of the charge and purported to state some facts connected with it, and he supposed he did, at the time, form a natural mental conclusion as to the guilt or innocence of the defendant from what he had read. He had talked with no one who claimed to know the facts and had heard or read nothing to change his opinion, and had the opinion yet, and supposed that it would take some evidence to remove it. He stated on cross-examination that he could give the defendant the benefit of the presumption of innocence until he was proved guilty, if that was the law, and if the court instructed the jury that it was necessary to prove the defendant guilty beyond a reasonable doubt before he could be convicted, he could give him the benefit of it, and that his present opinion would in no wise control his verdict. A careful examination by the court disclosed that he had no opinion and was, within the rule recognized in *Whitcomb v. State,* 102 Neb. 236, qualified to act. But the record shows that the jury was composed of Wm. McNamara, Chas. Rocole, Carl Sandburg, M. L. Schelkopf, F. H. Sauer, John McCabe, Loren Teter, Frank Yetman, Lou Schafer, Arno Gunderman, Frank Hrdy, and Mel Martin, and that Mr. Norton did not serve. It does not appear whether he was excused peremptorily by one of the parties, or by direction of the court, and it is sufficient to say that, as he did not serve, the defendant

was not prejudiced.

As to the ruling of the court in sustaining the state's challenge to the proposed juror Stuckey, we think it was without error. Each party was entitled to an "impartial jury," and it was quite evident that Mr. Stuckey was so closely connected with counsel for the defendant in business and in another case that his ability to act impartially was open to question. He had a case pending in court, and the defendant's counsel were his attorneys in that case. See section 8158, Rev. St. 1913. A competent juror, who was not challenged, took his place and was retained. The defendant was not entitled to a specific juror. If the members of the panel possessed the requisite qualifications and constituted an "impartial jury," that was all he could ask.

It is urged that there was misconduct on the part of the prosecuting attorney resulting in prejudice to the defendant. The trial is said to have lasted more than five days, and the verdict was returned within an hour and twenty minutes after the case was submitted. "Prominent among the acts of the assistant prosecutor complained of," it is said, "was his asking the defendant upon cross-examination: 'Did you ever tell John Cromwell that the sheriff was looking for you from Colorado?'" On cross-examination, the county attorney asked the defendant this question: "Q. Did you ever tell John Cromwell that the sheriff was looking for you from Colorado?" The defendant promptly objected and the court sustained him. "Q. In the presence of John Cromwell, did you ever make the statement to John Cromwell, that you had gotten into a similar scrape like this out in Colorado?" The defendant's objection was promptly sustained, and at his request the court informed the jury: "The objection will be sustained, and that form of cross-examination is improper and should not be pursued further, and the jury should not in any way give any consideration to anything that might be inferred from the question, the objection to which has been sustained. Exception." And

the following colloquy took place:

"By Mr. Waring: Your honor, I want to get straightened out here, I am trying to perform my duty as well as I know how. Do I understand the court's ruling that if I should bring admissions of this court, of the defendant—not saying that I have them—to the effect indicated in my question, does the court mean to say that I am unable to introduce those admissions?

"By Mr. Sloan: Defendant objects distinctly and emphatically to the inquiry submitted to the court at this time under the circumstances, as being especially improper and prejudicial to this defendant under the circumstances, and should not, under any circumstances, be mentioned by the prosecutor; it is another and entirely different offense, if anything of that kind occurred, and I think that the court should render proper rebuke for the inquiry being submitted in the presence of the jury.

"By the court: The court means to say, Mr. Waring, that you are not entitled to make any inquiry on cross-examination with respect to any offense except the one on trial in this case, and nothing with respect to anything else, if there should be anything of the kind, should be considered by the jury in any manner, and any matter of inquiry relating to the character of the defendant is not admissible until something of that character has been offered by the defendant himself.

"By Mr. Waring: If that is the ruling of the court, I will respectfully adhere to it. I had a different idea."

Not being satisfied with the court's statement, the defendant requested and the court gave the jury the following instruction: "The jury are especially cautioned against giving any consideration or weight whatever to the question propounded by counsel for the state, relative to a purported statement made by defendant to one Cromwell concerning another alleged charge against defendant. Whether the assumption was true or false, the question should not have been propounded in your presence, and you should not permit the same to in any wise

influence, bias, or prejudice you in the formation of a verdict."

And the court further instructed the jury on his own motion: "You are cautioned against giving any consideration or weight whatever to the question propounded by counsel for the state, relative to a purported statement made by defendant to one Cromwell concerning another alleged charge against defendant. Whether the assumption was true or false, the question should not have been propounded in your presence, and you should not permit the same to in any wise influence, bias, or prejudice you in the formation of a verdict."

Subordinate courts are not gifted with prescience and cannot, in the midst of a heated trial, foresee what moment an improper question may be propounded to a witness. But where, as in this case, an objection is promptly made thereto and sustained, and the court fully instructs the jury that the question was improper and should not be considered by them, we think the defendant was not prejudiced. See *City of Shawnee v. Sparks*, 26 Okla. 665, L. R. A. 1918D, 1, and notes.

It is said that there was error in the county attorney's assistant in demanding that the defendant stand up while the state's evidence was being submitted and before the defendant had offered himself as a witness or had signified his intention of going upon the stand, which, it is urged, was for the purpose of compelling the defendant to give evidence of his age, which at that time was a material allegation of the first count of the information and incumbent upon the state to establish beyond a reasonable doubt. But as there is no dispute that the defendant was more than 22 years of age at the time of the commission of the offense, and as there is nothing in the record to show that he complied with the request, or that the court's attention was called to it, he was not prejudiced.

The defendant claims that the court erred in giving instruction No. 13, which is as follows: "As to the question of the previous chastity of Gladys Dyer, it is not

necessary that her testimony that she was not previously unchaste be corroborated. It is sufficient as to this point if you are satisfied by the evidence, beyond a reasonable doubt, that she was not unchaste previous to the time of the alleged act of sexual intercourse complained of in the information." The instruction correctly stated the law. *Leedom v. State,* 81 Neb. 585.

The court's fourth instruction is in the following language: "In order to find the defendant guilty of the offense charged in the information, you must be satisfied, beyond a reasonable doubt, that the defendant, Walter Christiancy, was, on or about the 18th day of September, 1920, a male person of at least the age of 18 years; that the prosecuting witness, Gladys Dyer, was at said time a female child under the age of 18 years and over the age of 15 years and previously chaste; that she was at said time, and in the county of Fillmore and state of Nebraska, assaulted by the said Walter Christiancy; and that he did then and there unlawfully and feloniously carnally know and abuse her." It is contended that "previously chaste" is not the equivalent of the phrase "not previously unchaste." We think these phrases are synonymous; that "not previously unchaste" is an affirmation that the prosecuting witness was "previously chaste," and that the instruction did not mislead the jury.

Complaint is made of the court's twentieth instruction, which is as follows: "If you believe that any witness has knowingly sworn falsely to any material fact in this case, you may, if you see fit to do so, disregard all of the testimony of such witness." The specific objections are that the word "wilfully" and the phrase "unless corroborated, etc.," were omitted. Knowingly is equivalent to wilfully. *Fry v. Hubner,* 35 Or. 184. The words are synonymous; to do an act knowingly is to do it wilfully, and to do it wilfully is to do it knowingly. The phrase "unless corroborated, etc.," is not an element of the maxim *"Falsus in uno, falsus in omnibus,"* or, false in one matter, deceitful in everything, and the court did not err

in omitting it. *Titterington v. State,* 75 Neb. 153; *Atkins v. Gladwish,* 27 Neb. 841. If a witness knowingly testifies falsely to one or more material facts, there is no reason why he should be given credit for telling the truth respecting a particular in which his testimony and that of reputable witnesses happen to concur. Indeed, in such a case, the credit would be given to the testimony of the reputable witnesses, and not to that of the disreputable or perjured witness. The rule is clearly stated in Starkie on Evidence (9th Am. ed.) p. 766: "As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, *'Falsus in uno, falsus in omnibus.'* The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness' testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected."

The defendant tendered and the court refused the following request: "The jury are instructed that the object of the statute under which the first count of the information is drawn is to protect the virtuous maidens and the undefiled virgins of the state; and the female under 18 years of age and over 15 years of age, who has had improper or unlawful intercourse with a male, is not within the act." But in that connection the court gave the following instruction: "The object of the statute under which the information is drawn is to protect the virtuous maidens and the undefiled virgins of the state; and a female under 18 years of age and over 15 years of age, who has had unlawful sexual intercourse with a male, is not within the act." The evident purpose of the request was to impress the jury with the belief that, if the prosecuting witness had had "improper" relations with others short of sexual intercourse, that fact might be taken into

consideration in determining whether she was or was not a woman of previous chastity. The drift of the request was to the effect that, if a woman between the ages of 15 and 18 years had had "improper" relations with another man, she would not be within the statute. The defendant does not claim that the prosecuting witness had intercourse with any other man, but he contends that she permitted others to take improper liberties with her person. Notwithstanding this, if such liberties stopped short of actual sexual intercourse, they were not within the meaning of the statute.

It is urged that the verdict is contrary to and not supported by the evidence. It is admitted that the prosecuting witness was more than 15 and less than 18 years of age at the time of the flagrant act, and that the defendant was more than 22 years of age. It is said that they had sexual intercourse in Fillmore county on the night of September 18, 1920, and the only disputed question is whether the prosecuting witness was at that time "not previously unchaste." The drift of the testimony introduced by the defendant is directed to this question. On cross-examination of the prosecuting witness, defendant's counsel sought to show that she had been guilty of previous misconduct, and there was a studied effort to show that she was therefore to be classified as unchaste. Speaking of the criminal act, she said: "Q. And now he stopped his car there; what happened then, Gladys? A. He started to talk to me; he told me that I had been in the habit of letting other boys do such things as he tried to do back there, I could let him do it now. I told him I hadn't, that there wasn't a boy that would do such things as that to me, or even dare to. He said, 'You may just as well let me, you have let other boys,' and I told him I hadn't, and he started to try to do it again, and I tried to tell him what it would mean to do such things as that, that it was sin, and he just kept on; he pushed me out of the car and I fell upon the ground, and I got up and started to run away, but I didn't know where to go,

it was dark and we was all alone, there were no houses close there, and then he got up and began to swear at me, and said now I was out there he would now, and he just picked me up and threw me down on the ground and got on top of me and choked me and slapped my face and pulled my hair and did what he was going to do, got me all wore out trying to." On redirect examination she said: "Q. Gladys, have you always been a good girl? Q. Have you, Gladys? A. Yes, sir. Q. Has any man ever taken these liberties with you before? A. No, sir. Q. Or since? A. No, sir. Q. And the statement made by the accused that you had, is or is not that true or false?" We think her version of the transaction is corroborated by the testimony of the doctors, by her complaint to her parents made the next morning after the transaction, the condition of her apparel and the apparent evidence of the struggle at the scene of the act, and that the court was fully warranted in sending the case to the jury and the jury warranted in returning a verdict of guilty.

We have carefully examined other suggested objections to the rulings of the court, but we find them without error.

Finally, the defendant claims that the penalty imposed upon him was excessive, and we are inclined to that belief. There was no testimony that he had ever been engaged in a like transaction, or violated the law in any other respect. Considering these things in connection with his youth, we think that the sentence should be reduced to three years' imprisonment in the penitentiary, and, with this modification, the judgment of the district court is affirmed.

AFFIRMED: SENTENCE REDUCED.

JOHN SEATON V. STATE OF NEBRASKA.

FILED OCTOBER 14, 1921. No. 21928.

1. **Criminal Law:** CONTINUANCE: SHOWING. Defendant's motion and affidavit for a continuance on the ground of the absence of a material witness, or for time to take his testimony, examined, and *held* insufficient.
2. ———: VENIREMEN: COMPETENCY. The question of the competency of a venireman to sit in the trial of a criminal case cannot be raised by a motion for a continuance.
3. ———: JURORS: QUALIFICATION. Where two or more persons are jointly indicted or informed against for the commission of a single offense and sever in their trials, jurors who sat in the trial of one are thereby disqualified to sit in the trial of another.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed.*

D. W. Livingston, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

Heard before MORRISSEY, C.J., ROSE and ALDRICH, JJ., ALLEN and REDICK, District Judges.

ALLEN, District Judge.

May 7, 1920, about 2:30 a. m., the residence of Edwin A. Duff, in Nebraska City, was burglarized, and the plaintiff in error, herein called the defendant, and one William Holmes were arrested as participants therein. June 4, 1920, the county attorney filed an information in the district court for Otoe county against "John Seaton, William Holmes, John Doe, real and true name unknown, John Stiles, real and true name unknown, Richard Roe, real and true name unknown," charging them with having jointly committed the offense, and the defendant and Holmes entered pleas of not guilty, the other defendants not being apprehended. The defendant and Holmes severed in their trials, Holmes' trial being concluded Sep-

tember 16, 1920, and the defendant was tried and found guilty on the same day, the jury consisting of Henry Reese, James Meek, William Ottens, Ed. South, Mike Roddy, J. H. Carlson, R. R. Booth, Richard Arends, Al Patten, George Roos, C. C. Heck, and Ed Smallfoot. Before the jury were impaneled, the defendant filed a motion for a continuance to the next term because of the absence of Schull, said to be a material witness for the defendant, but then in South Dakota, and because Holmes had been tried by 12 of the panel summoned for the term, 23 of whom were present, while the other 11 were in court and listened to the trial, which he claims rendered them incompetent to try him. The substance of that part of the defendant's affidavit which was filed in support of his motion respecting Schull's absence is to the effect that he was then at an unknown place in South Dakota, but, "if present, would testify that this defendant was hired by him on the evening of May 6th to drive him, the said Schull, in an automobile to Nebraska City, which the said defendant did; that the business of the said Schull at Nebraska City was not made known to this defendant; that, if said Schull had anything to do with the alleged burglary, this defendant had absolutely no knowledge of that fact;" and "that he has made diligent search and effort to locate the said witness, Schull; that the best information he can get with reference to his whereabouts is that the said Schull is working with a threshing crew in South Dakota, but just where or with whom in said state he has been unable to learn; that he expects and intends to locate the said Schull and have his testimony for use upon the trial of this case at the next term of this court."

In so far as a continuance was sought on account of Schull's absence, we think the affidavit was insufficient. It fails to show that the defendant was ignorant of any other person or persons within the jurisdiction of the court by whom the same facts could be proved. The statement that Schull hired the defendant to drive him to Nebraska City, but that his business there was not

made known to the defendant, and that, if Schull had anything to do with the alleged burglary, the defendant had no knowledge of it, has no bearing on the case. The defendant does not negative the charge that he committed or participated in the commission of the crime. Instead of stating in general terms that he had made diligent search and effort to locate Schull, he should have set out the facts, so that the court could determine whether he was diligent or not. When charged with the offense, he should have taken prompt steps to secure Schull's presence at the trial, or to take his deposition, if his presence could not be obtained, but he did not do so. He could not wait until the last moment and expect the court to grant a continuance on the showing made. Respecting that part of the affidavit for a continuance on the ground that nine of the jurors who sat in the trial of Holmes and were retained in the trial of the defendant were, by reason of that fact, incompetent, it is sufficient to say that it afforded no grounds for a continuance. *Humphries v. State,* 100 Ga. 260. If these jurors were disqualified, a motion to discharge them and to summon others under section 9106, Rev. St. 1913, would probably have been sustained; but, as the defendant fully presented and preserved the question of his challenges, the denial of his motion was without prejudice.

Having disposed of the defendant's application for a continuance, we turn to a more difficult question raised by his fourth assignment of error in these words: "The court erred in forcing the plaintiff in error to be tried by the same jury who had tried one of his codefendants upon substantially the same testimony."

The list from which the jury were selected consisted of 23 names, of which 3 were excused for cause, the defendant challenged 6 peremptorily and the state 1, and 1 was probably excused by the court itself, leaving 13, 9 of whom, Ottens, South, Roddy, Booth, Carlson, Arends, Patten, Roos, and Smallfoot had served in the Holmes trial. Smallfoot being called after the defendant had exhausted

his peremptory challenges was retained over the defendant's objection. It is evident that, when the panel was completed in the Holmes trial, the name-slips were replaced in the receptacle containing the names of veniremen who had appeared, and, when the clerk drew for the defendant's trial, they were taken therefrom.

The information charges in apt language that the defendants named jointly burglarized the house of Mr. Duff, and the state claims that Holmes and the defendant were of the number. The identical transaction, the single *corpus delicti*, the body or essence of the crime in the Holmes trial, is the foundation of the defendant's trial. The testimony tends to show that the persons engaged in the burglary stopped near the Duff home, and, while some were ransacking the house, the defendant and another stood as an armed guard. Each of the 9 jurors stated on his *voir dire* examination that he had served on the Holmes panel; that he had not formed or expressed an opinion as to the defendant's guilt or innocence, and believed that he could try the defendant fairly and impartially and give him the benefit of any reasonable doubt in the case. It is urged that by reason of their service on the Holmes jury, these gentlemen were disqualified to sit in the trial of the defendant. In our judgment, it was impossible to separate the defendant from Holmes in the commission of the crime, and it is inconceivable that Holmes could have been tried without proving the *corpus delicti* necessary to be proved in this trial, and the evidence in the Holmes trial must, of necessity, to that extent at least, have been the same on the trial of the defendant. The witnesses for the state on the Holmes trial, to wit, Mrs. Frank Chapin, R. H. Fischer, Edwin A. Duff, Jess Palmer, and Paul Jessen, were witnesses for the state on the trial of the defendant. It is possible, but not probable, that Holmes was tried without the name of the defendant being mentioned in connection with the offense, although Ottens, South, Roddy, Booth, Carlson, Arends, Patten, and Smallfoot, remember the substance of the

testimony in that trial, and South, Carlson, Arends, Patten, and Smallfoot recollect that the prosecuting attorney and some of the witnesses mentioned the name of the defendant.

In section 11, art. I of the Constitution, it is provided that one charged with a crime is entitled to "a speedy public trial by an impartial jury," which provision is to be construed with subdivision 2, sec. 9109, Rev. St. 1913, which provides, *inter alia*, that, if a proposed juryman "has formed or expressed an opinion as to the guilt or innocence of the accused," he may be challenged for that reason. *Curry v. State*, 5 Neb. 412.

The trial by jury took on a divine hue when the "sworn twelve" were chosen in memory of the twelve Apostles on the twelve thrones; the twelve tribes of Israel, the twelve patriarchs, and the twelve officers of Solomon. The right was wrested from King John at Runnymede in 1215 and incorporated in Magna Charta and subsequent revisions thereof, but it was denied for many centuries by his successors. It was transplanted to the United States by the Pilgrims, and, when not refused by royal governors, was the settled practice of the colonists. It found lodgment in the Declaration of Rights of the first congress in 1774, and in the Declaration of Independence in 1776. It was guaranteed by the ordinance for the government of the Northwest Territory in 1787. It was insisted on in the ratifying conventions of the respective states. It was written in the sixth amendment of the Constitution of the United States that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury," and it is imbedded in the Constitution of every state of the Union. The struggle for its recognition and preservation was long, bitter, and sometimes bloody. It has been a safe refuge against the invasion of an aggressive and arbitrary power on the one hand, and a sometimes turbulent populace on the other. Speaking of its sanctity, Mr. Sedgwick in his work on Statutory and Constitutional Law (2d ed.) 482, says:

"The trial by jury is very dear to the race to which we belong. There can hardly be named any institution which has survived so many changes, or existed under such various forms of government. * * * When this country threw off the government of England, the passionate attachment of our people to this form of procedure was repeatedly and energetically declared; and the Constitution of the youngest state of the American confederacy adopts the trial by jury as a part of its fundamental law. Springing up under the feudal despotism of the Plantagenets, it has survived alike their rule, that of the house of Tudor, and of the house of Stuart, and now flourishes with all its original vigor under the mildest and wisest form of monarchy of which history makes mention; while during the same period, transplanted to a different hemisphere, it has struck deep its roots into the new soil, and is, perhaps, the most cherished institution of the greatest exemplar of free and intelligent government that the world has ever seen."

President Jefferson in his first inaugural address in 1804 speaks of "trial by juries impartially selected" as one of the blessings of the American people. Mr. Hume in his history speaks of it as "an institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice that ever was devised by the wit of man."

Mr. Starkie says in his work on Evidence (10th ed.) *9: "It is obvious that the experience which would best enable those whose duty it is to decide on matters of fact, arising out of the concerns and dealings of society, to discharge that duty, must be that which results, and which can only result, from an intimate intercourse with society, and an actual knowledge of the habits and dealings of mankind; and that the reasoning faculties best adapted to apply such knowledge and experience to the best advantage in the investigation of a doubtful state of facts are the natural powers of strong and vigorous minds, unencumbered and unfettered by the technical and artificial rules

by which permanent tribunals would be apt to regulate their decisions. Nor is the trial by jury less recommended by considerations of extrinsic policy. It constitutes the strongest security to the liberties of the people that human sagacity can devise; for, in effect, it confides the keeping and guardianship of their liberties to those whose interest it is to preserve them inviolate; and any temptation to misapply so great an authority for unworthy purposes, which might sway a permanent tribunal, can have no influence when entrusted to the mass of the people to be exercised by particular individuals but occasionally."

And Sir William Blackstone says in 4 Blackstone (Jones, 1916) sec. 395: "The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary for preserving the admirable balance of our Constitution to vest the executive power of the laws in the prince, and yet this power might be dangerous and destructive to that very Constitution, if exerted without check or control by justices of *oyer* and *terminer* occasionally named by the crown, who might then, as in France or Turkey, imprison, dispatch or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury, and that the truth

of every accusation, whether preferred in the shape of indictment, information or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue and courts of conscience. And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern. What was said of juries in general, and the trial thereby, in civil cases, will greatly shorten our present remarks with regard to the trial of criminal suits; indictments, informations and appeals; which trial I shall consider in the same method that I did the former, by following the order and course of the proceedings themselves as the most clear and perspicuous way of treating it."

In respect to the qualifications of a juror, Mr. Bishop, who is confessedly one of the ablest and most thoughtful writers on the criminal law of this country, in 1 Bishop, Criminal Procedure, sec. 910, has this to say: "The true view would seem to be that, since the law presumes every man to be innocent until he is by judicial evidence proved in a court of justice to be guilty, and since the burden is on the prosecuting power to make the guilt appear affirmatively by proofs produced at the trial, if a man

leaps in advance of the law, and settles in his own mind the question of guilt against the prisoner, whether by reason of what he has read or heard, or by reason of an inner impulse which condemns before it hears, he is not a fit person to be a juror in the cause; for his mind, which ought at least to be a blank on which the evidence might write its conclusions, is already preoccupied. It is vain for a man to say, or even believe, that he can judge impartially of a matter which he has already determined. Human nature, as developed in the average of men, does not permit this. The juror is to hear, and then say what he believes; but, if he believes before hearing that only which can lawfully affect his belief—namely, the testimony of the witnesses in open court—he is, in legal reason, disqualified to hear and be swayed by the testimony. It is immaterial, therefore, whether the belief which comes not according to the law is derived from rumor, or from listening to statements of a more reliable sort. Likewise, if the juror has not expressed his belief, he is still unfit, though the expression of it might render him unfit in a yet higher degree. Such is the legal reason which should govern the question."

In impaneling the jury in the great case of *United States v. Burr*, 25 Fed. Cas. No. 14,693, pp. 55, 77, Chief Justice Marshall observed: "The chief justice observed that it might save some altercation if the court were to deliver its opinion at the present time; that it was certainly one of the clearest principles of natural justice, that a juryman should come to a trial of a man for life with a perfect freedom from previous impressions, that it was clearly the duty of the court to obtain, if possible, men free from such bias; but that if it were not possible from the very circumstances of the case—if rumors had reached and prepossessed their judgments—still the court was bound to obtain as large a portion of impartiality as possible, that this was not more a principle of natural justice, than a maxim of the common law, which we have inherited from our forefathers, that the same

right was secured by the Constitution of the United States, which entitles every man under a criminal prosecution, to a fair trial by an 'impartial jury.' Can it be said, however, that any man is an impartial juryman who has declared the prisoner to be guilty and to have deserved punishment?. If it be said that he has made up this opinion, but has not heard the testimony, such an excuse only makes the case worse; for if the man has decided upon insufficient testimony, it manifests a bias that completely disqualifies himself from the functions of a juryman."

And Owen, J., says in *Scribner v. State of Oklahoma*, 3 Okla. Cr. Rep. 601, 35 L. R. A. n. s. 985, 991, quoting from *Johnson v. State*, 1 Okla. Cr. Rep. 321: "But the enumerated causes of challenge in the statute are not exclusive of all others not enumerated. When the juror has any opinion as to the guilt of the defendant, it matters not how this opinion was formed, the closing paragraph of the statute provides that it must appear to the court that the juror can and will act fairly and impartially in the case. But, if this provision was not in the statute, we would be forced to place this construction upon the first part of the statute, because section 20 of our Constitution is in this language: 'In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury.' Const. art. II, sec. 20. Any statute which would even tend to deprive a defendant of a trial by an impartial jury would be unconstitutional and void. Although a juror may know absolutely nothing about the facts of the case, and may not have the slightest opinion as to the guilt of the defendant, yet if, from any cause or upon any ground, it appears to the trial court that the juror is biased or prejudiced against the defendant, it cannot be said that he would be a fair and impartial juror, and he should be excluded from the jury; otherwise, the Constitution of the state would be disregarded and trampled upon. The trial court should resolve all doubts upon this matter in

favor of the defendant."

In 2 Lieber, Political Ethics (2d ed.) 405, the learned author observes: "By the institution of the jury two great ends, the one of liberty, the other of the administration of justice, have been united, namely, direct participation of the people in the dispensing of justice and the preventing of it from falling entirely into the hands of the executive or of a separate and closed caste. From whatever point of view we may examine this peculiar institution as it has developed itself in the Anglican race—and it may be viewed in a great many, all equally important—it will always appear that the citizen cannot act in any more solemn capacity than that of a juror; in my opinion, in no capacity so solemn and important. Society requires the state; the state acts through laws; the laws are the great organs of human society, of combined reason; and now, when the very moment ultimately arrives for which the law was made, when it is finally to be applied as a general rule to a practical and concrete case, when, in short, the abstract principle is to be realized in practical life, for weal or woe, for the protection of some or the punishment of others, all this is in a great measure left to the juror, to the citizen taken fresh from the people. The jurors, therefore, are justly called by the British law the country. There is a deep meaning in this expression, as it has grown in the course of centuries; for the jury truly and practically represent the country to the person that is to be tried. The law is the expression of public will, and the jury represent the jural society, in judging whether in the given case the facts warrant the application of the law. The jury represent the country, not the government; they judge of facts according to rules and laws indeed, but also with the feelings of living men, and not merely as if they represented the abstract law as it is written down. To represent this a learned judge would be sufficient. The jury represents, or rather is, whenever faithful, the living, operating law. Indeed, it may justly be said that though for a brief

time, yet, for this brief time, a jury represents more fully and entirely human society as formed into a state, with its great objects, than any other person or body of men, even the monarch's person not excepted. Not that I mean to intimate the idea as if on this account the jury were released either from strict obedience to law or proper advice. Even though they were the very sovereign, we have seen on a previous occasion that sovereignty and absolute power are very different. On the contrary, the jury according to the essence of their character are strictly bound by the law, yet by the law as their country requires it, or must be supposed to require it, applied to the particular and, probably, complex case before them."

Having shown that a jury is, under our form of government, indispensable in the administration of the criminal law, it will probably be accepted as a truism that freedom from bias is as indispensable in that body as it is in the presiding judge. We cannot have two kinds of juries, one for the guilty and another for the innocent, as every defendant enters upon the trial with the presumption of innocence in his favor, which continues with him as a matter of evidence until such time as his guilt may be proved beyond a reasonable doubt. *Garrison v. People*, 6 Neb. 274, 285; *Olive v. State*, 11 Neb. 1, 20; *Long v. State*, 23 Neb. 33, 55; *Flege v. State*, 90 Neb. 390. Verdicts can be set aside and new trials granted in both civil and criminal cases, except a verdict of not guilty where the Constitution protects the accused from being "twice put in jeopardy for the same offense;" and a verdict of acquittal of a guilty person has met with the approval of no less a jurist than Lord Mansfield. 2 Lieber, Political Ethics (2d ed.) 408.

And now we come directly to the pivotal question in the case: Were the nine jurymen who sat in the trial of Holmes, jointly informed against with the defendant and three other persons for the commission of a single offense, qualified, over objection, to sit in the trial of the

defendant? We think not. If that were true, these gentlemen would be eligible as jurymen in the separate trials of each of the other defendants. This conclusion is supported by the weight of authority and the better considered cases. Thus in *People v. Troy,* 96 Mich. 530, it is said:

"We think, however, that the court erred in permitting the jury who sat in the Flanders case to sit in the present. The facts are nearly identical, and must necessarily have all been called forth in the Flanders trial. The jury in that case must have considered them, and reached some opinion as to the merits of the controversy in the present case. The respondent was entitled to a fair and impartial trial by an impartial jury, who had no preconceived opinions of his guilt or innocence. We are aware that some English and American authorities hold that jurors who have sat in one case are not disqualified from sitting in a case against another joint respondent, who has taken a separate trial, and involving the same state of facts. We are not inclined to follow that doctrine. Where the issue is the same in both cases, it is but fair to the respondent that he have another panel of jurors to try his cause. For this reason the verdict must be set aside, and a new trial ordered."

So in *Priestly v. State,* 19 Ariz. 371, 377, 3 A. L. R. 1201, 1205, Chief Justice Franklin says: "The tendency of legislation is to increase the dignity of the jury and lessen the power of the courts to influence or control their verdicts. It is indispensable, therefore, to the due administration of the law that this important right be carefully guarded. No higher duty rests upon the trial judge than to see that an unbiased, unprejudiced, and impartial jury should in every case be provided. If jurors objectionable in the particulars here stated are permitted to serve, this case must become a precedent for others sure to follow, and thus the impairment of the right will insidiously gain such a foothold that the right itself would in time become the mere echo of a voice, a shadow,

not substance, and as 'idle as a painted ship on a painted ocean.' These objectionable jurors are no doubt good men and representative citizens, perfectly conscientious in the belief they expressed of an ability to be indifferent between the state and the defendant, notwithstanding the knowledge they had obtained of the facts and witnesses in a court of justice where they had sat as jurors and given their verdict. So, too, the action of the learned trial judge, we are persuaded, was dictated by a proper sense of propriety and decorum. But the weakness and error in the ruling lay in the trial judge having that confidence in the ability of the jurors to be entirely impartial under the circumstances, which confidence the jurors had expressed, each in himself. Having passed upon the credibility of witnesses in a similar case upon substantially the same testimony, and having theretofore rendered a verdict on their oaths, it is not to be believed that they could sit upon this case with such an opinion previously formed without it influencing their action."

And in *McKay v. State*, 6 Ga. App. 527, the defendant and one Hickman were jointly accused of an offense, but severed on the trial. Hickman was convicted, and, on the defendant's trial, the court permitted the state to ask each juror on his *voir dire* examination if he had formed or expressed an opinion as to the guilt of the defendant, and four stated that they had and eight that they had not. The court discharged the four, but permitted the eight to serve, and this ruling was assigned as error. In reversing the judgment, Russell, J., speaking for the court, said:

"In the case at bar it plainly appears that the two offenses do involve the same transaction, inasmuch as the two defendants were jointly accused, and it further appears that the other defendant had been convicted. Jurors should go into the jury box entirely free from even a suspicion of having prejudged the defendant or formed any opinion upon his guilt; and where a juror has participated in a verdict of guilty against another person

charged with the same offense, growing out of the same transaction, and necessarily to some extent depending upon the same evidence, he has, in some degree at least, prejudged the defendant. See *Jacobs v. State,* 1 Ga. App. 519, wherein this court said: 'It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof.' Unless the jury be absolutely impartial, the jury system becomes an 'awkward instrument of justice,' and the constitutional guaranty that 'every person charged with an offense against the laws of this state * * * shall have a public and speedy trial by an impartial jury' * * * is worthless."

This rule is recognized in 17 Standard Ency. of Procedure, 347: "A juror," it is said, "is incompetent where he has sat on a jury that tried another jointly indicted defendant, even though he says he has formed no opinion and can try defendant impartially."

To the same effect, see section 9106, Rev. St. 1913; *United States v. Smith,* 27 Fed. Cas. No. 16342b, p. 1246; *People v. Mol,* 137 Mich. 692, 68 L. R. A. 871; *Burns v. State,* 145 Wis. 373; *Scribner v. State of Oklahoma,* 3 Okla. Cr. Rep. 601, 35 L. R. A. n. s. 985, and notes; notes to *Priestly v. State* (19 Ariz. 371) 3 A. L. R. 1201; 24 Cyc. 278, 279.

We hold that this case presents an instance of implied bias, and that the learned trial judge erred in denying the defendant's challenges to the jurors who sat in the Holmes trial. The judgment of the district court is therefore reversed and the cause remanded for a new trial.

REVERSED.

ELMONT F. PRESTON V. STATE OF NEBRASKA.

FILED OCTOBER 14, 1921. No. 21952.

1. **Evidence** examined, and *held* insufficient to support the verdict.
2. **Parent and Child**: FAILURE TO SUPPORT CHILD: WILFUL NEGLECT. The failure of the husband to furnish his wife money for the maintenance of a two months old infant born in the home of her parents, after she had left the matrimonial domicile without cause and contrary to his wishes, is not in itself wilful neglect or refusal to provide for such child, within the meaning of section 8614, Rev. St. 1913.
3. **Criminal Law**: ACTION FOR ABANDONMENT: VENUE. The county in which the matrimonial home or domicile of the husband and wife is located fixes the venue of a case prosecuted under section 8614, Rev. St. 1913, and such case cannot be instituted in another county.
4. **Husband and Wife**: DOMICILE. The husband has the right to establish the matrimonial domicile, and it is the duty of the wife to recognize that fact.
5. **Parent and Child**: ABANDONMENT: APPLICATION OF STATUTE. No inflexible rule can be laid down for the application of section 8614, Rev. St. 1913; each case must be decided on its own merits; the statute was enacted for a wise purpose, but is capable of abuse and of being made an instrument of intolerable oppression.
6. **Penal Statutes**: CONSTRUCTION. It is elementary that penal statutes are inelastic and must be strictly construed; they are never extended by implication.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed.*

D. W. Livingston, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C.J., ROSE and ALDRICH, JJ., ALLEN and REDICK, District Judges.

ALLEN, District Judge.

The plaintiff in error, Elmont F. Preston, was convicted of the crime of abandoning and wilfully neglecting and

refusing to provide for his minor child, Robert Elmont Preston, under section 8614, Rev. St. 1913, and from a judgment of guilty on the verdict and a sentence to one year's imprisonment in the penitentiary, he has brought the case to this court for review. For convenience, the parties will remain classified as they were in the district court.

January 28, 1921, the county attorney filed a complaint in the district court for Otoe county containing two counts, the first charging that the defendant, on or about May 26, 1920, in said county, wilfully and feloniously refused and neglected to support, maintain and provide for his wife, and the second reading as follows:

"And the said Geo. H. Heinke, county attorney within and for the county and state aforesaid, for further complaint and information makes upon his oath as aforesaid, and says that on or about May 26, 1920, that Elmont F. Preston, then and there being in said county as aforesaid, and then and there being the father of Robert E. Preston, aged two months, then and there being in said county, and being a minor, did then and there without good cause unlawfully, wilfully and feloniously abandon the said Robert E. Preston, his minor child, and did then and there unlawfully, wilfully and feloniously neglect to support, maintain and provide for said Robert E. Preston, his said minor child, although of sufficient ability so to do, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state of Nebraska."

It does not appear when the prosecution was instituted. At the conclusion of the state's case, the court directed a verdict for the defendant on the first count, and we have to deal only with the case stated in the second. The state introduced two witnesses, May Preston, wife of the defendant, and Margaret Gaskell, her mother; while the defendant testified in his own behalf, and introduced the testimony of W. R. Holly, Louise Schnittker, and his mother, Mrs. W. J. Preston.

The pivotal facts are not in dispute and are, in substance, these: The defendant and May Gaskell were married in Kansas City, Missouri, March 10, 1915, and sometime thereafter, probably in 1917, moved to Kearney, Nebraska, where the defendant purchased and furnished a comfortable five-room house for his family, and engaged in the occupation of garageman as a means of supporting himself and wife and paying a mortgage debt upon his home. October 21, 1919, a quarrel arose between them, because, in his absence, she had purchased a rug which he insisted was unnecessary and inadvisable, inasmuch as the house was carpeted and his income limited; and, over the defendant's protest and contrary to his wishes, she left home in anger and reached her parents' home the next day. She left her work undone and the dishes unwashed on the table. She was *enceinte* at the time, and her child was born in Otoe county, March 6, 1920, and it was a little over two months old when, it is said, the defendant abandoned it. After the prosecuting witness left Kearney, the defendant kept the home open and continued to occupy it until some time in July, 1920. She returned in November, 1919, and remained a week or more and then went back to her parents. The defendant never lived or had a residence in Otoe county, nor was a home established there. He visited his wife and baby in March, April, and May, 1920, and on his last visit, May 19, 1920, he remained with his wife and child in the home of her parents for a few hours, at which time their differences were talked over, and it was agreed that, on account of the trouble they had had in Kearney, they could not return, and did not want to live in Nebraska City, and that the Kearney property and its contents should be sold and a residence established elsewhere; but no place was agreed upon. She testified that he said she should, in the meantime, live with her parents: "Well, we didn't expect to establish a residence here, but I was to stay here until he came after me, and this was to be my home until he came and got me. * * * Well, I was to live

there with mother until he came and got me." The defendant gave his wife $75 with which to pay expenses incident to her lying-in sickness. Pursuant to the understanding of May 19, 1920, the Kearney home and its contents were sold in July, after which the defendant went to Imperial, Nebraska, and for two months, probably, there was no correspondence between them. There is no testimony that any specific demand for money was made on the defendant for the support or maintenance of the child, but there is some testimony that the prosecuting witness wrote him for money, while he testified that he sent her some, but the amount is not stated. There is no testimony that the child needed additional shelter, clothing, a nurse, or anything else. It drew nourishment from its mother; presumptively it slept with her in the same bed and under the same roof. Its requirements must, of necessity, have been few and simple. There is no evidence tending to show that any request was made of the defendant for money, apart from that which the prosecuting witness was to use for herself. There was no excuse for Mrs. Preston leaving her Kearney home. The fact that her husband, during their quarrel over the rug, may have said that if she left it would be final and she could not return, and that he advertised her, did not seem to have any effect, as she returned and remained for many days. That she did not intend to establish a residence in Otoe county is manifest from her admitted statement to her mother-in-law: "I told her I would go back. Q. Did you go back after that? A. Yes, sir; shortly after that I went up to Kearney; within a week or two. * * * Q. You did express a wish to that effect, didn't you, Mrs. Preston? A. I did." But it does not appear that she communicated the wish to her husband, or that he knew of her desire. But, apart from this, the conduct of the husband, however unnecessary and uncalled for, furnished no excuse for her desertion of her home.

That part of section 8614, Rev. St. 1913, applicable to this case, is as follows: "Whoever abandons his or her

legitimate or illegitimate child or children under the age of sixteen years, and wilfully neglects or refuses to provide for such child or children, shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six months."

The defendant's failure to send money to the prosecuting witness on her request seems to have been considered as an abandonment and wilful neglect or refusal to provide for his minor child. This is a *non sequitur* and the interpretation is incorrect. The defendant left with his wife's consent and there is nothing to show that he was then or thereafter informed that the child needed anything. Of course, the defendant owed the child the duty "to provide for" it; but to convict him, it was necessary to prove that it was in necessitous circumstances. He was not required to send the prosecuting witness money "to provide for such child," as he might provide for it directly or by establishing a credit where articles suitable to its condition could be purchased. The failure or refusal of the husband to send the prosecuting witness money on her demand was not the commission of a crime. The phrase, "whoever abandons his * * * child * * * under the age of sixteen years, and wilfully neglects or refuses to provide for such child," shall be guilty of the crime of desertion, is elliptical. "Wilfully neglects or refuses to provide" what? Not money, but those things that were necessary to the comfort, health and protection of an infant slightly over two months of age. The state made no attempt to show that the defendant had neglected or failed in this respect. No inflexible rule can be laid down in cases of this kind; each must be decided on its own merits. The statute was enacted for a wise purpose, but is capable of abuse and being made an instrument of intolerable oppression. It is elementary that penal statutes are inelastic and must be strictly construed; they are never extended by implica-

tion. *Andrews v. United States,* 2 Story (U. S. C. C.) 202, 1 Fed. Cas. No. 381, p. 904. The testimony is, in our judgment, insufficient to support the verdict.

The defendant urges that the venue was laid in the wrong county, and that the district court for Otoe county had no jurisdiction of the case. It is elementary that, notwithstanding modern statutes have greatly changed the status of married women, the husband is the head of the family and has the right to choose the matrimonial domicile, and this right must be recognized by the wife. The matrimonial domicile of the defendant and his wife May 26, 1920, when it is claimed he committed the offense, was in Buffalo county. In *Cuthbertson v. State,* 72 Neb. 727, it is said: "The county in which the home is fixes the venue of the offense." That case was well considered and has stood the test for nearly 17 years, and is vindicated by the ruling in *State v. Smith,* 145 La. 913; *State v. Justus,* 85 Minn. 114; *State v. Baurens,* 117 La. 136; *State v. Fick,* 140 La. 1063; *In re Roberson,* 38 Nev. 326; *State v. Dangler,* 74 Ohio St. 49; *State v. Dvoracek,* 140 Ia. 266; *In re Price,* 168 Mich. 527. Section 9024, Rev. St. 1913, provides, "All criminal cases shall be tried in the county where the offense was committed," and if the county in which the home was fixes the venue of the offense, if any, it is clear that the district court for Otoe county was without jurisdiction.

The judgment is reversed and the cause remanded.

REVERSED.

CORNELIUS F. BEELER ET AL., APPELLEES, V. SUPREME TRIBE OF BEN HUR, APPELLANT.

FILED OCTOBER 14, 1921. No. 21600.

Insurance: APPLICATION: REPRESENTATIONS AND WARRANTIES. Certain statements, consisting of questions and answers in an application for insurance, set out in the opinion, examined, and *held* to be representations, and not warranties; that, in order to establish

a defense based on the alleged falsity of said statements, it is incumbent on the defendant to prove that said questions were asked and answered by assured as written in the application; that they were false in some respect material to the risk; that they were made by the assured knowingly with the intent to deceive; that the defendant relied upon said representations and was deceived by them to its injury.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed as modified.*

Garlow & Long and *R. J. Harper,* for appellant.

Lambe & Butler and *J. F. Fults, contra.*

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS and MORNING, District Judges.

CLEMENTS (E.J.), District Judge.

This action was brought by the plaintiffs, as guardians of Margaret E. Axtell, minor daughter and beneficiary of J. Edward Axtell, deceased, on a beneficiary certificate for $2,000 issued on June 23, 1916, by defendant to said J. Edward Axtell, who died April 1, 1917. From a verdict and judgment in favor of plaintiffs, defendant appeals.

The petition is in the usual form employed in such a case, and all the material allegations thereof are admitted in defendant's amended answer. Defendant pleads fraud on the part of the assured in procuring said insurance as a defense to the action. The substance of the allegations in the answer on which this defense is based is that Axtell made a written application for membership, which is a part of the insurance contract, in which appears the following questions and answers thereto by applicant, to wit: "How long since you consulted or were attended by a physician? One year." "For what disease? La grippe." "Have you had any severe illness or injury not mentioned above? No." That said answers were false and fraudulent; that assured well knew that he had been treated shortly before for bronchitis and pneumonia; that prior to the date of said application applicant was suffering from heart trouble and was in a weakened con-

dition, which he well knew, and failed to reveal said facts to defendant, all of which were unknown to it; that said fraudulent misrepresentations and concealment were intentional for the purpose of deceiving defendant; and that, if it had known the truth in regard to said matters, it would not have accepted said Axtell as a beneficiary member. In the reply plaintiffs deny every allegation in the answer, and allege that at the time said certificate was issued, prior thereto, and during the lifetime thereof, defendant had full knowledge of the true physical condition of assured, and with such knowledge collected and retained all monthly dues on said certificate.

Under the rule for distinguishing between representations and warranties in an application for insurance laid down in *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, and followed in *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, *Ætna Life Ins. Co. v. Rehlaender*, 68 Neb. 284, *Goff v. Supreme Lodge, Royal Achates*, 90 Neb. 579, *Yonda v. Royal Neighbors of America*, 96 Neb. 730, and other cases, we have no hesitancy in holding that the statements of assured in the application complained of are representations, and not warranties. It is apparent that defendant entertained the same opinion when it filed its amended answer herein, for the defense therein pleaded is not that of a breach of warranty, but is that of fraud and deceit on the part of the applicant in making said alleged false answers and misrepresentations, which defendant alleges were made intentionally for the purpose of deceiving defendant.

The chief distinction between a warranty and a representation in insurance law is that the former is the assertion by the assured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact; while a representation is also the assertion by the assured of a fact, but the validity of the policy does not depend upon the literal truth of said assertion. *Ætna Ins. Co. v. Simmons, supra.*

In the case at bar the defendant treated the answers

complained of as representations, pleaded their falsity, alleged that said false statements were knowingly and intentionally made to deceive defendant; and, in order to establish such defense, it was incumbent on the defendant to prove that said questions were asked and answered by assured as written in the application; that they were false in some respect material to the risk; that they were made by the assured knowingly with the intent to deceive; that the defendant relied upon said representations and was deceived by them to its injury. *Kettenbach v. Omaha Life Ass'n, supra; Ætna Life Ins. Co. v. Rehlaender, supra;* Rev. St. 1913, sec. 3187. Defendant recognized the correctness of the foregoing propositions and on the trial assumed the burden and introduced evidence tending to prove all of them.

In their brief counsel for defendant have abstracted the evidence introduced by them to prove the answers to the questions complained of were false and that assured knew that they were false. The only evidence referred to or offered to prove that it had not been one year before the date of the application since Axtell had consulted or was attended by a physician is the testimony of Dr. Barta. This witness testified that he made an examination of assured some time in the year 1916; that he did not know and would not say whether it was before June or not. On being asked whether he would say it was in the first or last half of the year 1916, he answered that, if he was to guess, he would put it in the first half, but that he could not say definitely when it was. Fraud is not presumed and cannot be established by the guess of a witness. This evidence falls far short of proving conclusively the falsity of said answer.

To prove the falsity of assured's answer to the question, "Have you had any severe illness or injury not mentioned above?" counsel refer to the testimony of the witness Beranek to the effect that, in the fall of 1915, Axtell was sick and told witness that he had dropsy; also the testimony of Drs. Brewster, Green, and Week. Dr. Brewster

testified that he had treated assured for heart trouble in September, 1914; Dr. Green, that he had treated him about the same time for bronchial pneumonia; and Dr. Week, that he had treated him in the spring of 1915 for pneumonia. There is no evidence to show whether the sickness testified to by the witness Beranek was of long or short duration. It evidently was not very serious, as it is not shown that a doctor was called, and none of the physicians testified that Axtell had dropsy or that he was ever treated therefor. Not one of said physicians testified that he informed assured what he was treating him for, and the only competent evidence to show that assured knew he had, or had been treated for, any of the diseases mentioned by the doctors is wholly circumstantial. Assured did not die of dropsy or pneumonia, but of mitral and bicuspid insufficiency and tuberculosis. None of the doctors claim to have treated assured for tuberculosis before the date of his application, and only one, Dr. Brewster, for heart trouble, and his treatment was in September, 1914. This doctor does not state whether the trouble was severe or not, whether it was of short or prolonged duration, whether assured was confined to his bed or not, and whether the doctor saw or treated him on more than one day. If assured did have heart trouble in September, 1914, it would seem that it was not serious, as Dr. Newbecker's examination, made in June, 1916, shows the heart to have then been in good condition, and the doctor said that, if assured had heart trouble at that time, it was latent, as she was unable to detect it. If a trained physician was unable to discover any heart trouble, how can it be said that assured's heart was diseased, and that he knew it?

The question of whether assured had had any severe illness is one of fact for the jury. "A jury is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but neither are they required to accept and give effect to testimony which they find to be unreliable, although it may be uncontradicted." *State v.*

Woods, 102 Kan. 499. The credibility of the witnesses and the weight to be given to their testimony was for the jury to determine, and we are not prepared to say that its finding on this question of fact is so clearly wrong as to require a reversal of the judgment.

We have read all the evidence received, that offered and excluded, the objections thereto, and find no prejudicial error in the rulings of the court thereon.

Defendant requested the court to submit four special interrogatories to the jury, which request was refused, and this refusal is alleged to be error. The submission of special interrogatories, when requested, is within the discretion of the court (*Huxoll v. Union P. R. Co.*, 99 Neb. 170), and the refusal to submit the interrogatories requested by defendant herein was not an abuse of such discretion.

Defendant's contention that the court erred in refusing to give its requested instruction No. 5, and in giving instructions Nos. 3 and 4 by the court, may be properly considered together. The substance of said requested instruction is embodied in instruction No. 3, given by the court. It contains a clause which appears to be, in substance, the same as the clauses in said instructions Nos. 3 and 4, given by the court, complained of; and the defendant will not be permitted to take advantage of an alleged error in giving instructions because of a proposition therein which is substantially like the one in the instruction requested by it.

Counsel's assignment and presentation in this brief of the alleged errors of the court in refusing to give instructions Nos. 6, 7, 8, and 9, requested by defendant, are so vague and indefinite that they do not merit consideration. However, an examination of said instructions shows that some of them are based on the theory that the answers to the questions in the application complained of are warranties; that some assume facts, and thus invade the province of the jury; and that all of the correct legal propositions stated therein applicable in this case are em-

bodied in and covered by the instructions given by the court.

Counsel do not contend that instruction No. 5, given by the court, is not a correct statement of the law, but insist that it is not supported by the evidence. This instruction is evidently based upon plaintiff's theory that defendant failed to prove that the answers written in the application by Dr. Newbecker were made by deceased, or that he signed part II of said application. The reply contained a general denial. The burden of proving every material allegation in the amended answer rested upon defendant. Among these are the allegations that assured made a written application in which were his answers to questions alleged to be false; and counsel for plaintiff contend that Dr. Newbecker's testimony proves that the answers in the application are the answers of the doctor, and not those of assured. However, the giving of an instruction which is not applicable to the issues or evidence will not work a reversal of a judgment unless the rights of the complaining party were prejudiced thereby. *Burlington & M. R. R. Co. v. Gorsuch*, 47 Neb. 767; *McClellan v. Hein*, 56 Neb. 600. We perceive no prejudice resulting to defendant from the giving of said instruction which requires a reversal of the judgment herein.

We do not think that counsel's criticism of instructions Nos. 6, 7, 8, and 9, given by the court, is justified, or that the giving of same constitutes prejudicial error. It devolved upon defendant to prove that the answers complained of were made by assured, and that he had theretofore had a "severe illness" within the correct meaning of that term; and it was not error for the court to define "severe illness," nor to put the burden of proof upon defendant, as was done in instructions Nos. 6 and 7.

Instruction No. 8 appears to correctly state the law; and counsel's criticism of instruction No. 9, which they say "in general terms states the law," is hypercritical.

We find that the amount allowed the plaintiffs by the trial court as attorneys' fees is excessive and should be

reduced to $350. It is therefore ordered that said amount for attorneys' fees be, and the same is, hereby reduced to $350; and the judgment of the trial court, as thus modified, is affirmed; and an attorney fee of $150 allowed plaintiffs' attorneys in this court.

AFFIRMED AS MODIFIED.

MICHAEL MULLALLY, APPELLEE, V. GEORGE HASLAM, APPELLANT.

FILED OCTOBER 14, 1921. No. 21689.

1. **Negligence**: INSTRUCTIONS. Record examined, and *held* that the court did not, in instructions Nos. 1 and 6, given on its own motion, and referred to in the opinion, submit allegations of negligence where no evidence was offered in support thereof.
2. **Appeal**: FAILURE TO REQUEST INSTRUCTION. Where the basis of plaintiff's cause of action was the alleged negligent operation by defendant of his car in violation of an ordinance, and where the court's instructions did not specifically point out the particular provisions of the ordinance alleged to have been violated, but did in a general way submit their violation as alleged in the petition, the defendant, having failed to ask specific instructions thereon, cannot, on appeal, complain of the court's instructions.
3. ———: INSTRUCTIONS. Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment. Instructions given by the court on its own motion and those given by the court at the request of the defendant and appearing in the opinion, *held* to present to the jury substantially the same issues.
4. **Damages**: REMITTITUR. Evidence examined, and *held* that, while the verdict is excessive, it was not the result of passion or prejudice, and, if a remittitur be filed in the amount stated in the opinion, the judgment of the lower court will be affirmed in that amount.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed on condition.*

Courtright, Sidner, Lee & Jones and *Kennedy, Holland, DeLacy & McLaughlin*, for appellant.

J. E. Daly and *J. C. Cook, contra.*

Heard before MORRISSEY, C.J., ROSE and FLANSBURG, JJ., DICKSON and TROUP, District Judges.

DICKSON, District Judge.

This case was begun in the district court for Dodge county to recover damages. The plaintiff alleged that the defendant negligently and carelessly ran into and collided with the coal wagon in which he was riding, thereby permanently injuring him. A trial was had to a jury, which resulted in a verdict for plaintiff for $6,000, upon which judgment was entered, and defendant appeals to this court.

It appears that plaintiff was assisting his son in hauling coal to the electric light plant situated on the west side of Main street in the city of Fremont, the son doing the hauling and unloading, and the father loading the wagons from the cars at the railroad track. Access to the light plant was by an alley running east and west and to the south and leading to and from Main street. After delivering the last load of coal, which was about midnight, the plaintiff and his son started for home, traveling the alley from the light plant to Main street, where they turned south along the west side. At this time the defendant was driving to the north on Main street in his automobile, and, at a point where the team and wagon was turned into Main street, the defendant's car struck the tongue of the wagon, knocking down one or both horses, and throwing the plaintiff down in the wagon, injuring him.

Plaintiff predicates his cause of action upon a violation by defendant of certain ordinances of the city of Fremont, as well as the laws of the state. It is charged by plaintiff in his petition that the defendant negligently and carelessly, and in violation of the ordinances and the laws of the state, drove his car along the west side of Main street at a high and dangerous rate of speed, and failed to keep a vigilant watch ahead for other vehicles

which were entering upon the street, and failed to stop or attempt to stop or check the speed of his car in the shortest time and space possible when the defendant saw, or could by the exercise of ordinary care, have seen the team and wagon in time to stop his car and avoid the collision.

The ordinance referred to in the petition and offered in evidence contains many provisions that are not material in the consideration of this case, and only those that bear upon the issues will be noticed. The ordinance provides that vehicles shall be driven in a careful manner, with due regard for the safety and convenience of other vehicles; that vehicles shall keep on the right of the center of the street; that vehicles meeting shall pass to the right; that drivers of motor vehicles shall have their cars under control; that no vehicle shall be operated at a greater rate of speed than is reasonable or proper, having regard to the traffic and use of the highway, or so as to endanger the life and limb of any person, or in any event at a greater rate than ten miles an hour in the congested district, and outside of the congested district no car shall be operated at a greater speed than twelve miles an hour.

Many errors are assigned, but only those presented by the appellant's brief will be considered. It is contended by the appellant in his brief that the court erred in giving instructions Nos. 1, 4, and 6, and in refusing to give instructions Nos. 1, 3, 4, and 5, requested by him; that the verdict of the jury is not supported by, and is contrary to, the evidence, and is the result of passion and prejudice. The assignments of error will be considered in the order named.

The jury are told in instruction No. 3 that the matters contained in instruction No. 1 are taken from the pleadings and are not evidence. By instruction No. 4 the jury were instructed that the burden is upon the plaintiff to prove, by a preponderance of the evidence, that the defendant was guilty of negligence in some way or ways set

out in instruction No. 1, and that such negligence was the proximate cause of plaintiff's injury, if any. By instruction No. 1, the jury were instructed:

"Plaintiff claims the cause of said collision was the negligence of the defendant in operating his automobile in violation of the law and the ordinances of the city of Fremont, and in driving his machine on the wrong side of the street at a high and dangerous rate of speed."

In instruction No. 6 the court instructed the jury: "It is the duty of parties driving vehicles upon the streets to obey the ordinances of the city and the laws of the state with reference to such use of public thoroughfares. And in this case, it was the duty of defendant to obey the ordinances of the city of Fremont with reference to the use of its streets for automobiles, and also the laws of the state and the usual rules of the road. If you find the defendant failed in any or all the above particulars, such fact or facts should be considered by you with all other evidence as tending to prove negligence."

The appellant insists that the court, by these instructions (Nos. 1 and 6) submitted allegations of negligence where no evidence was introduced in support thereof, and cites many decisions of this court in support of this contention. We have no fault to find with the rule announced in these cases; they state the rule correctly. But were allegations of negligence submitted without evidence to support them? We think not. The theory of the plaintiff's case was that the defendant was negligent in driving on the wrong side of the street at a dangerous and excessive rate of speed, and his failure to have his car under control, to keep a vigilant watch ahead, and that he failed to stop or check the speed of his car after seeing the team and wagon, or, by the exercise of ordinary care, could have seen them. The evidence was confined to these issues as nearly as possible in the trial of a case. There was, however, evidence as to the lights on the defendant's car, and other matters pertaining to the car, its occupants, their places of residence, the course of travel before enter-

ing upon Main street, the purpose for which defendant was traveling this street, and many facts preceding and succeeding the collision, not directly an issue in the case or alleged as a ground for recovery. Some of these acts may have been in violation of some provision of the city ordinance or laws of the state, but no recovery thereon was sought either in the pleadings or the evidence; and, while these were not specifically eliminated by the court in its instructions to the jury, they were not presented as issues. The basis of plaintiff's cause of action was the alleged operation by defendant of his car in violation of the ordinances and the laws of the state; and, while the court's instructions did not specifically point out the particular provisions of the ordinance alleged to have been violated, yet the instructions did, in a general way, submit their violation as alleged in the petition, and the defendant cannot now complain, he having failed to ask specific instructions thereon. *Olmsted v. Noll*, 82 Neb. 147.

Again, before a reversal could be had for submitting allegations of negligence where no evidence was introduced in support thereof, it must appear that the jury were misled in their consideration of the facts of the case. *Mannion v. Talboy*, 76 Neb. 570. Instructions must be considered as a whole. A consideration of the instructions given by the court on its own motion in connection with those given at the request of the defendant leaves him without complaint.

The following instruction (No. 6) was given by the court at the request of the defendant: "You are instructed that unless you find the defendant guilty of negligence, in whole or in part, as charged in his petition, then your verdict must be for the defendant, and the burden is on the plaintiff to prove, by a preponderance of the evidence that the defendant was negligent, and that such negligence was the proximate cause of plaintiff's injury, and that plaintiff sustained injuries as a result thereof."

And, again, the court was requested by defendant and gave instruction No. 7, which reads as follows: "You are instructed that certain ordinances of the city of Fremont have been introduced in evidence and as to these you are instructed that the violation of such ordinances, if you find there was, does not amount to negligence as a matter of law, but is a fact to be considered, together with all the rest of the evidence in the case, in determining whether the defendant exercised care."

By these instructions the defendant presented to the jury substantially the same issue as stated by the court in its instruction No. 6, and thereby adopted and approved the theory of the court, and, having done so, he cannot now complain. Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment. *Jonasen v. Kennedy,* 39 Neb. 313. The complained-of instructions, when considered with those given by the court on its own motion, fairly presented to the jury the issues as made by the pleadings and the evidence and are far from being prejudicial to the defendant.

Did the court err in refusing to give instructions Nos. 1, 3, 4, and 5, requested by defendant? Instruction No. 1 was a peremptory instruction to find for the defendant. By No. 3, the jury are instructed that, as to the allegation that the defendant was operating his car at a dangerous and excessive rate of speed, they should find for the defendant. By No. 4, the jury are instructed that, as to the the allegation that the defendant failed to keep vigilant watch ahead, they should find for the defendant. And by No. 5, the jury are instructed to find for the defendant on the allegation that the defendant failed to stop or attempt to stop or check his speed and avoid the collision. The giving of instructions Nos. 3, 4, and 5 would have eliminated every question of negligence alleged in the petition, other than the allegation that the defendant was negligent in traveling on the wrong side of the street. As to whether the defendant was driving at a dangerous

rate of speed, and whether he was looking ahead, and whether he had his car under control, and whether he failed to stop his car when he discovered the presence of the team and wagon in the street, or by the exercise of due care he could have discovered them, were questions of fact for the consideration of the jury, and are largely dependent upon the part of the street he was traveling upon and the rate of speed. To a great extent, they are dependent upon each other, and not subject to separation, and must be considered together. These requested instructions presented to the court the sufficiency of the evidence on the issues thus presented. As to these issues, the evidence was conflicting and it was for the jury to pass upon them under proper instructions. The plaintiff's son, the driver of the team, testified that the defendant's car struck the wagon tongue, knocking down both of his horses; that this happened as he was driving on the street and just as the horses stepped on the pavement, the hind wheels of the wagon being on the sidewalk; he says he noticed the car one-half block away (190 ft.) to the south, about the middle of the street, and that he just let the wagon drop down on the street and turned the horses south and close to the curb; that the car was traveling 30 miles an hour; that when it struck the tongue of the wagon it drove the wagon back to the curb, knocking down both horses, one falling back under the wagon, the other falling out on the street, the tongue being pulled over him; that the tongue was driven into the car, and that fire flew out of it and glass fell on the street; that he turned the team as fast as he could after he saw the light of the approaching car; that the car stopped 100 feet from the place of collision; that the first thing he did after he saw the car approaching was to jerk the horses around to the right; that he got them to the curb, the right-hand horse having his hind feet against it; that when he came out of the alley he looked first to the north, and, just as the horses were going down the slope, he noticed the lights

from a car coming from the south on the west side of the street.

The plaintiff called as a witness an employee in the Monich garage, which was across the street from the place of collision, who testified he heard a crash; that he saw the defendant's car up the street in the middle or west of the middle of the street; that the hind wheels of the wagon were on the sidewalk and the front wheels in the gutter, and the horses were swung sharp to the right over against the curbing. An employee of the electric light plant testified that about 12:30 a. m. he was sitting by the side door, and a coal wagon had just passed; a few minutes later he heard a terrific smash; that it frightened his wife; that he opened the door and looked out and saw the back wheels of the coal wagon on the sidewalk, and noticed the left-hand horse down on the pavement. The owner of the electric garage, where the defendant's car was taken, testified that he saw the defendant's car after the collision; identified the radiator in court; said that the hood of the engine was wrinkled up "some awful bad;" that the main leaf of the spring was doubled back, letting the front wheel slide back and jamming the bolts that held the spring to the front axle; that the front lights were tipped back, smashed completely; that the wheel struck something, evidently, and that enough weight came on it that doubled the spring, kind of put a kink in it; that the front axle was out of line from four to seven inches, so it was impossible to steer.

The defendant testified that from Military avenue he was driving principally in the middle of the street; that he slowed up a little at the Cronin residence (this was on the west side of Main street and fronting Main street), as he thought of putting one of the occupants of the car out there, but that he decided to go and put her down coming back; that he saw nothing of the team until it was possibly four or five feet away; that he was then traveling twelve miles an hour; that he put on the brakes and turned to the east; that by the time he struck the

pole of the wagon he was going not more than half that rate. The defendant's stenographer was called by the defendant and testified that she rode in the front seat of the car; that she did not notice the team until they were within two or three feet of it, and that she thought they were in about the center of the street; that she put her hands up to her face, being afraid of glass from the windshield, and defendant made a quick turn to the right and stopped the car; that the tongue went into the radiator, and the collision knocked one of the horses down. The other two occupants of the car were ladies, riding in the back seat. They say they saw nothing until they heard the crash. One testified that she was looking west towards the Cronin residence, where she lived, at the time of the collision, and that the car was traveling in about the middle of the street.

As to whether the defendant was driving on the wrong side of the street, and as to whether he was traveling at a high and dangerous rate of speed, and as to whether he had his car under control, were disputed questions of fact and properly for the consideration of the jury; and for the trial court to have instructed the jury as requested by the defendant would have been error. The rule in this state is: "Where the facts are disputed, it is solely the province of the jury to determine the same; and, whether the facts be disputed or undisputed, if different minds might honestly draw different conclusions from them, the case is properly left to the jury." *Ogden v. Sovereign Camp, W. O. W.*, 78 Neb. 804, 806.

From a careful examination of the evidence in this case, we are convinced that the trial court did not err in refusing to direct the jury to return a verdict for the defendant, and that the evidence was sufficient to sustain a verdict for the plaintiff. "A verdict will not be set aside on the ground of want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong." *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb. 529.

This leaves for consideration the question, Is the verdict excessive and the result of passion or prejudice? That the plaintiff sustained numerous minor injuries from which he recovered is not questioned, leaving no permanent injury other than to his shoulder. The extent of his injuries was fully presented to the jury by proper instructions. His physician testified that his permanent injury was a fracture of the coracoid process of the left shoulder, impairing the strength and limiting the action and use of his arm, and that he was also permanently affected with hysteria resulting from the injury to his shoulder.

The plaintiff is a laboring man, 65 years of age, with an expectancy of 11 years, depending upon his day's labor for a livelihood. He testified that he had no use of his left arm. At the time of the injury he was earning, and had been for some time, $7 to $10 a day helping his son in delivering coal to the light company. The record is silent as to his occupation prior to his coming to Fremont about a year before, except for a short time he drove a team for Swift & Company in Sioux City, and before that he was engaged in farming. We must take judicial notice of the change of the times. At the time of the injury, as well as at the trial of the case, labor of all kind was commanding the highest price in the history of our country. This man had been and was engaged in the very hardest kind of manual labor. It is not reasonable or fair to presume that he could continue to do so the remainder of his expected days. While the verdict of the jury was much more than would compensate the plaintiff for the damages sustained, yet we do not think it was the result of passion or prejudice, but rather due to the times and conditions existing at and before the trial—the seeming little value placed upon the dollar. The plaintiff is entitled to be fully compensated for all damages sustained, and we are convinced that, under the evidence and the changed conditions of the time, $4,000 will fully compensate him for all damages suffered. And if he will, within 20 days

from the filing of this opinion, file a remittitur in this court of $2,000, the judgment, so reduced, will be affirmed; otherwise the case will be reversed and a new trial granted.

AFFIRMED ON CONDITION.

W. BRUCE SHURTLEFF ET AL., TRUSTEES, APPELLANTS, V. L. K. SCHOENLEBER ET AL., APPELLEES.

FILED OCTOBER 14, 1921. No. 22012.

1. **Corporations: DISSOLUTION: TRUSTEES: DUTIES.** Where, by operation of law, the directors of a dissolved corporation are made trustees for its creditors and stockholders, and the statute specifically points out and designates their duties as such, they are not entitled to instructions from a court of equity.
2. **Trusts: STATUTORY TRUSTS.** The rule that when the meaning of a will, deed, contract or other instrument which relates to or creates a trust, is doubtful, so that by reason thereof the trustee is embarrassed or exposed to danger in the execution of his trust, a court of equity will construe the instrument, declare its legal force and effect and give advice and instruction in regard to carrying out of said trust, *held* not to apply in a case where the trust is created by statute and the duties imposed specifically stated.
3. ———: ———: **NEGLECT OF TRUSTEES.** Under section 559, Rev. St. 1913, before a court of equity will assume control of the trustees of a dissolved corporation, it must appear from the petition of some person interested that they have been guilty of some neglect, or omission of duty, or abuse of trust. The petition examined, and *held* not to state a cause of action under this section of the statute.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

C. C. Flansburg, for appellants.

G. H. Risser, C. S. Wilson, Albert S. Johnston and *W. T. Stevens, contra.*

Heard before MORRISSEY, C.J., ROSE and ALDRICH, JJ., DICKSON and TROUP, District Judges.

DICKSON, District Judge.

This is a suit in equity begun in the district court for Lancaster county. The court sustained a demurrer to the petition, and appellants, plaintiffs below, stood on their petition, refusing to plead further, and the case was dismissed.

The petition alleges that prior to January 26, 1918, the Jen-Lan Company was a corporation engaged in buying, selling and exchanging real estate, with an authorized capital of $50,000; that on January 26, 1918, the stockholders changed the name to Federal Building & Investment Company, and the articles of incorporation were amended increasing the capital stock to $300,000, 2,400 shares being preferred and 600 shares being common, of the par value of $100. Among other things there was a provision relating to the preferred stock, as follows:

"The holders of preferred stock shall be entitled to receive, when and as declared by the board of directors from the surplus or net profits of the corporation, yearly dividends at the rate of seven per cent. per annum, payable semi-annually on July and January 1st of each year. The dividends on such preferred stock shall be cumulative and shall be paid before any dividends on the common stock shall be paid or set apart, so that if in any year the dividends amounting to seven per cent. shall not have been paid upon the preferred stock the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock.

"The holders of common stock shall be entitled to receive, when and as declared from the surplus or net profits of the corporation, yearly dividends at the rate of seven per cent. per annum, payable semi-annually on July and January 1st of each year, and such dividends shall likewise be cumulative, but shall not be payable until all dividends on the preferred stock for all previous years have been fully paid, or the company shall have set aside from its surplus or net profits a sufficient sum to meet the payment thereof.

"After all such cumulative dividends on the preferred and common stock have been fully paid and provided for, the board of directors may set aside such additional amount of the net surplus or profits of the corporation as they may deem proper as additional dividends. Of such amount so set aside twenty-five per cent. shall be paid to the holders of the preferred stock, fifty per cent. shall be paid to the holders of the common stock, and the remaining twenty-five per cent. shall be carried as reserve which is to be used to pay the seven per cent. dividends on the preferred stock should said corporation during any one year fail to earn sufficient out of which to pay the seven per cent. dividend on the preferred stock. Should said surplus fund accumulate, it may be reduced and distributed by the order of the board of directors; and upon any distribution of said surplus fund, fifty per cent. thereof shall be distributed to the preferred stockholders and the remaining fifty per cent. shall be distributed to the common stockholders.

"In case of the dissolution of this corporation, the preferred stock shall be preferred to the extent of the par value together with any earned and unpaid dividends due thereon at the rate of seven per cent. per annum. After such amounts have been paid to the preferred stock, the common stock shall then be paid its par value together with any earned and unpaid dividends due thereon at the rate of seven per cent. per annum. Any surplus remaining thereafter shall be divided pro rata among the shares of the preferred and common stock."

The common stock merely certified that the holder was the owner of a given number of shares of stock, without any provision with regard to dividends. Under the amended articles of incorporation, 785½ shares of preferred stock and 603 shares of common stock were issued, which were fully paid for at the time of the issuance. The purpose of the corporation was to build apartment houses, store buildings, including garages and dwelling-houses. From the money derived from the sale of stock,

property was purchased, repaired and remodeled, only two new buildings being constructed.

On January 20, 1920, the properties held by the corporation were appraised at $382,500, with incumbrances of $113,975.26. There were other assets at that time estimated at $65,464.36, with liabilities, including corporate stock outstanding, of about $157,855.66. At the annual meeting of the stockholders held March 2 the financial condition of the company was discussed, and the president was authorized to sell properties of the company for the purpose of liquidating outstanding obligations. Failing in this, a special meeting of the stockholders was called for June 26 to consider the manner of dissolving and liquidating the corporation. At this meeting the stockholders voted to dissolve the corporation, and to assist in the liquidation two stockholders were elected to act in conjunction with the directors. At a meeting of the liquidating committee held September 11, 1920, it was agreed that the property could not be reduced to cash without great sacrifice, and it was proposed to divide the properties into groups and offer to permit the stockholders to surrender stock for same—the groups being composed of properties that had been handled as units by the company—and notice was then given to each stockholder that they could bid on said property, or make an offer to exchange stock therefor on the basis of $200 a share for an equal interest in the groups of properties based on the appraised value.

It is further alleged in the petition that the applicants are mandatories of the court, created trustees by operation of law upon dissolution, holding the properties of the corporation in trust for the benefit of the creditors and stockholders; that they have been advised they have the right to divide and distribute the property of the corporation in specie under the terms of the statute, but have been unable to fix upon a definite plan or exact terms of liquidation in the exchange of stock for property; that the value of the two classes of stock depends upon what

is to be treated as surplusage or earnings and the value of the property, and are in doubt as to the meaning of the trust and duties imposed upon them.

By supplemental petition it is alleged that, since the filing of the original petition, a special meeting of the stockholders was held; at this meeting the property was estimated to be the value of $151,850 and the company's indebtedness at about the sum of $10,000; that since this special meeting, which was held on November 20, 1920, an offer was made to appellants to exchange 176 shares of preferred stock for the equity in the property owned by the company and known as the Lincolndale property, subject to $30,000 incumbrance thereon; and an offer of 100 shares of common stock for the Sewell street lots owned by the company, subject to $10,000 incumbrance; and that 170 shares of preferred stock were offered for the equity in the Rollins building owned by the company, the incumbrance thereon being $33,000; that the appellants desire the assistance of the court in making distribution and liquidation of this stock and transfer of this property, if the same can, in the judgment of the court, be done without prejudice to the rights of the other shareholders. It is alleged that parties owing notes given for stock desire to liquidate their stock by surrendering the same for the notes on the basis of the par value of the stock. And the appellants pray the aid of the court to take testimony and fix and ascertain the value of all the real estate and properties held and owned by the company at the date of its dissolution; that the court, by decree, fix and determine the method of liquidation; that the court authorize and empower the trustees to make the exchange of property for said stock, each transaction to be reported to the court and confirmed by the court; and that the court direct, by its decree, the method of meeting the obligations of said dissolved corporation; and for such other and further instructions as the court may deem necessary in discharge of the trust imposed upon them by law.

The sole issue presented is whether the petition states a cause of action. To determine this question it is necessary to examine several provisions of our statutes.

Section 558, Rev. St. 1913, provides that the title of all real estate belonging to a dissolved corporation shall, at the time of the dissolution of the same, pass to the trustees of such corporation, who shall have full power and authority to sell and dispose of any such real estate in such manner and upon such terms as may be thought best for the interest of the creditors and stockholders; and upon such sale to make a good and sufficient title therefor.

By section 555, Rev. St. 1913, it is provided that, upon the dissolution of any corporation, the directors or managers of the affairs of such corporation shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, collect and pay the outstanding debts, and divide among the stockholders the moneys and properties that shall remain in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses.

By section 559, Rev. St. 1913, it is provided the trustees of any such dissolved corporation shall be subject to the control of the court, and be liable to be sued by petition in equity on behalf of any person interested on account of any neglect or omission of duty or abuse of trust.

By statute it is made the duty of the appellants to settle the affairs of the corporation, and imposes upon them the duty of deciding every proposition that they, by their petition, seek to have the court determine. In bringing this action appellants evidently relied upon section 559 to give the court jurisdiction. That this section gives the court jurisdiction over the trustees of a dissolved corporation cannot be disputed. But when and how will it be exercised, and at whose instance? The statute specifically points out the duties of the appellants, and, if they fail in that regard, they are subject to the control of the

court, and not otherwise. A careful analysis of the petition fails to show that the appellants have done or propose doing that which is a neglect or omission of duty or an abuse of the trust imposed upon them by law. And until they have done or propose doing some such act, they are not subject to the control of the court. Besides the action must be on the petition of some person interested, and because of some neglect or omission of duty or abuse of the trust imposed upon them by law. The statutory right to sue by some person interested precludes the appellants from bringing the action authorized by this section. It therefore follows that the petition does not state a cause of action under this section.

The appellants seek to invoke the rule that when the meaning of a will, deed, contract or other instrument which relates to or creates a trust is doubtful, so that by reason thereof the trustee is embarrassed or exposed to dangers in the execution of his trust, a court of equity will construe the instrument, declare its legal force and effect, and give advice and instruction in regard to carrying out of said trust. The statute creating the trust imposes no duty upon the appellants that is doubtful or that will embarrass them in the exercise of the duties devolving upon them. True, the petition recites that certain stockholders propose to surrender stock in exchange for certain properties, and others to surrender stock for notes given in settlement for stock and not paid, and that they have been advised by counsel that as trustees and by operation of law they have the right to divide and distribute the property of the corporation in specie under the terms of the statute, and that the value of the two classes of stock depends upon what is to be treated as surplus or earnings and the value of the property, and that they are in doubt as to what they should do, and pray that the court fix and determine the method of liquidation. In other words, that the court shall relieve the appellants of the duties and responsibilities imposed upon them by law, some of which are mandatory and

others discretionary. We are of the opinion that the facts stated in the petition do not bring them within this rule. To follow such a rule in this case would be the discharging by the court of the duties imposed upon appellants by law and relieve them from responsibility in the liquidation of the affairs of the corporation. This the court will not do. The appellants are, by statute, made trustees of the dissolved corporation. Their duties are specifically pointed out, fixed and determined by law, and they are not entitled to apply to the court for instructions. To instruct them would be to direct that they follow the plain and explicit direction of the statute.

The petition does not state a cause of action, and the trial court properly sustained the demurrers thereto.

The judgment of the lower court is

AFFIRMED.

PETERS TRUST COMPANY, APPELLANT, V. DOUGLAS COUNTY, APPELLEE.

FILED OCTOBER 14, 1921. No. 21556.

1. **Taxation: TRUST COMPANIES: SHARES OF STOCK.** Shares of stock in a trust company are a distinct entity from the capital stock, or property and assets of the corporation.
2. **———: ———: ———.** The tax contemplated by section 6343, Rev. St. 1913, as amended by ch. 108, Laws 1915, relating to the taxation of trust companies, is a tax upon the shares of stock in the hands of stockholders, and is not a tax upon the property of the corporation.
3. **———: ———: "CAPITAL STOCK."** The words "capital stock," as used in section 6343, *supra*, does not mean capital stock in the aggregate, but shares of capital stock in the hands of stockholders which are subject to taxation.
4. **———: ———: SHARES OF STOCK: DEDUCTION OF SECURITIES.** When the tax is laid upon shares of stock of a trust company in the hands of the stockholders, no deduction of securities exempt from taxation, owned by the trust company, is required to be made by the laws of this state or by the laws of the United States.

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

Stout, Rose, Wells & Martin, for appellant.

W. W. Slabaugh and *A. V. Shotwell, contra.*

Heard before LETTON, DEAN and DAY, JJ., GOOD and RAPER, District Judges.

GOOD, District Judge.

This is an appeal from the assessment for taxation of the shares of stock of the Peters Trust Company, appellant herein. Appellant requested the taxing authorities of Douglas county to deduct from the valuation for assessment purposes certain bonds of joint stock land banks, organized under the laws of the United States, and certain United States Liberty bonds, which were at the time of the assessment owned by appellant. The request was denied, and on appeal the action of the taxing authorities was upheld by the judgment of the district court. This appeal is lodged to review that judgment.

It is conceded that both series of bonds are not subject to taxation as property in the hands of their owners. Appellant insists that including these bonds in the valuation of the shares of stock for assessment purposes, as required to be done under section 6343, Rev. St. 1913, as amended by chapter 108, Laws 1915, does in effect lay a tax on the bonds in the hands of their owners, and is contrary to the laws of the United States declaring such bonds exempt from taxation in the hands of their owners.

The solution of the question presented depends on the interpretation given to said section 6343, as amended, which provided the same method and procedure for the assessment of the shares of stock of trust companies that are provided for the assessment of shares of stock of banking corporations. In *State v. First Nat. Bank,* 103 Neb. 280, this court, after a thorough and elaborate presentation by able counsel, and after full investigation and careful consideration, construed said section in so far as

it relates to the assessment of shares of stock of banking corporations. The reasons for the interpretation and authorities sustaining the conclusions reached are therein set forth and will not be repeated here. The principles therein stated and the conclusions reached are applicable to and control the decision in this case. Following the rules laid down in *State v. First Nat. Bank, supra,* we hold that shares of stock in a trust company are a distinct entity from the capital stock, or property and assets of the corporation; that the tax contemplated by section 6343, Rev. St. 1913, as amended by chapter 108, Laws 1915, relating to the taxation of trust companies, is a tax upon the shares of stock in the hands of stockholders, and is not a tax upon the property of the corporation; that the words "capital stock," as used in section 6343, *supra,* does not mean capital stock in the aggregate, but shares of capital stock in the hands of stockholders which are subject to taxation; and that, when the tax is laid upon shares of stock of a trust company in the hands of the stockholders, no deduction of securities exempt from taxation, owned by the trust company, is required to be made by the laws of this state or by the laws of the United States.

The judgment of the district court is

AFFIRMED.

GEORGE SOLE, APPELLEE, V. CITY OF GENEVA, APPELLANT.

FILED OCTOBER 14, 1921. No. 21662.

1. **Pleading.** When a privilege or right is conferred by statute, on certain prescribed conditions, and a party desiring to avail himself of such privilege or right brings action for the enforcement thereof, he must allege and prove all the facts that are essential to a strict compliance with the prescribed conditions.
2. **Municipal Corporations: DETACHMENT OF TERRITORY: REMEDIES.** Section 5090, Rev. St. 1913, relating to the detachment of territory from the corporate limits of cities and villages, does not

provide an exclusive remedy for detaching territory from such cities and villages.

3. ———: ———: ———. Under the general chancery and common-law powers conferred by the Constitution, and without reference to statute, district courts are vested with jurisdiction to hear and determine whether an owner of agricultural lands included within the corporate limits of a city is entitled to have the same disconnected therefrom.

APPEAL from the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Affirmed.*

Charles H. Sloan, F. W. Sloan and *T. J. Keenan,* for appellant.

John K. Waring and *Robert B. Waring, contra.*

Heard before LETTON, DEAN and DAY, JJ., GOOD and RAPER, District Judges.

GOOD, District Judge.

This is an appeal from a decree of the district court for Fillmore county, disconnecting from the corporate limits of the city of Geneva a tract of land comprising approximately 41 acres, owned by appellee.

Appellant insists that the petition of plaintiff, appellee herein, did not state facts sufficient to entitle him to the relief demanded of, and granted by, the district court; that the decree is not supported by sufficient evidence, nor is it supported by proper findings of fact by the trial court. Appellant's contention is founded on the assumption that the action is based on section 5090, Rev. St. 1913, which is in part as follows:

"Whenever a majority of the legal voters residing on any territory within and adjacent to the corporate limits of any city or village, or the owner or owners of any unoccupied territory so situated, shall desire to have the same disconnected therefrom, they may file their petition in the district court of the county in which such city or village is situated, praying that such territory be detached therefrom. * * * If the court find in favor of

the petitioners, and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly."

The allegations of plaintiff's petition showed that the land was owned and occupied by him, but did not show that he was the only voter or a majority of the legal voters residing on the territory sought to be disconnected, nor did the evidence show that the plaintiff was the only legal voter or that he was a majority of the legal voters residing on the territory, and the trial court did not make the findings prescribed by the statute, viz., "That justice and equity require that such territory shall be disconnected from such city."

When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, he must allege and prove all the facts essential to a strict compliance with the prescribed conditions. So that if the action is founded on the statute above quoted, appellant's contention is well taken and plaintiff is not entitled to have the land disconnected. The views herein expressed find support in the following cases: *Delozier v. Village of Magnet,* 104 Neb. 765; *McCullough v. Colfax County,* 4 Neb. (Unof.) 543; 31 Cyc. 115; *Haskins v. Alcott & Horton,* 13 Ohio St. 210; *Dye v. Dye,* 11 Cal. 163; *Village of Osmond v. Smathers,* 62 Neb. 509.

But the statute above referred to does not provide an exclusive remedy for disconnecting territory from a city or village. Such relief may on proper pleading and proof be granted by the district court in the exercise of the general chancery and common law powers conferred upon it by the Constitution. This power of the district court has been exercised heretofore and approved by this court. *State v. Dimond,* 44 Neb. 154; *Village of Osmond v. Smathers,* 62 Neb. 509; *Village of Osmond v. Matteson,* 62 Neb. 512.

In *Village of Osmond v. Smathers, supra,* it is said:

"Said section 101 is not a limitation upon the right to institute proceedings to have territory taken out of the corporate limits of a city or village. That section merely conferred the right to a petition for the detachment of territory upon a majority of the legal voters within the boundaries thereof, and it would seem that such voters need not necessarily be owners of real estate. It was not the intention of the legislature in passing said section, nor could it lawfully do so, to take away the right of the owner of real estate included in the boundaries of a city or village to invoke the powers of the court to determine whether such real estate is properly included within the corporate limits of such municipality. This principle was held and applied in *State v. Dimond, supra.* Plaintiff, being the exclusive owner and in possession of the tract of land in question, had a right to bring this suit."

The section 101 referred to in the above quotation was the one that then provided for the disconnecting of territory from a city or village, and was quite similar to section 5090, Rev. St. 1913. It was necessary, therefore, only for the plaintiff to allege and prove that he was the owner and in possession of the tract of land, and to allege and prove such other facts as would show that it was inequitable to retain the territory within the corporate limits of the city.

Plaintiff in his petition alleged that the land in question had never been platted or divided into lots or parcels, nor had any streets or alleys ever been surveyed or located thereon, but that all of said real estate has at all times been used exclusively for agricultural purposes as one complete body of land; that the premises are situated on the extreme west boundary of said corporate limits, and that by reason of its character and location it is in no wise benefited by being so included within said corporate limits.

The evidence discloses that while the city has a system of water-works, electric lights, a sewer system, paving, sidewalks, and other improvements, none of them reach

to the premises of the plaintiff. Plaintiff's premises are entirely without the sewer district; the nearest approach of the water system to plaintiff's premises is about 600 or 700 feet and a still greater distance to the buildings upon his farm. It appears that the electric lights reach the street that runs in front or on the east side of plaintiff's farm. It further appears that the town is divided by a railroad running north and south, and that practically all the business portion of the town is on the east side of the railroad, and that of the ten or twelve blocks of paving now completed all except one-half block is on the east side, and that all of the new paving in process of construction is on the east side. It further appears that there has practically been no buildings of any consequence constructed on the west side of the track for more than ten years, and that new additions to the town and new buildings have all been upon the east side of the track. There is nothing to indicate that there is any likelihood of city growth to the west of the railroad track.

There are other details that need not be mentioned, but from a careful consideration of all the evidence it appears that plaintiff's farm derives no benefit from the city government, other than that of any other farm located adjacent or near a city or village. Under the circumstances we hold that it is inequitable that plaintiff's land should remain within the corporate limits of the city.

The judgment of the district court is right, and is

AFFIRMED.

JOHN NEDELA, APPELLEE, V. MARES AUTO COMPANY, APPELLANT.

FILED OCTOBER 14, 1921. No. 21522.

Master and Servant: EMPLOYERS' LILBILITY ACT: "CASUAL EMPLOYMENT." One who is employed to work in an automobile garage without any understanding as to the time of his employment, or the particular character of labor he is to perform, and assembles and sets up automobiles and performs such other labor in and

about the garage as he is directed to do by the foreman or manager, and such work is incident to, and in the usual course of, the business, is *held* not to be casually employed within the meaning of the employers' liability act.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Reversed.*

Crofoot, Fraser, Connolly & Stryker and *B. V. Kohout,* for appellant.

Bartos & Bartos, contra.

Heard before MORRISSEY, C.J., ROSE and FLANSBURG, JJ., BEGLEY and LESLIE, District Judges.

LESLIE, District Judge.

Action for personal injuries alleged to have been sustained by the appellee, who will be referred to as the plaintiff, while employed by the appellant, who will be referred to as the defendant.

The plaintiff brought this action upon the theory that the accident was caused by negligence on the part of the manager of the garage, but the prayer is that his damages be assessed under the compensation act, should the facts call for an assessment of damages under that act, and, if not, then for judgment for $10,450 and costs.

The defendant by its answer denies that the accident was due to its negligence, and alleges that both parties were subject to the provisions of the employers' liability act; that neither had filed an election or declaration not to be bound thereby.

The jury found for the plaintiff in the sum of $4,500. Motion for a new trial was overruled, and from this the defendant has appealed.

It appears from the evidence that on the 16th day of December, 1918, the manager of the defendant company solicited plaintiff to work for the defendant, and that on the following day he went to work in the defendant's garage. Nothing was said by either party as to what particular work the plaintiff was to do, over what period

of time his employment would extend, nor what his wages would be. The only evidence bearing upon the subject is found in the record of the plaintiff's testimony, and is as follows: "Q. Now, did you have a talk with Charley Mares about going to work for him? Did you have a talk with him? A. Yes. Q. When was that talk? A. Sixteenth of December. Q. What year? A. 1918. * * * Q. Now, what did he say to you, and what did you say to him at that time and place? A. Why, he told me if I couldn't help him work. Q. What did you say? A. And I said yes. Q. At that time did he say what kind of work you was to do? A. No. Q. At that time did he say for how long you was to work for him? A. Nothing was said. Q. At that time was there anything said about what wages you were to get? A. No. Q. Is that all that was said at that time and place? A. Yes."

From the 17th to the 21st of December, five days, the plaintiff was engaged in assembling and putting together new cars, and whatever else he was directed to do in and about the garage. The evening of the 21st, and just before he left the garage, he was requested by the manager to hold a wheel while the manager took a hammer and chisel and attempted to do something to the wheel; just what is not disclosed. It seems, however, that he struck the chisel with the hammer while it was against some part of the wheel, and immediately a chip of steel struck the plaintiff in his right eye. As a result of this the plaintiff lost the sight of his eye, and later had the eye removed.

Two questions are raised by the appeal of the defendant: First, were the parties subject to the provisions of the employers' liability act? Second, does the evidence disclose any actionable negligence on the part of the defendant?

Section 3653, Rev. St. 1913, provides: "In the occupations described in section 97 of this chapter, and all contracts of employment made after the taking effect of this article, shall be presumed to have been made with ref-

erence and subject to the provisions of Part II hereof unless otherwise expressly stated in the contract, or unless written or printed notice has been given by either party to the other, as hereinafter provided, that he does not accept the provisions of Part II. Every such employer and every employee is presumed to accept and come under Part II hereof, unless prior to accident he shall signify his election not to accept or be bound by the provisions of Part II."

Section 3652 provides: "Such agreement or the election hereinafter provided for shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in Part II of this article."

Subdivision 3, sec. 3656, is as follows: "It shall not be construed to include any person whose employment is casual, or not for the purpose of gain or profit by the employer, or which is not in the usual course of the trade, business, profession or occupation of his employer. The term 'casual' shall be construed to mean 'occasional;' coming at certain times without regularity, in distinction from stated or regular."

The plaintiff was not hired for a limited or even definite period of time, nor to do a particular job or specific kind of work. He was asked to go to work for the defendant, agreed so to do, and entered the service of the defendant for an indefinite period of time. During the five days of his employment he assembled and put together new cars and performed whatever other duties he was directed to do by the foreman or manager of the garage. It is apparent from the record that he was expected to do and did do such labor as men employed about a garage would ordinarily do. His employment was in the usual course of the business of the employer, and it is clear that it was in furtherance of the defendant's gain or profit. Neither party had elected or declared that he or it would not accept or be bound by the provisions of Part II of said act.

The plaintiff urges, however, that the defendant rested its case without making an effort to prove that the employment was casual, and also of showing that it had complied with section 3687, Rev. St. 1913, as amended, Laws 1917, ch. 85, sec. 21, which is as follows:

"Every employer in the occupations described in section 97 of this chapter shall either insure and keep insured his liability under this article in some corporation, association or organization authorized and licensed to transact the business of workmen's compensation insurance in this state, or shall furnish to the compensation commissioner satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due as provided for in this act. In the latter case the compensation commissioner may in his discretion require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred. Every employer who fails, neglects or refuses to comply with the conditions set forth in this section shall be deemed to have elected not to come under Part II hereof, and shall be required to respond in damages to an employee for personal injuries, or where personal injuries result in the death of an employee, then to his dependents, in like manner as if the employer had filed an election with the compensation commissioner rejecting the provisions of Part II of the compensation act."

We cannot agree with plaintiff's contention in this regard. First, it was not necessary for the defendant to offer evidence to show that the plaintiff's employment was not casual if the evidence offered by the plaintiff himself established the elements necessary to bring the parties within the provisions of the employers' liability act. Second, the defendant is presumed to have complied with the law and taken out liability insurance, or furnished the compensation commissioner satisfactory proof of its financial ability to meet claims for compensation made against it. In the absence of evidence re-

butting this presumption, it was not necessary for the defendant to offer evidence that it had complied with the law.

Numerous courts have expressed themselves in various ways under the different employers' liability acts as to what constitutes casual employment, but none of the cases that we have examined throw any light upon the situation developed by the facts in this case. As we view it, the employment of the plaintiff was not casual, but was regular and in the usual course of the business of the employer. This being true, both parties surrendered their rights to any other method of determination of the amount of compensation than that provided for under the employers' liability act. The plaintiff was not entitled to maintain this action, but should have submitted his claim for compensation.

Takng this view of it, we shall not consider whether or not there was actionable negligence on the part of the defendant.

For the reasons herein stated, the judgment of the lower court is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE BOWIE.

AMY ROBINSON, APPELLEE, V. GRIFFIN E. YEATMAN ET AL., APPELLANTS.

FILED OCTOBER 14, 1921. No. 21935.

APPEAL from the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

James & Danley, for appellants.

Harry S. Dungan, Philip H. Fuller and *James E. Addie, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., ALLEN and REDICK, District Judges.

REDICK, District Judge.

After a careful and painstaking reading and study of the record and evidence in this case, we are forced to the conclusion that the judgment of the district court is right, and the same is

AFFIRMED.

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2. Where an attorney withdraws from a case, his cocounsel is entitled to extra compensation for carrying on the litigation. *Jones v. Thomas* 635
3. An assistant attorney general is not an independent officer. *Lower v. State* 666

Banks and Banking. See CARRIERS, 1-4.

1. A bank's contract for a loan in excess of limitation fixed by statute is enforceable. *Bank of College View v. Nelson* 129
2. The validity of purchase by directors of stock of a national bank in failing circumstances can be questioned only by the United States. *Iowa State & Savings Bank v. City Nat. Bank* 397

Bastardy.

1. Evidence *held* to sustain verdict for plaintiff. *Walton v. Carroll* 138
2. A bastardy proceeding is quasi-criminal. *Bolich v. Robinson* 449
3. A mother may recover her lying-in expenses after adoption of the child during pendency of action. *Bolich v. Robinson* 449
4. Adoption of child during pendency of action abates the action as to maintenance of the child. *Bolich v. Robinson*. 449

Bills and Notes.

1. In an action by the indorsee of notes given to a corporation for capital stock, the maker is estopped to deny their ownership by the corporation. *Union Nat. Bank v. Moomaw* 388
2. Whether plaintiff was a *bona fide* holder of notes *held* a question for the jury. *Union Nat. Bank v. Moomaw* 388
3. A bank purchasing an insurance premium note with knowledge that the policy had not been delivered *held* not a *bona fide* holder. *Stockmen's State Bank v. Fisher* 525
4. Petition *held* to state a cause of action. *Craver v. McPherson* 568

Boundaries.

1. The location of quarter corners by the use of field notes will be adopted, in absence of other evidence. *Halley v. Harriman* 377
2. Government monuments control field notes. *Halley v. Harriman* 377
3. The location of a quarter corner midway between known section corners *held* not authorized. *Halley v. Harriman* .. 377
4. Change of township corner by state surveyor will not affect location of quarter corner by government surveyor. *Halley v. Harriman* 377

Boundaries—*Concluded.*

5. Marking a new township corner by the government surveyor does not change the location of a government quarter corner. *Halley v. Harriman* 377
6. Evidence *held* to establish government quarter corner. *McShane v. Murray* 512

Brokers.

1. A broker is entitled to his commission when he has procured a purchaser ready, able, and willing to buy on the terms proposed by the seller. *Pierce v. Roach* 140
2. Agent *held* authorized to enter into a contract for sale of land. *Seberger v. Wood* 272
3. A parol contract for commissions for procuring an exchange of lands is not within sec. 2628, Rev. St. 1913. *Sallack v. Freeman* 299
4. A broker cannot recover for loss of profits on a sale which was not *bona fide*. *Lowman v. Shotkoski* 540
5. In an action on a brokerage contract, defenses of limitation and cancelation of contract *held* not sustained. *Baughan v. Schuelke* 627

Burglary.

1. It is error to instruct that possession of recently stolen goods is presumptive evidence of guilt. *Pospisil v. State*.. 40
2. Evidence of exclusive possession of recently stolen property is admissible. *Pospisil v. State* 40

Carriers.

1. Where a bank honored a draft accompanying a bill of lading of grain bearing a restrictive indorsement, and the grain was sold in violation of the indorsement, the bank was liable for conversion. *Standard Grain Co. v. State Bank* 73
2. Evidence *held* to show that bank had knowledge of meaning of restrictive notation on bill of lading. *Standard Grain Co. v. State Bank* 73
3. Bank *held* chargeable with knowledge that its principal was without authority to negotiate a bill of lading. *Standard Grain Co. v. State Bank* 73
4. Subsequent transfers of a bill of lading constitute new contracts, which are governed by the law of the state where made. *Standard Grain Co. v. State Bank* 73

Carriers—*Concluded.*

5. A railroad company is liable for loss of grain shipped over its road, and proof of loss makes a *prima facie* case. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 149
6. The carrier is not liable for natural shrinkage in weight of grain during shipment. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 149
7. The burden of proving loss of grain during shipment is upon the shipper. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 149
8. Weights of grain before and after shipment are presumptively correct; but, if impeached by evidence of mistakes, the question of their correctness is for the jury, and the shipper must prove their correctness by a preponderance of evidence. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 149
9. The burden of showing natural shrinkage in grain during shipment is upon the shipper. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 149
10. Instruction as to burden of showing loss of grain during shipment *held* erroneous. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 149
11. The owner of a passenger elevator must use the same degree of care as a common carrier. *Dailey v. Sovereign Camp, W. O. W.* 767
12. The owner of a building is liable for injuries caused by an unskilled passenger elevator operator. *Dailey v. Sovereign Camp, W. O. W.* 767
13. Facts *held* not to constitute a new shipping agreement, but only delay in transportation. *Berliner v. Director General of Railroads* 801
14. Measure of damages for delay in shipment stated. *Berliner v. Director General of Railroads* 801

Chattel Mortgages.

A subsequent mortgagee *held* liable as trustee to prior mortgees for proceeds of mortgaged chattels. *Farmers State Bank v. Home State Bank* 711

Compromise and Settlement.

The burden is on the maker of notes given in settlement of accounts to show that the settlement did not include all items. *Stuart v. Torrey* 608

Constitutional Law.

1. Ch. 244, Laws 1919, providing for condemnation of land for a school site is unconstitutional for failure to provide for notice of meeting of appraisers. *Albin v. Consolidated School District* 719
2. Actual knowledge will not validate an appraisal under a condemnation act, unconstitutional in not providing for notice. *Albin v. Consolidated School District* 719

Contracts.

1. In an action under a building contract, *held* that neither party should recover. *Home Builders v. Busk* 86
2. The rule that courts will construe a contract more strongly against the party drafting it does not apply where the attorney for each party approved it. *Bee Building Co. v. Peters Trust Co.* 294
3. Where a written contract is susceptible of two interpretations, parol evidence introduced without objection will be considered. *Lowman v. Shotkoski* 540
4. In construing a contract, a court will give due force to the grammatical arrangement of words and clauses, unless by so doing the intention of the parties is varied. *Baylor v. Hall* 786
5. A relative word or clause will ordinarily be construed as referring to its nearest antecedent. *Baylor v. Hall* 786
6. Contracts relating to hotel property and accounts construed. *Baylor v. Hall* 786

Corporations.

1. Showing *held* to justify holding that person served with summons was not an officer, clerk or managing agent of defendant corporations. *Ferson v. Armour & Co.* 42
2. Service of process on state auditor held sufficient to confer jurisdiction over a foreign corporation. *Buckley v. Advance Rumely Thresher Co.* 214
3. Notes *held* admissible in evidence without proof of authority of treasurer of payee to indorse them. *Union Nat. Bank v. Moomaw* 388
4. Action of a majority of stockholders governs, when within express or implied powers and not violative of contract rights. *Iowa State & Savings Bank v. City Nat. Bank*..... 397

Corporations—*Concluded.*

5. A corporation is not bound by an agent's representations outside of those contained in a written order for stock. *Schuster v. North American Hotel Co.* 672
6. Where a contract for the sale of stock provides that only its printed conditions shall bind the company, an agent's oral promise that the company will repurchase is unauthorized. *Schuster v. North American Hotel Co.* 679
7. The principal is responsible for the agent's fraudulent representations concerning the subject-matter of the contract. *Schuster v. North American Hotel Co.* 679
8. Corporation *held* not bound by agent's unauthorized oral promise to repurchase stock. *Schuster v. North American Hotel Co.* 679
9. Where the duties of the directors of a dissolved corporation as trustees are fixed by statute, they are not entitled to instructions from a court of equity. *Shurtleff v. Schoenleber* 870

Counties and County Officers.

1. A county surveyor is not an agent of the county in laying out drainage ditches. *Thompson v. Colfax County* 351
2. County commissioners do not act for the county in contracting for drains and the county is not liable for their neglect or delay. *Thompson v. Colfax County* 351
3. Counties are not liable for negligent acts of their officers in discharge of official duties, in absence of a statute creating such liability. *Dawson County Irrigation Co. v. Dawson County* 367
4. County commissioners may construct bridges in anticipation of tax levy. *Central Bridge & Construction Co. v. Saunders County* 484
5. Bridges may be constructed to the amount of levy. *Central Bridge & Construction Co. v. Saunders County* 484
6. Warrants for prior work cannot be lawfully paid with funds for current year, unless included in estimates or there is a surplus in the current fund. *Central Bridge & Construction Co. v. Saunders County* 484
7. Cost of culverts is chargeable to the county bridge fund. *Central Bridge & Construction Co. v. Saunders County* 484
8. Counties are not chargeable with interest on claims, except by contract, or when imposed by statute. *Central Bridge & Construction Co. v. Saunders County* 484

Counties and County Officers—*Concluded.*

9. The special provision in sec. 954, Rev. St. 1913, controls a courthouse bond election. *State v. Marsh* 760

Courts.

1 When the district court acquires jurisdiction of an action, it may enter any judgment that is proper under the pleadings and evidence. *Bolich v. Robinson* 449

2. County courts are courts of record. *Foote v. Chittenden*.. 704

Criminal Law. See BURGLARY. FORGERY. HOMICIDE. INDICTMENT AND INFORMATION. LARCENY. PARENT AND CHILD, 2-4. PHYSICIANS AND SURGEONS. RAPE.

1. "Third term" in sec. 9022, Rev. St. 1913, *held* to refer to regular terms of court. *Glebe v. State* 251

2. Consent to a continuance over a term *held* a waiver by accused of right to count such term as one at which he should be tried. *Glebe v. State* 251

3. Telephonic conversation is inadmissible when the voice is not recognized. *Bernstein v. State* 337

4. It is not error to refuse a requested instruction covered by one given. *Strong v. State* 339

5. It is prejudicial error to incorporate in an instruction defining the issues a count stricken from the information. *Roberts v. State* 362

6. It is not error to refuse to give an instruction covered by one given. *Robbins v. State* 423

7. It is incompetent to ask a witness on cross-examination as to a plea of guilty in another case; such plea not being a "conviction" within sec. 7906, Rev. St. 1913. *Ford v. State*. 439

8. Where the *corpus delicti* is in dispute, the court cannot assume in an instruction that it is established. *Zediker v. State* 473

9. If accused testifies, the county attorney may ask him whether he has been convicted of a felony. *Denker v. State* 779

10. A conviction on conflicting evidence will not be set aside, where the state's evidence sustains the verdict. *Denker v. State* 779

11. Sustaining state's challenge to a venireman was not prejudicial, where a competent juror, not challenged, took his place. *Christiancy v. State* 822

12. Instruction as to disregarding all testimony of a witness swearing falsely to any material fact approved. *Christiancy v. State* 822

Criminal Law—*Concluded.*

13. Refusal to require the state to elect between a count charging rape and charging assault with intent to commit rape *held* not error. *Christiancy v. State* 822
14. Overruling of challenge to a venireman who was subsequently excused *held* not prejudicial. *Christiancy v. State*. 822
15. A request by the county attorney that accused stand before the jury was without prejudice. *Christiancy v. State* 822
16. Accused is entitled to an impartial jury. *Christiancy v. State* 822
17. Where the county attorney asked the accused a question not within his direct examination, to which the court sustained an objection and instructed the jury to disregard it, *held* not error. *Christiancy v. State* 822
18. Motion and affidavit for continuance on ground of absence of material witness *held* insufficient. *Seaton v. State* 833
19. Question of competency of a venireman cannot be raised by motion for continuance. *Seaton v. State* 833
20. Jurors who sit in the trial of one jointly indicted are disqualified to sit in the trial of the others. *Seaton v. State*.. 833
21. The venue of a case of abandonment of child is in the county of the matrimonial domicile. *Preston v. State* 848

Damages.

1. To warrant recovery for a permanent injury, the permanency must be shown with reasonable certainty. *McGowan v. Dresher Bros.* 374
2. There is no fixed rule for measuring damages for personal injuries. *Dailey v. Sovereign Camp, W. O. W.* 767
3. Elements of damages for personal injuries enumerated. *Dailey v. Sovereign Camp, W. O. W.* 767
4. Personal injury verdict *held* excessive. *Mullally v. Haslam* 860

Death.

1. Absence for seven years raises a presumption of death. *Crane v. Grand Lodge, A. O. U. W.* 291
2. Evidence *held* not to raise presumption of death. *Maxwell v. Maxwell* 689

Dismissal and Non-Suit.

Dismissal of state *held* not to affect the action as to other defendants. *McShane v. Murray* 512

Divorce.

1. Where the pleadings and findings are sufficient, the supreme court may enlarge a decree from bed and board to an absolute divorce. *Marquis v. Marquis* 122
2. Where final distribution of an estate is delayed only by the existence of a life estate, an undivided remainder may be awarded as alimony to the wife of a remainderman. *Maxwell v. Maxwell* 689
3. A suit for divorce abated where one party died within six months after decree. *Holmberg v. Holmberg* 717
4. A decree for alimony is not affected by death of husband within six months after decree. *Holmberg v. Holmberg*... 717

Drains.

A construction company, in contracting for drainage work, is presumed to know the extent of the county's authority and the limitations thereof. *Thompson v. Colfax County* 351

Elections. See MANDAMUS, 7, 8.

1. The duties of canvassing boards are purely ministerial. *State v. Bower* 436
2. Women may vote at a courthouse bond election. *State v. Marsh* 760

Electricity.

1. A mortgage on electric plants *held* to cover a subsequently constructed transmission line. *Roebling's Sons Co. v. Nebraska Electric Co.* 255
2. A transmission line constructed from an electric plant becomes an appurtenance thereof from the time construction is commenced. *Roebling's Sons Co. v. Nebraska Electric Co.* 255
3. Acceptance of money by mortgagor on faith of construction of a transmission line will subject the line to the lien of the mortgage. *Roebling's Sons Co. v. Nebraska Electric Co.* 255
4. Lien of materialman on transmission line *held* subordinate to lien of mortgage. *Roebling's Sons Co. v. Nebraska Electric Co.* 255
5. Evidence *held* to sustain verdict. *Graham v. City of Lincoln* 305

Eminent Domain.

Where condemnation proceedings were without jurisdiction, the owner did not waive objections by appealing. *Albin v. Consolidated School District* 719

Equity. See TRUSTS, 5, 6.

Where equity reforms an instrument it may grant full relief thereon, whether legal or equitable. *Baughan v. Schuelke*. 627

Evidence. See CRIMINAL LAW. WITNESSES.

1. Where a physician has testified fully as to a personal injury, he cannot testify as to whether he could discover any reason why plaintiff could not work when he examined him. *McGowan v. Dresher Bros.* 374
2. Self-serving declarations of a decedent are incompetent to disprove a prior agreement to reconvey lands. *Kiser v. Sullivan* 454
3. Evidence of physicians as to effect on health of breach of a promise to marry *held* admissible. *Fellers v. Howe* 495
4. The owner of merchandise may testify to its value. *Gilbert v. Rothe* 549
5. Opinion of expert must be based on proved facts, and can not be invoked to supply facts. *Hornby v. State Life Ins. Co.* 575
6. Admission of conclusions of expert, as to value of live stock, based on a hypothetical question containing insufficient facts is error. *Berliner v. Director General of Railroads* 801
7. Oral evidence is not admissible to vary the terms of a written contract. *Leypoldt & Wickstrom v. Alderman* 131
8. Parties to a written contract may show by parol the real agreement, in a suit thereon by a third person. *Durland Trust Co. v. Payne* 135
9. Parol evidence is not admissible to show an oral agreement varying the terms of a written instrument. *Schuster v. North American Hotel Co.* 679
10. The rule that evidence of a parol promise is inadmissible to vary a written contract is not applicable in an action for fraud or to rescind, where the oral promise was an inducement to the contract. *Schuster v. North American Hotel Co.* 679
11. Parol evidence is admissible to show official acts of a public officer. *State v. Warrick* 750

Executors and Administrators. See HUSBAND AND WIFE, 3.

1. Where no penalty was fixed in an administrator's bond for the sale of land, the sale was not void, the bond being reformable in equity. *Pohlenz v. Panko* 156
2. Where publication of notice of administrator's sale was not made full three weeks prior to the sale, *held* an irregularity not defeating jurisdiction. *Pohlenz v. Panko* 156
3. Defective notice of administrator's sale *held* not ground for setting sale aside on a collateral attack. *Pohlenz v. Panko*. 156
4. The giving of a bond by an administrator is not a jurisdictional prerequisite to a valid sale of land. *Pohlenz v. Panko* 156
5. Failure to enter a formal order allowing claims is not fatal to a sale of land to pay debts. *Pohlenz v. Panko* 156
6. Sale of homestead upheld after confirmation. *Pohlenz v. Panko* 156

Extradition.

"Fugitive from justice" defined. *Finch v. West* 45

Forgery.

Evidence *held* to sustain conviction. *Denker v. State* 779

Fraud.

1. Rescission, recoupment, and an action for damages are remedies for fraud. *Bringen v. Wolf* 590
2. Renewal of note for purchase price of property is not a waiver of right of action for deceit, as a matter of law. *Bringen v. Wolf* 590
3. In a suit to cancel deeds, it is proper to join the fraudulent purchaser with his grantee as defendant. *Bailey v. Chilton* 795

Guardian and Ward.

Failure to give non-resident minors notice of the appointment of a guardian is not a jurisdictional defect rendering a sale of their property void. *Foote v. Chittenden* 704

Habeas Corpus.

1. The question of guilt or probable cause is exclusively for the courts of the state demanding extradation. *Finch v. West* 45
2. The questions to be determined on an application for habeas corpus by one held under extradition are whether the person demanded is substantially charged with a crime, and whether he is a fugitive from justice. *Finch v. West* 45

Highways.

1. The statute limiting speed of motor vehicles has no application where one motor vehicle overtakes another. *Thomas v. Rasmussen* 442
2. Evidence *held* insufficient to sustain verdict for personal injuries. *Thomas v. Rasmussen* 442

Homestead.

1. Taking of stay of sale in foreclosure suit *held* not to estop defendant from claiming surplus from sale of homestead. *Thompson v. Todd* 545
2. Plea of selection of homestead from wife's separate property *held* sufficient. *Williams v. Williams* 584
3. The wife may become vested with a homestead interest in land occupied under an executory contract of sale partially performed. *Alston v. Alston* 623

Homicide.

1. The furnishing of intoxicating liquor to another is not ordinarily such an unlawful act as will supply the place of criminal intent. *Thiede v. State* 48
2. One furnishing liquor which he should have known contained poisonous ingredients is guilty of criminal intent. *Thiede v. State* 48
3. Though one who drinks poisonous liquor may be guilty of contributory negligence, such negligence is not a defense to a charge of homicide against the person who furnished the liquor. *Thiede v. State* 48
4. Evidence *held* sufficient to sustain submission of charge of involuntary manslaughter. *Thiede v. State* 48
5. Where the information charges only murder in the first degree, it is error to instruct on other degrees of homicide. *Thompson v. State* 395

Husband and Wife.

1. A deserted wife *held* liable on her contracts as a *feme sole*. *Peterson Bros. & Co. v. Gunnarson* 29
2. A contract of separation and equitable settlement of property rights will be enforced. *In re Estate of Lauderback*. 461
3. A postnuptial contract *held* to debar the survivor from receiving statutory allowances. *In re Estate of Lauderback*. 461
4. Verdict for plaintiff in an action for alienation of affections *held* sustained by evidence. *Wendt v. Wendt* 554

Husband and Wife—*Concluded.*

5. Instruction in an action for alienation of affections *held* proper. *Wendt v. Wendt* 554
6. The wife cannot maintain ejectment against her husband in occupancy of the homestead, though selected from her separate property. *Williams v. Williams* 584
7. The husband has the right to establish the matrimonial domicile. *Preston v. State* 848

Indictment and Information.

1. An assistant attorney general has no authority to sign an information. *Lower v. State* 666
2. An indictment for practicing without authority need not negative exceptions in the medical practice act. *Carpenter v. State* 742

Insurance.

1. Evidence *held* to sustain finding that a railroad right of way was by mistake omitted from description of land in an insurance contract. *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n* 80
2. Power of a court to correct a mutual mistake implies admissibility of proof of such mistake. *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n* 80
3. A separate suit to reform a fire insurance policy is unnecessary, as reformation may be had in an action on the policy. *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n* 80
4. A mutual correction of an unexpired fire insurance policy to cover future loss does not prevent insured from seeking correction of the policy to cover past loss. *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n* 80
5. A mutual insurance company is bound by rules applicable to other corporations and individuals as to correcting a mutual mistake in a policy. *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n* 80
6. Misrepresentations in application for insurance will not defeat recovery if they did not contribute to the loss. *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n* 80
7. The mortgaging of insured chattels in violation of a fire policy will not invalidate the insurance, unless the breach contributes to the loss. *Security State Bank v. Aetna Ins. Co.* 126

Insurance—*Continued.*

8. An attorney's fee is not allowable on a fire policy covering personalty only. *Security State Bank v. Aetna Ins. Co.* ... 126
9. A court will not write a forfeiture clause into an insurance policy. *Hagelin v. Commonwealth Life Ins. Co.* 187
10. After contract is made, the insurer cannot impose new conditions creating forfeiture without consent of assured, and without a new consideration. *Hagelin v. Commonwealth Life Ins. Co.* 187
11. Voluntarily aiding a peace officer in pursuit of criminals is not, as a matter of law, "voluntary exposure to unnecessary danger." *Sackett v. Masonic Protective Ass'n* 238
12. A liability insurer is not a favorite of the law. *Ford Hospital v. Fidelity & Casualty Co.* 311
13. A narrow or technical construction of a liability insurance policy is not permissible. *Ford Hospital v. Fidelity & Casualty Co.* 311
14. A child born in a hospital and returned to its mother for nourishment is a "patient." *Ford Hospital v. Fidelity & Casualty Co.* 311
15. The bathing of a child, injured through negligence of a hospital nurse, *held* to be "hospital treatment," within the meaning of a liability insurance policy. *Ford Hospital v. Fidelity & Casualty Co.* 311
16. A liability insurer, by making a defense as agreed, does not lose the right to assert that insured's loss is not covered by the policy. *Ford Hospital v. Fidelity & Casualty Co.*.. 311
17. A liability insurer cannot defeat recovery on the policy because the judgment was not paid in money according to the literal terms of the policy. *Ford Hospital v. Fidelity & Casualty Co.* 311
18. Assignment of potential judgment as security does not bar suit on policy. *Ford Hospital v. Fidelity & Casualty Co.*.. 311
19. In a suit on a liability insurance policy, transactions of insured's attorneys in purchasing the judgment *held* not available as a partial defense. *Ford Hospital v. Fidelity & Casualty Co.* 311
20. Provisions as to payment of premium and modification of contract by agent may be waived by insurer. *Echols v. Mutual Life Ins. Co.* 409

Insurance—*Continued.*

21. Agreement by agent to take a note for first premium *held* a payment of the premium as between insured and the company. *Echols v. Mutual Life Ins. Co.* 409

22. Agreement by agent to extend time of payment of first premium *held* a waiver of conditions of the contract. *Echols v. Mutual Life Ins. Co.* 409

23. Notice to general agent *held* notice to the company. *Echols v. Mutual Life Ins. Co.* 409

24. A provision for forfeiture for failure to pay premiums is enforceable. *Novak v. LaFayette Life Ins. Co.* 417

25. Whether a note was taken as payment of a premium or for extension of time of payment *held* a question of fact. *Novak v. LaFayette Life Ins. Co.* 417

26. Retention of premium note after its maturity *held* not to prevent a forfeiture. *Novak v. LaFayette Life Ins. Co.* ... 417

27. Insurer *held* not estopped from claiming a forfeiture. *Novak v. LaFayette Life Ins. Co.* 417

28. Default in payment of premium note *held* to work a forfeiture. *Novak v. LaFayette Life Ins. Co.* 417

29. In case of injury resulting in death, there is a presumption that it was not voluntarily self-inflicted. *Hornby v. State Life Ins. Co.* 575

30. Blood poisoning *held* to result from accidental injury, and time of infection to be immaterial. *Hornby v. State Life Ins. Co.* 575

31. An instruction as to determination of cause of injury *held* misleading. *Hornby v. State Life Ins. Co.* 575

32. Property on separate lots *held* to be on separate "premises" under average clause in policy. *Nye-Schneider-Fowler Co. v. Nebraska Lumbermen's Mutual Ins. Ass'n* 605

33. Proof of loss *held* waived by negotiation for settlement. *Brown v. Firemen's Ins. Co.* 615

34. The Grand Lodge, A. O. U. W., of Iowa may be enjoined from transacting insurance business in Nebraska to the injury of the Grand Lodge of Nebraska. *Grand Lodge, A. O. U. W., v. Grand Lodge, A. O. U. W.* 12

35. Beneficiary *held* not to have shown that insured was excused from tendering assessments. *Jensen v. Grand Lodge, A. O. U. W.* 66

Insurance—*Continued.*

36. Where insured accepts a new certificate, his beneficiary, in action thereon, cannot question the validity of assessments under the original certificate. *Jensen v. Grand Lodge, A. O. U. W.* 66

37. A beneficiary cannot claim that insured was excused from tendering assessments because of invalid increase, without showing a tender of original rates. *Jensen v. Grand Lodge, A. O. U. W.* 66

38. Evidence *held* to establish that insured abandoned his insurance. *Jensen v. Grand Lodge, A. O. U. W.* 66

39. Where the supreme legislative body of a fraternal beneficial association has given a reasonable construction of an ambiguous by-law, courts will adopt that construction. *Fowler v. Sovereign Camp, W. O. W.* 192

40. Loading of rate of assessment of a beneficial association by the percentage method *held* within the discretion of the association. *Fowler v. Sovereign Camp, W. O. W.* 192

41. Loading of rate of assessment of beneficial association *held* not excessive nor discriminatory. *Fowler v. Sovereign Camp, W. O. W.* 192

42. By-law of fraternal association permitting a disabled member to surrender his certificate and receive benefits *held* not to constitute endowment insurance. *Fowler v. Sovereign Camp, W. O. W.* 192

43. A readjustment whereby a lien is placed on the amount to be paid on the certificate of a beneficial association is not invalid. *Fowler v. Sovereign Camp, W. O. W.* 192

44. A fraternal association may change from an assessment basis to a level premium plan. *Fowler v. Sovereign Camp, W. O. W.* 192

45. It is proper to consider adverse selection in readjusting rates of fraternal association. *Fowler v. Sovereign Camp, W. O. W.* 192

46. Equity will not declare a readjustment plan of a fraternal association void, unless clearly shown to be illegal. *Fowler v. Sovereign Camp, W. O. W.* 192

47. Division of members of fraternal associations into two classes *held* discriminatory. *Case v. Supreme Tribe of Ben Hur* 220

48. Amendment to by-laws, requiring payment of assessments during disability, *held* not a reduction in amount of benefits. *Case v. Supreme Tribe of Ben Hur* 220

Insurance—*Concluded.*

49. The signing of an agreement to pay additional assessments during disability *held* not a waiver of insured's right to object to discriminatory classification. *Case v. Supreme Tribe of Ben Hur* 220

50. A fraternal beneficial association may increase rates and change the plan of assessments, where no injustice is done. *Case v. Supreme Tribe of Ben Hur* 220

51. Increase of rates or change of plan of assessments of beneficial associations will be presumed to be reasonable. *Case v. Supreme Tribe of Ben Hur* 220

52. An increase of rates, prohibitive to older members, of a fraternal association does not of itself make the rate unreasonable. *Case v. Supreme Tribe of Ben Hur* 220

53. Actual acceptance of application *held* required to create a contract of insurance under laws of beneficial association. *Handlier v. Knights of Columbus* 267

54. Delegates elected to a regular session of the supreme legislative body of a beneficial association cannot serve at a special session. *Widener v. Sharp* 654

55. A special session of the governing body of a beneficial society *held* without power to adopt a new table of rates. *Widener v. Sharp* 654

56. Enforcement of rates illegally adopted by the governing body of a beneficial society will be enjoined. *Widener v. Sharp* 654

57. Certain questions and answers in an application for insurance *held* to be representations, and not warranties. *Beeler v. Supreme Tribe of Ben Hur* 853

58. Proof required to establish defense of falsity of statements in application for insurance. *Beeler v. Supreme Tribe of Ben Hur* 853

59. Warranty and representation distinguished. *Beeler v. Supreme Tribe of Ben Hur* 853

Judgment.

1. The personal representative of a decedent is not precluded by a judgment against a carrier under the federal employers' liability act for the benefit of the widow from maintaining a later action against a joint tort-feasor under a state statute for the benefit of the mother. *Moore v. Omaha Warehouse Co.* 116

Judgment—*Concluded.*

2. Where a party is entitled to a jury trial, the court cannot disregard the verdict and enter such judgment as the evidence warrants. *Kenesaw Mill & Elevator Co. v. Aufdenkamp* 246
3. *Res judicata*, the law of the case, and *stare decisis* have in view the determination of controverted questions of fact and of law. *Scott v. Scotts Bluff County* 355
4. Statements to defendant by a third person that the action had been settled is not ground for setting aside a default after the term. *Kulhanek v. Kulhanek* 595

Jury. See CRIMINAL LAW, 11, 14, 19, 20.

1. On *voir dire* examination each party may ask pertinent questions for the purpose of challenge for cause. *Strong v. State* 339
2. The extent of *voir dire* examination rests in the sound discretion of the court. *Strong v. State* 339

Landlord and Tenant.

1. Equity has power to relieve against forfeiture of lease for nonpayment of rent. *Ostenberg v. Scottsbluff Investment Co.* 143
2. Enforcement of penalty for nonpayment of rent *held* barred in equity. *Ostenberg v. Scottsbluff Investment Co.* 143
3. The remedy created by secs. 8466, 8467, Rev. St. 1913, for forfeiture for nonpayment of rent *held* not a limitation on the power of a court of equity. *Ostenberg v. Scottsbluff Investment Co.* 143
4. A mortgagee of a leasehold takes with notice of covenants of lease. *Bowen v. Selby* 166
5. The mortgage interest in a leasehold is coextensive with the leasehold interest. *Bowen v. Selby* 166
6. Forfeiture of a lease for nonpayment of rent terminates a mortgage of the leasehold. *Bowen v. Selby* 166
7. A lessee may place signs on walls which do not injure the freehold. *Bee Building Co. v. Peters Trust Co.* 294
8. A lessee may change the name of a building. *Bee Building Co. v. Peters Trust Co.* 294
9. The right of the lessee to change the name of a building under a 99-year lease will be implied. *Bee Building Co. v. Peters Trust Co.* 294

Landlord and Tenant—*Concluded.*

10. An injunction will not issue to compel a lessee to restore a panel bearing the name of the building. *Bee Building Co. v. Peters Trust Co.* 294
11. A landlord is not bound to repair in absence of express contract. *Daggett v. Panebianco* 572
12. Evidence *held* to justify direction of verdict for plaintiff. *Daggett v. Panebianco* 572

Larceny.

Instruction as to inference to be drawn from possession of property stolen *held* reversible error. *Zediker v. State* 473

Libel and Slander.

In an action for slander, a decree in a suit to cancel notes given in settlement of damages from the slander *held* inadmissible. *Macke v. Wagener* 282

Mandamus.

1. Pleadings *held* sufficient to warrant writ to compel county board of health to abate nuisance. *State v. Clark* 59
2. In mandamus to compel a board of health to abate a nuisance, property owners *held* not necessary parties. *State v. Hart* 61
3. Issuance of writ compelling board of health to abate a nuisance *held* not an interference with the board's discretion. *State v. Hart* 61
4. Though a court cannot control the discretion of a board of health, it may compel it to act. *State v. Hart* 61
5. In a proceeding to compel a board of health to abate a nuisance, failure of the alternative writ to disclose that the board has funds is not fatal. *State v. Hart* 61
6. Mandamus will not lie to control discretion of county court to suspend payment of a disputed claim against an estate pending appeal, though no supersedeas bond is given. *State v. Bischof* 170
7. Mandamus will not lie to compel a county board to reconvene as a canvassing board and go behind returns of school bond election. *State v. Bower* 436
8. In mandamus to compel registration of water-works bonds, *held* that the call for and notice of election were sufficient. *State v. Marsh* 547

Marriage.

Evidence as to defendant's reputation for wealth *held* admissible to show plaintiff's loss of prospective status in life. *Fellers v. Howe* 495

Master and Servant.

1. The employer's right to subrogation under the workmen's compensation law is not barred by the employer's concurrent negligence. *Graham v. City of Lincoln* 305
2. A finding on conflicting evidence as to the manner of an injury is conclusive. *Swift & Co. v. Prince* 358
   Ulaski v. Morris & Co. 782
3. Employer *held* not liable for compensation penalty. *Swift & Co. v. Prince* 358
4. The supreme court may allow an attorney's fee on an appeal in a compensation case. *Derr v. Kirkpatrick* 403
5. The employee is entitled to an attorney's fee where compensation award is affirmed in court. *Derr v. Kirkpatrick* 403
6. A judgment awarding compensation on conflicting evidence is final. *Derr v. Kirkpatrick* 403
7. Findings in compensation case *held* conclusive. *Simon v. Cathroe Co.* 535
8. Evidence *held* to sustain finding as to disability. *Knuffke v. Bartholomew* 763
9. Whether a workman is an employee or independent contractor is determined from all the facts. *Knuffke v. Bartholomew* 763
10. Compensation allowable for loss of use of middle finger stated. *Ulaski v. Morris & Co.* 782
11. Employment *held* not "casual" within compensation act. *Nedela v. Mares Auto Co.* 883

Municipal Corporations.

1. Where the police judge mistakenly entitled a case as if the complaining witness instead of the state were plaintiff, proceedings to review the judgment must be conducted as provided by statute. *Boyd v. Francisco* 249
2. Dismissal of suit to enjoin construction of sidewalk *held* proper under the evidence. *Shanner Bros. v. Village of Page* 470
3. Mandamus, and not injunction, is the remedy to enforce performance of a duty of a municipality. *Shanner Bros. v. Village of Page* 470

Municipal Corporations—*Concluded.*

4. Municipal authorities may determine what rules and ordinances are required for health, comfort and safety, but their action is reviewable by the courts. *Standard Oil Co. v. City of Kearney* 558
5. To overturn an ordinance as arbitrary, unreasonable or discriminatory, the evidence should be clear and satisfactory. *Standard Oil Co. v. City of Kearney* 558
6. An ordinance prohibiting construction of a gas filling station on a principal city street *held* an unreasonable and discriminatory exercise of the police power. *Standard Oil Co. v. City of Kearney* 558
7. District courts, independently of statute, have power to determine whether agricultural lands should be disconnected from a city. *Sole v. City of Geneva* 879
8. The remedy provided by sec. 5090, Rev. St. 1913, for detaching territory from cities and villages is not exclusive. *Sole v. City of Geneva* 879

Negligence. See CARRIERS, 11, 12.

1. Question of comparative negligence is for the jury. *Francis v. Lincoln Traction Co.* 243
2. Petition *held* to show plaintiff guilty of more than slight negligence in comparison with the negligence of defendant. *Frye v. Omaha & C. B. Street R. Co.* 333
3. A skater will be presumed to know how to adjust skate straps. *Frye v. Omaha & C. B. Street R. Co.* 333
4. Negligence, contributory negligence, and proximate cause are ordinarily questions for the jury. *Burton v. Lincoln Traction Co.* 521
5. Instructions *held* warranted by the evidence. *Mullally v. Haslam* 860
6. Evidence *held* to sustain verdict for plaintiff in action for negligence of automobile owner. *Mullally v. Haslam* 860

New Trial.

1. A judgment becomes final on failure to pay according to order of remittitur. *Ford Hospital v. Fidelity & Casualty Co.* 311
2. The granting of a new trial is largely discretionary. *Derr v. Kirkpatrick* 403

Nuisance. See MANDAMUS, 1-5.

Officers.

A janitor of a courthouse is not a public officer. *Scott v. Scotts Bluff County* 355

Parent and Child.

1. That a stepmother owes stepchildren no duty, finds no support in nature, logic, or law. *Fischer v. Fischer* 477
2. Evidence *held* insufficient to sustain conviction of neglecting and abandoning child. *Preston v. State* 848
3. Husband's failure to furnish his wife money for maintenance of a two months' old child born after she had left the matrimonial domicile without cause *held* not "wilful neglect" of child. *Preston v. State* 848
4. On a prosecution for abandonment of a child, each case must be decided on its merits. *Preston v. State* 848

Partition.

1. Minors may join as plaintiffs in partition proceedings. *Nitz v. Widman* 736
2. The owner of a life estate may maintain partition against a co-tenant holding a fee-simple title. *Nitz v. Widman* 736

Physicians and Surgeons.

1. The medical practice act is not void for failing to provide for the practice of "napropathy." *Carpenter v. State* 742
2. The state board of health need not provide for examining all manner of healers. *Carpenter v. State* 742
3. Neither the legislature nor the state board of health can be expected to anticipate new methods of healing. *Carpenter v. State* 742

Pleading.

1. A pleading tested by demurrer will be construed most strongly against the pleader. *Frye v. Omaha & C. B. Street R. Co.* 333
2. A plea will be construed most strongly against the pleader where no complaint is made by either party. *Fellers v. Howe* 495
3. A party cannot plead one cause of action and at the trial rely on another. *Kulhanek v. Kulhanek* 595

Pleading—*Concluded.*

4. Finding of unintentional mistake in computation of accounts *held* not responsive to the pleadings. *Stuart v. Torrey* 608
5. Where an instrument is lost pending suit thereon, secondary evidence thereof is admissible without amendment of petition. *Baughan v. Schuelke* 627
6. A party cannot plead one cause of action and rely on proof of another. *Foote v. Chittenden* 704
7. In a suit to cancel deeds and recover title to land, a prayer for alternative relief in damages is proper. *Bailey v. Chilton* 795
8. A party seeking to establish a statutory privilege or right must allege and prove all facts essential to a strict compliance with prescribed conditions. *Sole v. City of Geneva* 879

Principal and Agent. See CORPORATIONS, 5-8.

1. A power not coupled with an interest may be revoked before performance. *Sjogren v. Clark* 600
2. Where an agent makes an unusual promise, a third person is required to ascertain his authority. *Schuster v. North American Hotel Co.* 672

Process.

1. After judgment a sheriff's return can be impeached collaterally only by clear and convincing evidence. *First Nat. Bank v. Anderson* 204
2. Where a sheriff testifies to the specific acts on which return of service was based, validity of the service is determined by a preponderance of the evidence, but it must be clear and convincing. *First Nat. Bank v. Anderson* 204
3. Evidence *held* insufficient to show service of summons. *First Nat. Bank v. Anderson* 204
4. A judgment creditor who knowingly advises or ratifies an abuse of process resulting in a wrongful levy is liable. *Gilbert v. Rothe* 549

Public Lands.

Original surveys control subsequent surveys, where property rights are affected. *Hickman v. Jones* 466

Rape. See CRIMINAL LAW, 13.

1. Evidence that accused was seen near the place of the crime is insufficient corroboration. *Roberts v. State* 362

Rape—*Concluded.*

2. The testimony of prosecutrix may be corroborated by circumstantial evidence. *Robbins v. State* 423
3. Evidence *held* to sustain verdict. *Fox v. State* 537
4. Defense of unchastity not proved. *Fox v. State*..... 537
5. Facts in evidence *held* to corroborate evidence of prosecutrix. *Wheeler v. State* 808
6. An instruction as to previous chastity approved. *Christiancy v. State* 822
7. Instruction that the state must prove that prosecutrix was "previously chaste" approved. *Christiancy v. State* 822
8. The phrase "previously chaste" in an instruction *held* synonymous with "not previously unchaste." *Christiancy v. State* 822
9. An instruction that a female under 18 and over 15 years of age, "who had improper or unlawful sexual intercourse," is not within the act, *held* properly refused. *Christiancy v. State* 822
10. An instruction that a female under 18 and over 15 years of age, who has had unlawful sexual intercourse with a male, is not within the act, approved. *Christiancy v. State* 822
11. Evidence *held* to sustain conviction. *Christiancy v. State*.. 822
12. Sentence of seven years' imprisonment reduced to three, as being excessive. *Christiancy v. State* 822

Replevin.

Variance between allegations of affidavit and proof as to location of hay *held* not ground for direction of verdict. *Hickman v. Jones* 466

Sales.

1. Letter *held* an offer, subject to revocation. *Poposia Coal Co. v. Nye-Schneider-Fowler Co.* 4
2. A contract *held* not complete until acceptance of order received two months after offer. *Poposia Coal Co. v. Nye-Schneider-Fowler Co.* 4
3. Conditions in acceptance constitute a counter proposal. *Poposia Coal Co. v. Nye-Schneider-Fowler Co.* 4
4. Custom of trade is part of contract. *Poposia Coal Co. v. Nye-Schneider-Fowler Co.* 4

Sales—*Concluded.*

5. Where a buyer refuses to make payment unless certain conditions are complied with, the seller may treat the contract as abandoned. *Poposia Coal Co. v. Nye-Schneider-Fowler Co.* 4
6. The term "turn" in contract for sale of coal construed. *Poposia Coal Co. v. Nye-Schneider-Fowler Co.* 4
7. A buyer *held* entitled to damages for nondelivery of coal. *Poposia Coal Co. v. Nye-Schneider-Fowler Co.* 4
8. Leaving a machine, over vendee's protest, with vendee's prospective purchaser *held* not a delivery. *Buckley v. Advance Rumely Thresher Co.* 214
9. Where a machine is not delivered, notice of defect is not obligatory. *Buckley v. Advance Rumely Thresher Co.* 214
10. A vendee is not bound to accept a machine which fails to comply with an express warranty. *Buckley v. Advance Rumely Thresher Co.* 214
11. Where there is an express warranty, proof of an implied warranty will be excluded. *Buckley v. Advance Rumely Thresher Co.* 214

Schools and School Districts. See CONSTITUTIONAL LAW.

1. Approval of annexation of territory by board of high school district to which it is annexed is sufficient. *State v. Warrick* 750
2. In proceedings to annex territory to a high school district, notice to boards of other districts affected is not required. *State v. Warrick* 750
3. The terms of the statute furnish sufficient notice of proposed boundaries of a consolidated district. *State v. Warrick* 750
4. Withdrawals from petition for annexation before approval by the board of education of the existing high school district is not material. *State v. Warrick* 750
5. Petitioners for annexation of territory to high school district may withdraw their names before the county superintendent takes action; but not after declaration and communication to the parties interested. *State v. Warrick* ... 750
   Dappen v. Weber 817
6. Consolidated district *held* to be a *de facto* high school district. *Dappen v. Weber* 812
7. The legality of a *de facto* school district cannot be attacked collaterally, but only by *quo warranto*. *Dappen v. Weber*.. 812

Schools and School Districts—*Concluded.*

8. The title of school officers acting under color of right cannot be questioned by injunction, but only by *quo warranto*. *Dappen v. Weber* 812
9. Signatures to petition for annexation may be attached by an authorized agent of the petitioner. *Dappen v. Weber* .. 817
10. Petition for annexation of territory to school district *held* sufficient. *Dappen v. Weber* 817

Sheriffs and Constables.

1. Evidence *held* sufficient to sustain action to remove a sheriff for failure to perform his duty. *State v. Dyson* ... 277
2. An action to remove a sheriff is a civil proceeding. *State v. Dyson* 277
3. A contract whereby a deputy sheriff is to perform the duties of jailer for a different compensation than fixed by law is void. *Scott v. Scotts Bluff County* 355
4. A deputy sheriff who acts as jailer is a public officer. *Scott v. Scotts Bluff County* 355
5. The compensation of a deputy sheriff who acts as jailer is $1.50 a day. *Scott v. Scotts Bluff County* 355
6. A sheriff who levies on property of a wife under an execution against her husband is liable. *Gilbert v. Rothe* 549

Specific Performance.

1. To establish an oral contract to convey land, the evidence must be clear, convincing, and unequivocal. *Remaly v. Sweet* 327
2. Evidence *held* insufficient to establish a parol gift of land. *Remaly v. Sweet* 327

States.

1. Immunity of the state from suit cannot be waived by a voluntary general appearance by the attorney general. *McShane v. Murray* 512
2. Decree against state *held* void. *McShane v. Murray* 512

Statute of Frauds.

1. Where an agreement for the sale of lands consists of separate instruments, the vendor must sign, and the name or some description of the vendee must also appear. *Barkhurst v. Nevins* 33
2. Facts *held* to show acceptance of part of wheat sold. *Kenesaw Mill & Elevator Co. v. Aufdenkamp* 246

Statute of Frauds—*Concluded.*

3. Sec. 2628, Rev. St. 1913, *held* to have no application to sec. 2650, authorizing an agent by writing to subscribe a contract for the sale of land. *Seberger v. Wood* 272
4. A contract for the sale of land is binding on the owner when subscribed by his authorized agent. *Seberger v. Wood* 272
5. Parol contract of heirship *held* void. *Fischer v. Fischer* .. 477
6. Agreement to marry and to care for a man's children is an entire contract, and within the statute. *Fischer v. Fischer* 477
7. Consummation of marriage *held* not such part performance as to take agreement for heirship out of the statute. *Fischer v. Fischer* 477

Statutes.

Penal statutes must be strictly construed, and are never extended by implication. *Preston v. State* 848

Street Railways.

Evidence *held* to sustain verdict for plaintiff. *Burton v. Lincoln Traction Co.* 521

Taxation.

1. What constitutes use for charitable purposes under exemption law stated. *Scottish Rite Building Co. v. Lancaster County* 95
2. Evidence *held* insufficient to show that Scottish Rite cathedral was exempt as a building used for charitable purposes. *Scottish Rite Building Co. v. Lancaster County* 95
3. A Scottish Rite cathedral *held* not exempt as property used for religious purposes. *Scottish Rite Building Co. v. Lancaster County* 95
4. Provisions for exemption should be given a reasonable interpretation and then should be strictly enforced. *Young Men's Christian Ass'n v. Lancaster County* 105
5. A Young Men's Christian Association *held* to be a charitable organization, and its building, in so far as used for its purposes, exempt. *Young Men's Christian Ass'n v. Lancaster County* 105
6. Floor space in a charitable organization building leased for a cafeteria is not exempt. *Young Men's Christian Ass'n v. Lancaster County* 105

Taxation—*Concluded.*

7. The fact that the portion of a charitable organization building not exempt from taxation cannot be segregated is no obstacle to its assessment for taxation. *Young Men's Christian Ass'n v. Lancaster County* 105
8. A foreclosure sale of separate tracts together to satisfy separate tax liens *held* void in a collateral suit. *Taylor v. Evans* 233
9. Shares of stock in a trust company are distinct from the capital stock, or property and assets. *Peters Trust Co. v. Douglas County* 877
10. Sec. 6343, Rev. St. 1913, as amended, relating to taxation of trust companies, provides for a tax on individual shares of stock, and not a tax on the corporate property. *Peters Trust Co. v. Douglas County* 877
11. "Capital stock," as used in the act relating to trust companies, *held* not to mean capital stock in the aggregate, but shares of stock in the hands of stockholders. *Peters Trust Co. v. Douglas County* 877
12. When a tax is laid on stock of a trust company in the hands of stockholders, no deduction of its securities exempt from taxation is required. *Peters Trust Co. v. Douglas County* 877

Telegraphs and Telephones.

1. Telephone companies must furnish reasonably prompt and efficient service. *Peterson v. Monroe Independent Telephone Co.* 181
2. Petition *held* not demurrable. *Peterson v. Monroe Independent Telephone Co.* 181
3. A rural telephone company *held* not a common carrier. *State v. Southern Elkhorn Telephone Co.* 342
4. The status of a rural telephone company is determined by its purpose, and not by its use of public roads. *State v. Southern Elkhorn Telephone Co.* 342

Trade-Marks and Trade-Names.

1. Denial of purpose to mislead *held* of little weight in view of similarity of names. *Carter Transfer & Storage Co. v. Carter* 531
2. Defendant enjoined from use of trade-name. *Carter Transfer & Storage Co. v. Carter* 531

Trespass.

1. Where a store is wrongfully closed, loss of profits and good-will are provable as elements of damages for trespass. *Gilbert v. Rothe* 549
2. To justify recovery for loss of good-will and profits, the evidence must afford sufficient data for estimating damages. *Gilbert v. Rothe* 549
3. Mental suffering is not an element of damages for trespass, in absence of fraud, malice, or aggravating circumstances. *Gilbert v. Rothe* 549
4. In absence of malice, fraud, or aggravating circumstances, the measure of recovery for trespass is the actual pecuniary damage. *Gilbert v. Rothe* 549

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. A court of equity may submit issues of fact to a jury and adopt their findings. *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n* 80
2. Introducing in evidence the opinion of the supreme court *held* not a waiver of exception to the ruling admitting the decree. *Macke v. Wagener* 282
3. It is not error to reject documentary evidence of an admitted fact. *Thompson v. Colfax County* 351
4. Recital to jury of allegations in pleadings not supported by evidence should be avoided. *Fellers v. Howe* 495
5. Where two instructions are so related that if one is upheld the other becomes harmless error, they will be construed together. *Fellers v. Howe* 495
6. Facts which plaintiff's evidence tends to establish may be considered proved, where defendant offers no proof. *Knuffke v. Bartholomew* 763
7. One cannot complain of an instruction substantially similar to one requested. *Mullally v. Haslam* 860

Trusts. See CHATTEL MORTGAGES.

1. A trustee contracting for the trust estate is personally liable, unless he stipulates otherwise. *Fay v. Day* 370
2. If a trustee binds himself by a contract for the benefit of the estate, he is personally liable. *Fay v. Day* 370
3. Evidence *held* insufficient to establish parol contract to reconvey lands. *Kiser v. Sullivan* 454

Trusts—*Concluded.*

4. An oral agreement to reconvey lands *held* not to create a constructive trust, and, not being in writing, inhibited as an express trust by the statute of frauds. *Kiser v. Sullivan* 454
5. A court of equity will not interfere with the execution of a statutory trust. *Shurtleff v. Schoenleber* 870
6. A court of equity will not assume control of the trustees of a dissolved corporation except for neglect, omission of duty, or abuse of trust. *Shurtleff v. Schoenleber* 870

Vendor and Purchaser.

1. Evidence *held* to sustain in part judgment for breach of contract. *Barkhurst v. Nevins* 33
2. A breach by one party to a contract which prevents the other party to perform is actionable. *Skriver v. Haberstroh* 92
3. When land is sold in gross, the purchaser is not entitled to an abatement in price, where no fraudulent representations were made as to quantity. *Hart v. Harding* 428
4. Sale of land *held* to be by the acre, and the vendee entitled to recover for deficiency in quantity. *Hart v. Harding* 428
5. Contracts *held* to be executory contracts of sale, and not leases. *Alston v. Alston* 623
6. *Bona fide* purchaser defined. *Miller v. Vanicek* 661
7. A mutual mistake in description in a contract of sale may be reformed as against a third party purchaser chargeable with notice. *Miller v. Vanicek* 661
8. A third person *held* chargeable with notice of a mistake in a contract in describing land. *Miller v. Vanicek* 661

Venue. See CRIMINAL LAW, 21.

Summons cannot be issued to a defendant in another county, where there is no issuable controversy as to defendant in the county where suit is begun. *Bailey v. Chilton* 795

Waste.

"Waste" defined. *Bee Building Co. v. Peters Trust Co.* 294

Waters.

1. Petition to enjoin use of water for irrigation *held* insufficient. *Belmont Irrigating C. & W. P. Co. v. Bridgeport Irrigation District* 1

Waters—*Concluded.*

2 Evidence *held* to show abandonment of an irrigation system. *Dawson County Irrigation Co. v. Dawson County* 367

Wills.

1. Change in testator's circumstances *held* not to work a revocation of his will by implication of law. *Hill v. Hill*.. 17
2. The common-law doctrine of revocation of a will by implication from subsequent changes in testator's circumstances obtains in Nebraska, except as modified by statute. *Hill v. Hill* 17
3. Whether or not revocation of a will may be implied from subsequent changes in testator's circumstances depends on the facts of each case. *Hill v. Hill* 17
4. Devise of a life estate to a married son and at his death to his wife, if living, does not violate the rule against perpetuities. *Hill v. Hill* 17
5. The intention of the testator, as disclosed by the language of the will and surrounding circumstances, governs, unless a rule of law or sound policy is violated. *Hill v. Hill* 17
6. A devise creating an estate that will vest beyond a life or lives in being and 21 years and the period of gestation thereafter is void. *Hill v. Hill* 17
7. A succession of life estates *ad infinitum* is within the rule against perpetuities. *Hill v. Hill* 17
8. Whether realty may be resorted to for payment of legacies is a question of intention. *In re Estate of Strolberg* 173
9. Realty disposed of by a general residuary clause in a will *held* chargeable with legacies. *In re Estate of Strolberg* 173
10. A direction in a will as to payment of legacies *held* not to prevent their being a charge on the residuary realty. *In re Estate of Strolberg* 173
11. Specific language *held* not necessary to charge realty with payment of legacies. *In re Estate of Strolberg* 173
12. Evidence of testator's financial condition and habits of investment is admissible to show intent to charge realty with legacies. *In re Estate of Strolberg* 173
13. Effect should be given to all the provisions of a will, if possible. *In re Estate of Strolberg* 173
14. A devise for life, with direction to sell at devisee's death, is an equitable conversion at testator's death. *Maxwell v. Maxwell* 689

Wills—*Concluded.*

15. Evidence *held* to show that testator was, at his death, the owner of land devised. *Nitz v. Widman* 736
16. A devise to a daughter for life, and after her death to her children, construed as referring to children living at testator's death, but to let in after-born children. *Nitz v. Widman* 736

Witnesses. See EVIDENCE.

1. Where the good faith of a bank as holder of notes is in question, wide latitude is allowed in cross-examination of its cashier. *Union Nat. Bank v. Moomaw* 388
2. In an action by a nonresident married woman against a decedent's representative, her husband is competent to testify to conversations with decedent. *Kiser v. Sullivan* .. 454
3. An expert is only entitled to the statutory fee. *Ulaski v. Morris & Co.* 782